RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
SAN ANTONIO, TEXAS
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I. FIRST AMENDMENT

United States v. Williams, 128 S.Ct. 1830 (2008)

After the Supreme Court found facially overbroad a federal statutory provision criminalizing the possession and distribution of material pandered as child pornography, regardless of whether it actually was that, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, Congress passed the pandering and solicitation provision at issue, 18 U.S.C. § 2252A(a)(3)(B). Respondent Williams pleaded guilty to this offense and others, but reserved the right to challenge his pandering conviction's constitutionality. The District Court rejected his challenge, but the Eleventh Circuit reversed, finding the statute both overbroad under the First Amendment and impermissibly vague under the Due Process Clause.

The Supreme Court held that section 2252A(a)(3)(B) is not overbroad under the First Amendment.

The Court went on to state that a statute is facially invalid if it prohibits a substantial amount of protected speech. Section 2252A(a)(3)(B) generally prohibits offers to provide and requests to obtain child pornography. It targets not the underlying material, but the collateral speech introducing such material into the child-pornography distribution network. Its definition of material or purported material that may not be pandered or solicited tracks the material held constitutionally proscribable in *New York v. Ferber*, 458 U.S. 747, 102 and *Miller v. California*, 413 U.S. 15, obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct.

The statute includes: (1) a scienter requirement; (2) operative verbs that are reasonably read to penalize speech that accompanies or seeks to induce a child pornography transfer from one person to another; (3) the phrase "in a manner that reflects the belief," *ibid*., that has both the subjective component that the defendant must actually have held the "belief" that the material or purported material was child pornography, and the objective component that the statement or action must manifest that belief; (4) the phrase "in a manner...that is intended to cause another to believe" that has only the subjective element that the defendant must "intend" that the listener believe the material to be child pornography; and (5) a "sexually explicit conduct" definition that is very similar to that in the New York statute upheld in *Ferber*.

The statute as construed does not criminalize a substantial amount of protected expressive activity. Offers to engage in illegal transactions are categorically excluded from First Amendment protection. The Eleventh Circuit mistakenly believed that this exclusion extended only to commercial offers to provide or receive contraband. The exclusion's rationale, however, is based not on the less privileged status of commercial speech, but on the principle that offers to give or receive what it is unlawful to possess have no social value and thus enjoy no First Amendment protection, The constitutional defect in Free Speech Coalition's pandering provision was that it went beyond pandering to prohibit possessing material that could not otherwise be proscribed.

Section 2252A(a)(3)(B) is not impermissibly vague under the Due Process Clause. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair, notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v Colorado*, 530 U.S. 703, 732. In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is. The statute's requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and

juries every day pass upon the reasonable import of a defendant's statements and upon "knowledge, belief and intent." *American Communications Assn. v. Douds*, 339 U.S. 382, 411.

***Federal Election Commission v. Wisconsin Right to Life, Inc.,* 127 S.Ct. 2652 (2007)**

Section 203 of the Bipartisan Campaign Reform Act of 2002 bans corporations from using its funds to pay for any "electioneering communication" within 30 days of a federal primary and within 60 days of a federal general election in the jurisdiction where the candidate is running. Wisconsin Right to Life ("WRTL") began broadcasting advertisements on July 26, 2004, advising the public that a group of Senators were filibustering in an attempt to block federal judicial nominees and encouraging voters to contact Wisconsin's two senators and tell them to oppose the filibuster. WRTL planned to air the ads during August of 2004, using the corporation's funds, despite the fact that August 15th was 30 days prior to the Wisconsin primary. In a preemptive move, WRTL filed suit against the FEC, seeking declaratory and injunctive relief, and alleging that §203 was unconstitutional as applied to WRTL's three ads they sought to run as well as future ads. The District Court denied the injunction and WRTL did not run its ads during the "black out period." The court subsequently dismissed the complaint.

Upon review by the Supreme Court, the Court found that the case fit under the exception to mootness for disputes capable of repetition. In this case, WRTL planned to air future ads. The majority found that §203 was unconstitutional as applied to the subject ads because the speech at issue was not the "functional equivalent" of express campaign speech. The Court found that the content of the ads was consistent with genuine issue ads. Likewise, the ads did not mention an election, primary, candidate, political party, or take a stand on a candidate's character or qualifications for office. Accordingly, the Court found that §203 was unconstitutional as applied to these ads.

Since the ruling in this case, the FEC has announced that it will write a new rule into the Commissioner's Regulations, reflecting the Court's ruling with regards to WRTL.

***Sole v. Wyner,* 127 S.Ct. 2188 (2007)**

Winning a battle but losing the war doesn't count, as one Floridian found out. Wyner, a nudist, notified the Florida Department of Environmental Protection ("DEP") in mid-January that she intended to create an antiwar artwork at a state beach park on Valentine's Day. Her proposed artwork consisted of nude individuals assembled into a peace sign. DEP responded that she had to comply with Florida's "bathing suit rule", which requires at least thongs to cover the lower half of individuals, and bikini tops for women. Wyner filed suit under 42 U.S.C. §1983, invoking the First Amendment and requesting immediate injunctive relief. The District Court granted her relief and the artwork was staged, although not in compliance with the District Court's suggestion that the artwork be screened from the public. After the Valentine's Day display, Wyner proceeded with her lawsuit, seeking to obtain a permanent injunction so that she could conduct future, nude activities. Ultimately, she lost. However, because §1983 provides that a prevailing party can recover reasonable attorney's fees, the District Court awarded Wyner her fees since she prevailed in obtaining the preliminary injunction.

The Supreme Court unanimously reversed the decision, holding that the "prevailing party status" does not apply on a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case.

***Davis v. McKinney, M.D.,* 518 F.3d 304 (5th Cir. 2008)**

Defendants McKinney and Chaffin brought an interlocutory appeal challenging the denial of their summary judgment motion

seeking dismissal based on qualified immunity from the Plaintiff's §1983 suit for retaliatory discharge in violation of the First Amendment.

Plaintiff filed this suit against two individual defendants (McKinney and Chaffin) as well as several divisions of the University of Texas system where she served as an IS Audit Manager at the UT Health Science Center in Houston, Texas. When the Plaintiff learned of a restructure in December 2003, she told the director she would like to apply for the new position, and was at that time given an indication she would likely get the job.

In August 2003, the Vice President for Facilities Planning requested an audit of the computer systems of his department because he suspected that employees were reviewing pornography on work computers. At a subsequent meeting, the Plaintiff presented evidence of 300 or more employees who were accessing pornography and was authorized to confiscate computers from employees if she had a clear indication that the access was intentional. After the meeting, the Plaintiff had 11 computers confiscated with one believed to have some child pornography on it. Plaintiff attempted to meet again as requested with her superiors but never could get her calls returned and had even received a call to have some of the confiscated computers returned to certain physicians. After continuing her investigation and being denied another meeting, she concluded that the upper management were turning a blind eye to the investigation. In September 2003, Plaintiff asked to be taken off the investigation because she felt like it created a hostile work environment and the requirement that she review this repugnant pornography materials denigrated her as a woman.

Around September 11, 2003, plaintiff applied for the newly created Assistant Director position but at the same time sought assistance from the Employee Assistance Program to cope with the stress of dealing with the pornography and receiving no support in her investigation. She also contacted the EEOC about discriminatory behavior of UT's upper management.

Plaintiff claimed that shortly after that her work responsibilities were reduced to mundane tasks and that she heard from others that upper management was pressuring for her to be terminated. In October 2003, the Plaintiff wrote a letter to the president accusing the upper management of unethical and alleged illegal activities claiming that the upper management had a pattern of sweeping pornography and investigations under the rug and not terminating or disciplining offending employees. She also outlined a pattern of treating certain employees, white men, physicians, and faculty members more lenient than black employees. The complaint letter also alleged that the president was creating an excessive number of highly paid upper management positions to the detriment of the division's budget as well as accusations that he was not fulfilling his responsibilities to the University and others. Near the end of the complaint letter, Plaintiff wrote because she was no longer confident that the UT system could investigate itself, she had contacted the FBI concerning possible child pornography on eight computers and the EEOC about discriminatory practices.

In November 2003, Plaintiff was advised that the position for which she applied and was almost assured would have was frozen and it would not be filled. Plaintiff contends that this action was taken in retaliation of her complaint letter and the related reports to the FBI and the EEOC. Defendant asserts that he froze the position because he was considering outsourcing the entire internal audit function. In December 2003, Plaintiff feeling that termination was imminent, resigned. She was diagnosed with depression and felt like her work place conditions had grown so deplorable that she had been constructively discharged.

In February 2004, the FBI concluded its investigation and found no child pornography. Plaintiff filed suit and May 2005 alleging that the individuals McKinney and Chaffin violated her civil rights pursuant to the Fourteenth Amendment and §1983 by retaliating against her for her First Amendment speech rights in her complaint letter and related communications to the FBI and EEOC.

While addressing the qualified immunity issues in its opinion, the Court continues its analysis of the First Amendment claims and specifically addressed the change in the law after the *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 1654 L.Ed.2d 689 (2006) case, noting that under *Garcetti* the Court must shift its focus from the content of the speech to the role of the speaker occupied when the person said the statement. The Court notes that the Seventh Circuit has framed the new test in a manner in which the Court find persuasive as follows:

> *Garcetti*…holds that before asking whether the subject matter of a particular speech is a topic of public concern, the court must decide whether the Plaintiff was speaking "as a citizen" or as part of her public job. Only when government penalizes speech that a Plaintiff utters "as a citizen" must the court consider the balance of public and private interests, along with the other questions posed *Pickering* and its successors….

The Court also liked the way it was stated in an educational law treatise as follows:

> The inquiry whether the employee's speech is constitutionally protected involves three considerations. First, it must be determined whether the employee's speech is pursuant to his or her official duties. It is it, then the speech is not protected by the First Amendment. Second, if the speech is not pursuant to official duties, then it must be determined whether the speech is on a matter of public concern. Third, if the speech is on a matter of public concern, the *Pickering* test must be applied to balance the employee's interest in expressing such a concern with the employer's interest in promoting the efficiency of the public services it performs through its employees.

Ronna Greff Schneider, 1 Education Law: First Amendment, Due Process and Discrimination Litigation § 2:20 (West 2007).

The first task is to determine whether the Plaintiff's speech was part of her official duties was whether she spoke as a citizen or as part of her public job. The Court noted that activities undertaken in the course of performing one's job are activities pursuant to official duties and not entitled to First Amendment protection. Cases from other circuits appear to be consistent in holding that when public employees raise complaints or concerns up the chain of command at their workplace about his job duties, the speech is undertaken in the course of performing a job. If, however, the public employee takes the job concerns to people outside of their job in addition to raising them up the chain of command, then the those external communications are usually seen as being made by a citizen, not an employee.

Whenever there is a "mixed" speech case, the courts have supported the analysis of looking at each of the communications separately both by topic and recipients. The court also noted that the aspects of the plaintiff's communications were made as a citizen qualify for First Amendment protection if they raise a matter of public concern.

Both of the defendants argued that the court erred in denying qualified immunity to them in their individual capacities because their actions were objectively reasonable. To evaluate a claim for qualified immunity it involves a two step inquiry: first, a court must decide whether if the allegations are true establish a violation of a clearly established right. Second, if the plaintiff has alleged a violation the court must then decide whether the conduct was objectively reasonable in light of a clearly established law at the time of the incident. The courts also note that even if the government official's conduct violates a clearly established right, the official is entitled to qualified immunity if his conduct was objectively reasonable.

The court concluded that the complaints about the university's inadequate response to the employees' computer pornography investigation for the Internal Audit Department directed at the president of the university and to her immediate supervisor was not protected speech under the First Amendment; complaints to the chancellor's university system were not protected speech and complaints about the presence of possible child pornography on the university's computers directed to the FBI and about racial discrimination to the EEOC were not made pursuant to the employee's official duties and that genuine issues of material fact barred summary judgment.

***James v. Collin County*, 535 F.3d 365 (5th Cir. 2008)**

James, a foreman in the Collin County public works department, twice ran (unsuccessfully) for County Commissioner during his employment. During his second campaign, James was reprimanded by one of his superiors; the reasons for and circumstances surrounding the reprimand were disputed. James later submitted a letter to a supervisor outlining what he believed were possible violations of County policy, unethical practices, and illegal actions, some involving a supervisor. James met with various other supervisors and County officials, but the situation continued to deteriorate during his campaign. Ultimately, James lost his campaign, and less than a week later, he was terminated.

James brought claims under §§ 1983 and 1988 against the County, the County Commissioners, and a supervisor, claiming he was wrongfully discharged after exercising his constitutionally protected rights of free speech, association and expression. The District Court granted the Defendants' motion for summary judgment, whereupon James appealed.

Of primary importance to the Fifth Circuit was the § 1983 claim against the County, as the claims against the officials in their individual capacities were properly dismissed. The Fifth Circuit reviewed a plaintiff's elements for proving a First Amendment retaliatory discharge claim: (1) plaintiff suffered an adverse employment action, (2) the speech involved a matter of public concern, (3) the *Pickering* balancing test demonstrates his interenst in commenting on the matter of public concern outweighs the County's interest in promoting efficiency, and (4) his speech was a substantial or motivating factor behind the County's actions.

With regard to his claim that he was discharged for running for office, the Fifth Circuit observed that it is unclear whether the First Amendment provides a right to run for office that extends generally to government employees. In analyzing the facts, the court determined that James had presented no competent summary judgment evidence that he was terminated for his decision to run for office, independent of and apart from his alleged campaigning on county property or soliciting on duty county employees, for which he had been previously disciplined. To the contrary, all evidence in the record indicated that the County did not punish employees for running for office. With regard to James' observation that he was discharged six days after losing the primary, the Fifth Circuit noted its own precedent that "[t]iming alone does not create an inference that termination is retaliatory." Finding that the policies banning political campaigning on county property and soliciting on-duty employees were viewpoint neutral, and that there was no evidence of discriminatory application of those policies, the court found it was not a violation of James' First Amendment rights to be terminated for violating them.

II. EQUAL PROTECTION AND DUE PROCESS

***Rigley v. FEMA,* 512 F.3d 727 (5th Cir. 2008)**

Recipients of federal disaster relief "rental assistance" payments following Hurricanes Katrina and Rita sued for "continued rent assistance" for periods following the initial three month payment after being found ineligible for the longer period and sought certification of a class of similarly-situated

individuals. In essence, plaintiffs challenged the denials (and system itself) as confusing, unresponsive, and deficient. The trial court certified a class and entered a preliminary injunction, enjoining FEMA from terminating rental assistance to members of the class without providing adequate written notice.

In this interlocutory appeal, FEMA successfully argued that the class members do not have a property interest in continued rental assistance payments that would rise to due process claims. While Plaintiffs described "an overly bureaucratic and frustratingly unresponsive agency that misapplies its own rules and standards, uses incomprehensible codes to inform applicants of its decisions on their requests for assistance, and failed to offer any meaningful review of those decisions on administrative appeal," Plaintiffs had not established a likelihood of success on the merits, given that continued rental assistance payments could be granted or denied at the government's discretion, which eliminates a property interest in the payments. In order for a government benefits program to give rise to a property interest in a stream of benefits, a plaintiff must identify an independent source governing the program that entitles him to receive recurring benefits upon an initial showing of eligibility (*e.g.*, welfare and social security disability programs). As nothing in FEMA's enabling legislation requires the provision of benefits on a continuing basis, no due process property interest was created.

***Linquist v. City of Pasadena*, 525 F.3d 383 (5th Cir. 2008)**

The unsuccessful applicants for city license for a used car dealership challenged the licensing ordinance both facially and as applied alleging denial of their application and of their appeal claiming it violated their equal protection and due process rights.

The court of appeals reviewed the *de novo* district court's dismissal of the complaint for failure to state a claim accepting all facts as true and viewing them in light most favorable to the Plaintiffs pursuant to FED. RULE CIV. PROC. 12(b)(6).

In 2003, the Pasadena City Council enacted an ordinance governing the issuance of used car dealership licenses essentially requiring that each new license location be a minimum of one thousand (1,000) feet from any existing license location as well as there shall not be issued a new license for the operation of a used car lot within one hundred fifty (150) feet of a residential area or subdivision subject to certain exceptions irrelevant to this appeal. In addition, the ordinance provided the applicant a right to appeal to the city council in a de novo proceeding with the applicant having the burden of proving that he is entitled to the license.

After the ordinance was enacted, the Lindquists considered purchasing two separate pieces of property but after consulting with the city officials were told that that neither lot qualified for a license nor were they told or aware that the city council sometimes issued licenses on appeal even if they violated the ordinance. Based on that, they did not seek a license to sell used cars.

The Lindquists subsequently discovered that their competitors had purchased a lot similar to theirs, and after it being denied a license, appealed to the city council arguing "economic hardship" and was subsequently granted the license. A member of the city council commented on the apparent inequity of the decision stating he believed there was a double standard in the city.

The following day, the Lindquists applied for a license to operate a used car dealership and after their application was denied, the city council heard their appeal and also denied it. One dissenting member described the decision as "favoritism." Subsequent to this denial, the city council granted a used car dealer license for another lot in violation of the Rule after a former city council member told the council that the owner was a "respectable businessman who made substantial donations to support local rodeos and would suffer economic hardship without the license."

The Lindquists sued the city, alleging that the licensing ordinance was facially invalid under both the United States and Texas Constitutions alleging among other things that it violated their equal protection rights and that the city council's arbitrary denial of their request for a license violated their due process rights.

In support of their equal protection claim, the Lindquists argued that no rational basis existed for the disparate treatment. The court held that the equal protection clause requires a rational basis for the city's differential treatment of similarly situated persons.

The court found that the precedent compelled the holding that the Lindquists' equal protection claim does not sound in selective enforcement and does not require a showing that the city acted with illegitimate animus or ill will. The court found that the district court erred in dismissing the claim, but stated that to prevail on the claim, the Lindquists "must carry the heavy burden of negating any reasonable conceivable set of facts that could provide a rational basis" for their differential treatment.

The court concluded that the dismissal of the Lindquists' substantive due process claims was proper as the court believed the substantive due process claim was essential the equal protection claim recast under a different claim. The court also dismissed the Lindquists' procedural due process claim as the requirement of notice and the opportunity to be heard was fulfilled.

Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008)

Plaintiffs, businesses which sell sexual devices, filed suit challenging the constitutionality of a Texas statute which made it a crime to promote or sell sexual devices, seeking a declaratory judgment that the statute violated the substantive liberty rights protected by the Fourteenth Amendment and the commercial speech rights protected by the First Amendment. The district court held that the statute did not violate the Fourteenth Amendment because there was no constitutionally-protected right to publicly promote obscene devices.

The Fifth Circuit, in reversing the district court, found that there was no governmental interests for the statute and therefore could not be constitutionally enforced. Moreover, the Court found that businesses can assert the rights of its customers when bans on commercial transactions involving a product unconstitutionally burden individual substantive due process rights. The Court concluded that the statute burdened the individual's substantive due process right to engage in private intimate conduct of his or her choosing.

Engquist v. Oregon Dept. of Agriculture, 128 S.Ct. 2146 (2008)

Engquist, a former employee of the Oregon Department of Agriculture, brought a "class-of-one" claim against her former employer, supervisor and co-worker, alleging that she was fired for arbitrary, vindictive and malicious reasons. Specifically, she claimed she was "arbitrarily treated differently from other similarly situated employees." The jury found for Engquist on this claim, but rejected her race, sex and national origin claims. The Ninth Circuit reversed, finding that the "class-of-one" claim was not appropriate in the public employment context. The Supreme Court agreed, holding in a 6-3 opinion authored by Chief Justice Roberts, that a "class-of-one" theory of equal protection does not apply in the public employment context.

The Court first noted that the government's powers are broader when it acts as an employer rather than as regulator or lawmaker. Accordingly, the government has significantly greater latitude in dealing with its citizen employees than in bringing its power to bear on citizens at large. While governmental employees do not lose constitutional rights when they go to work, those rights are necessarily balanced against the realities of the employment context. Analogizing this case to a First Amendment public employee speech case, the Court noted that "a federal court is not the appropriate forum in which to review the

wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

The Court rejected Engquist's argument that class-of-one claims were appropriate in the public employment context. While class-based decisions in public employment may give rise to an Equal Protection claim, discretionary employment decision making for individuals is "quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify," is characteristic of the employer-employee relationship and does not trigger Equal Protection concerns, especially in at-will public employment. Justices Stevens, Souter and Ginsburg dissented, rejecting the inherently discretionary nature of employment decisions, and arguing that there is a distinction between the exercise of discretion and arbitrary employment decisions.

III. EMPLOYMENT LAW

A. Title VII

Federal Express Corp. v. Holowecki, 128 S.Ct. 1147 (2008)

The ADEA requires a worker to file a timely charge of bias with the EEOC before bringing a lawsuit to pursue a claim. The charge must be filed within 180 days after the act of discrimination, or within 300 days if the state where the incident arose has its own age bias law. In this case, a FedEx carrier filed a Form 283 "Intake Questionnaire" with the EEOC and a detailed affidavit supporting her contention that FedEx's programs discriminated against older couriers in violation of the ADEA. However, the EEOC did not treat the questionnaire and affidavit as a filing of a charge and did not start an investigation. When Holowecki filed an ADEA suit against FedEx, FedEx moved to dismiss the action contending that Holowecki had failed to file the requisite "charge" required under the ADEA (29 U.S.C.§626(d)). The District Court agreed with FedEx and dismissed the case.

After the Second Circuit reversed, the Supreme Court concluded that a "charge" must include enough substance so that it can be "reasonably construed" as a request for the EEOC to take action to protect the workers' rights or to settle a dispute over those rights. In upholding the Second Circuit's ruling, the Supreme Court found that the combination of the questionnaire and accompanying affidavit were sufficient enough to constitute a "charge" in that the questionnaire contained all the information outlined in 29 U.S.C. §1626.8 (which outlines the requisite information for a charge) and the affidavit asked the EEOC to force FedEx to end its age discrimination plan.

Lauderdale v. TDCJ, 512 F.3d 157 (5th Cir. 2007)

Lauderdale, a female correctional officer, sued her former employer and supervisor under Title VII alleging she was sexually harassed and constructively discharged. Arthur, Plaintiff's supervisor, pursued a relationship with her over four months. After Arthur's advances became increasingly aggressive, Lauderdale refused to return to work and ultimately resigned, later filing a formal EEO complaint against Arthur for sexual harassment. Arthur was suspended and put on probation; he later resigned. Prior to her resignation, Lauderdale was able to perform all her duties fully and had no adverse actions taken against her; further, Lauderdale had only one discussion with a supervisor about Arthur and never complained to anyone else.

The district court granted TDCJ's motion for summary judgment, holding Arthur's behavior to be neither severe nor pervasive, and therefore did not create a hostile work environment. The Fifth Circuit disagreed, finding that Arthur's ten to fifteen telephone calls per night for almost four months constituted pervasive harassment, and his other advances created an altered work environment. Having determined there was a viable Title VII hostile work environment claim, the Fifth Circuit then turned to TDCJ's affirmative *Ellerth/Faragher* defense. The Court, observing that Title VII encourages saving actions which

would mitigate damages and allow employers to remediate situations of harassment, determined that once Lauderdale knew her single complaint was ineffective, it was unreasonable for her not file a second complaint as TDCJ had provided multiple avenues for complaints. Accordingly, TDCJ's affirmative defense was upheld.

The Fifth Circuit then determined that Arthur's behavior created a §1983 claim for which qualified immunity was not available. As the same analysis of "perrasiveness" applied to individuals under §1983 as to employers under §1981, and as the Court had previously determined his behavior was pervasive, summary judgment was not appropriate. Further, the Fifth Circuit observed "qualified immunity can never offer protection for sexual harassment because, if it is actionable at all, the harassment is by definition objectively offensive and unreasonable, and qualified immunity protect only the objectively reasonable. Finally, the Court held that Plaintiff offered no additional facts to establish the "greater degree of harassment" necessary for constructive discharge, and accordingly that claim was properly dismissed.

***Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395 (2008)**

Faced with significant budget cuts, Knolls Atomic Power asked its managers to score their subordinates on performance, flexibility and critical skills. The scores were then used, as well as years of service, to determine who would be laid off. Thirty out of thirty-one employees let go were over the age of 40. Plaintiffs filed suit against Knolls alleging a disparate-impact claim under the ADEA. After Plaintiffs won a jury trial and the Second Circuit affirmed, the Supreme Court vacated the judgment and remanded in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005), which held that the ADEA carves out an exception for cases in which the employer's decision is based on "reasonable factors other than age" (RFOA). *Smith*, however, did not hold who has the burden of proof as to whether the RFOA exception has been met.

After the Second Circuit held for Knolls based on *Smith*, the Supreme Court again took up the case to determine this issue. Justice Souter, writing for the six justices, stated that the ADEA's text and structure indicated that the RFOA exemption created an affirmative defense for which the employer bears the burden of proof. Souter explained that once the plaintiffs identify a specific employment practice that has a statistically significant disparate impact on older workers, the employer then bears the entire burden of proving that its actions were nonetheless based on "reasonable" factors.

***Gomez-Perez v. Potter*, 128 S.Ct. 1931 (2008)**

Gomez-Perez, a 45-year old postal worker, was subjected to various forms of retaliation after she filed an administrative ADEA complaint. The district court granted summary judgment on the behalf of the respondent and the First Circuit affirmed on the basis that the ADEA's prohibition of discrimination based on age (Section 633a(a)) did not cover retaliation.

On review, the Supreme Court addressed the issue whether the statutory phrase "discrimination based on age" includes retaliation for filing of an age discrimination complaint. In concluding that it does, the Court looked at two prior decisions interpreting similar language in other antidiscrimination statutes (*Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005)). In *Sullivan*, the Court held that a retaliation claim could be brought under 42 USC §1982, which prohibits discrimination based on race as it relates to property rights. Likewise, in *Jackson*, the Court held that Title IX's prohibition on discrimination based on sex also allowed retaliation claims. The Court concluded that the ADEA language at issue – discrimination based on age – was not materially different from the statutory language at issue in *Jackson* and was the functional equivalent to the language reviewed in *Sullivan*; all three statutory remedial provisions are aimed at prohibiting discrimination. Accordingly, the Court held that Section 633a(a) prohibits

retaliation against a federal employee who complains of age discrimination.

***Aryain v. Wal-Mart Stores Texas L.P.*, 534 F.3d 473 (5th Cir. 2008)**

Former Wal-Mart employee brought a Title VII action against Wal-Mart alleging sexual harassment, constructive discharge, and retaliation. The district court granted summary in favor of Wal-Mart and plaintiff appealed. The 5th Circuit affirmed in part, reversed in part, vacated in part, and remanded.

In February, 2005, Wal-Mart hired Aryain as a cashier in the Tire Lube Express Department and almost immediately began to receive unwelcome sexual comments and advances from Darrel Hayes, who was her superior in that department. Some of these comments occurred on a regular basis over a four month period while she worked in that department. Almost daily, he would tell her that her "butt looks good." There were other sexual comments that were made and were quite explicit.

At some point during her employment, she did complain to a supervisor regarding Hayes. Another employee also complained about sexually suggestive statements as well, but no action was immediately taken. It was only after Aryain was yelled at work by Hayes and left that she did tell her father what was occurring at which he called the store manager to complain of Hayes' conduct.

Aryain was transferred out of this department into a different department. Subsequent to this, Wal-Mart completed its investigation and determined that the complaint could not be substantiated. Aryain claims that after she was moved into a different department, she was given tasks that were usually only assigned to men and not allowed to take breaks at certain times. She also claims that she was laughed at and watched by her supervisors. Finally, she discovered that she was not on the work schedule for one particular week and at that point resigned claiming that Wal-Mart did not respond effectively to her complaint and that she had been left off the schedule because Wal-Mart was trying to force her to resign.

Based on these facts, she brought a suit under Title VII claiming sexual harassment, constructive discharge, and retaliation. To prevail, the Plaintiff had to show as part of her four elements: (1) that the employee belongs to a protected class; (2) that the employee was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition, or privilege of employment. The focus was on the fourth element in which the environment must be deemed both objectively and subjectively offensive as well as show that a reasonable person would find it to be hostile or abusive and that the victim in fact did perceive it to be.

The case law distinguishes between the *prima facie* case required for a harassment claim against a co-worker as opposed to a claim against a supervisor. Wal-Mart argued that the prima facie case was not met because she did not perceive her work environment to be hostile or abusive citing the fact that she never complained to her supervisor about these comments, was able to perform her job in the department, did not bring it up in her performance reviews and felt comfortable still working in the area as long as her supervisor did not know about her harassment complaint. Contrary to Wal-Mart's assertions there were other factors that the plaintiff testified to including not wanting to be alone with the supervisor, felt humiliated every time he made one of his sexually explicit comments, and the fact that she pursued these complaints with Wal-Mart and the EEOC. Based upon these factors the district court's granting of the summary judgment was improper.

On the issue of constructive discharge, the court looked to whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Id.* at 480. The court identified six factors to aid them in looking into whether or not it is constructive discharge: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering,

harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the employee worse off whether the offer were accepted or not. *Hunt v. Rapides Healthcare Sys., L.LC.*, 277 F.3d 757, 771-72 (5th Cir. 2001).

The court analyzed these factors and found that the plaintiff from a factual standpoint did not establish this was a constructive discharge as the court notes that part of the employee's obligation in the circumstances is to be reasonable, not to assume the worse, or jump to conclusions too quickly. In addition, the court found that Wal-Mart did not meet its affirmative defense as the court felt there was a fact issue as to whether Wal-Mart failed to exercise reasonable care in not responding to the harassment behavior sooner.

B. Other Employment Cases

Rockwell Int'l Corp. v. U.S., 127 S.Ct. 1397 (2007)

James Stone, a qui tam relator, brought an action against Rockwell, a government contractor, alleging that it violated the False Claims Act (FCA) while operating a nuclear weapons plant. Rockwell filed a motion to dismiss based on Stone's alleged failure to qualify as an "original source" under the FCA. The motion was denied. The government intervened and, together with Stone, filed a joint amended complaint alleging, among other things, that Rockwell committed environmental violations when it stored a form of processed toxic waste. Following a jury trial, the District Court entered judgment in favor of the plaintiffs and awarded treble damages. The only question on appeal to the Supreme Court was whether Stone qualified as an "original source" in order to collect on the judgment.

The FCA allows individuals, acting on the government's behalf, to file fraud suits against companies that do business with the government. If they prevail, they receive a portion of what the contractor must pay the government. Once allegations are disclosed publicly, often by the media, individuals face a higher hurdle in bringing fraud suits on the government's behalf. The exception to this rule is if an individual is an original source of the information, which Stone said he was.

The case turned on whether Stone provided information that a jury eventually used to find fraudulent claims. Rockwell said Stone was not an original source since he was laid off one year before Rockwell began submitting false claims to the government. Justice Scalia agreed, stating that "Stone did not have direct and independent knowledge of the information upon which his allegations were based."

Writing for the Court, Justice Scalia said Stone was not an original source of the information that resulted in Rockwell being ordered to pay the government nearly $4.2 million for fraud connected with environmental cleanup at the nuclear plant. Though Rockwell must pay the entire penalty, Jones may not collect on the judgment. Dissenting, Justice Stevens (joined by Justice Ginsburg) said whistleblowers should have to show only that their information led the government to the fraud, not that the claims ultimately proved to a jury must also have come from them.

C. Americans with Disability Act (ADA)

Pinkerton v. Spellings, 529 F.3d 513 (5th Cir. 2008)

Pinkerton suffers from arthrogryposis, which causes developmental abnormalities including shortness of limbs and limitation of motion in limbs. He is visibly disabled and limited in his ability to use a keyboard. He began working for the US Department of Education (DOE) as an Equal Opportunity Specialist in the Office of Civil Rights in 1980 under an initiative to recruit disabled individuals into federal employment.

In 2002, Pinkerton's first line supervisor—who had supervised him for five years—proposed Pinkerton's removal for unacceptable performance. The Regional Director terminated Pinkerton, whereupon

Pinkerton filed an EEOC complaint, which resulted in a finding of no discrimination. The district court asked the jury to decide whether Pinkerton was discharged "solely because of his disability." The jury said he was not and Pinkerton appealed.

The Fifth Circuit held that to prove disability discrimination, employees need to show only that the disability was a "motivating factor" in an employment decision, not the sole cause. If disability "actually plays a role" in the employer's decision-making process, then the employer discriminated based on disability.

In essence, the Fifth Circuit said the trial court used the wrong standard. Under both the ADA and the federal Rehabilitation Act, the correct question a jury must answer is whether the disability played ***any*** role in the employment decision. It does not have to be the sole cause. The court ordered a new jury trial using the more liberal "motivating factor" standard.

D. Family Medical Leave Act (FMLA)

***Nelson v. University of Texas at Dallas*, 535 F.3d 318 (5th Cir. 2008)**

Nelson, an employee of the University of Texas at Dallas, went on FMLA leave after being severely injured in a car accident and losing his son who committed suicide. Nelson's doctor told the University that Nelson would need 4 to 6 weeks of intermittent leave in order to fully recover. The University approved the request subject to the standard FMLA policies of providing notice of the timing and expected duration of the leave. Prior to the expiration of the 12 weeks of leave guaranteed by the FMLA, the University terminated Nelson for absenteeism when he did not call in or report to work for three consecutive days. After Nelson requested but was denied reinstatement, he filed suit against the University and David Daniel, the administrative head of the University. The district court dismissed Nelson's suit based on Eleventh Amendment immunity and official immunity.

On appeal, the Fifth Circuit treated Nelson's suit as one against the State of Texas and reviewed the case to see whether there was an exception to immunity. Nelson relied on the Supreme Court decision, *Ex Parte Young*, 209 U.S. 123 (1908), which states that the Eleventh Amendment does not bar suits for prospective relief against a state employee acting in his official capacity. The Fifth Circuit acknowledged that *Ex Parte Young* was an appropriate vehicle for pursuing reinstatement to a previous job. Moreover, the Court disagreed with Daniel's argument that Nelson's termination was a discrete act and therefore did not fall under the *Young* exception. *See Green v. Mansour*, 474 U.S. 64, 68 (1985)("*Young* also held that the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a *continuing violation of federal law*.")(emphasis added). While noting that Supreme Court precedent from employment discrimination cases held that termination was a discrete act, the Court pointed out that they were bound under *Warnock v. Pecos County*, 88 F.3d 341 (5th Cir. 1996), which held that a claim for reinstatement was not barred by sovereign immunity. Accordingly, the Fifth Circuit held that a request for reinstatement falls under the *Ex Parte Young* exception to Eleventh Amendment immunity since it is a claim for prospective relief designed to end a continuing violation of federal law.

***Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368 (5th Cir. 2008)**

Sheriff's deputy officer sued the sheriff and the parish jail warden under the FMLA alleging that they retaliated against him because of the FMLA suit filed by his wife against the sheriff and warden. The district court dismissed the complaint and the officer appealed. The Fifth Circuit affirmed the district court's ruling.

Elsensohn was employed as an officer by sheriff's office and rose to the position of sergeant. His wife was also once employed by the sheriff's office and at some point while being employed brought a complaint under the

FMLA against Defendants and sometime thereafter left the sheriff's office.

Plaintiff complained that he attempted at all times "not to involve himself" in his wife's FMLA claim except to give her moral support. He states in his complaint that both he and the defendants knew that if the matter went to trial that he would be called as a witness due to the fact that he was familiar with the circumstances surrounding his wife's claim since they both worked in the same department.

Prior to this occurring his wife settled FMLA claim against the defendant. Plaintiff claims he was subsequently harassed by the warden and after reporting this harassment to the Internal Affairs, he was assured that he would have no more problems. Plaintiff claims despite his excellent job reviews and the fact that he was the most qualified applicant he was denied each and every promotion he applied for. Plaintiff claims he was also told there was nothing he could do to advance himself and claims he was even involuntarily put on night shift.

FMLA was enacted to permit employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. 29 U.S.C. § 2601(b)(2). Included in this statute are provisions which create a series of substantive rights, namely, the right to take up to twelve weeks of unpaid leave under certain circumstances as well as barring employers from penalizing employees and other individuals from exercising their rights. The act also protects employees from interference with their leave as well as any discrimination or retaliation for exercising these rights.

Normally, these type of claims are brought under the statute by the employees who claim they were discriminated. To make a *prima facie* case for retaliation under § 2615(a)(2), a plaintiff must show that (1) he/she is protected under the FMLA; (2) he/she suffered an adverse employment decision; and either (3) that he/she was treated less favorably than an employee who had not requested leave under the FMLA; or (4) the adverse decision was made because he/she took the FMLA leave.

Plaintiff here relies upon §2615(b), which makes it unlawful for an employer to discharge or in any other manner discriminate against an individual because that person: (1) has filed a charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

The Court found that § 2615(b)(2) does not apply because the plaintiff did not provide any information of any kind in connection with an inquiry and in fact testified that he attempted to not get involved in his wife's FMLA claim. In addition, the Court found that the plaintiff did not meet § 2615(b)(3) because he does not claim that he was discriminated against as a result of the testimony he gave or was about to give. This is further supported by the fact that his wife's case had settled before trial.

The Court, in reviewing this case, as well as similar type of claims brought under ADEA refuses to provide an interpretation under § 2615(b) which is contrary to its literal meaning. The Court did not find any basis in the statute for providing more protection to the relatives and the friends of FMLA complainants that those offered to the same type people under ADEA.

E. <u>Section 1981</u>

CBOCS v. Humphries, **128 S.Ct. 1951 (2008)**

A former assistant manager at a Cracker Barrel restaurant sued CBOCS West, Inc., alleging he was dismissed for racial bias (Humphries is a black man) and because he had complained to management about the dismissal of an employee for race-based reasons. Humphries brought a "direct discrimination"

claim under Title VII and a retaliation claim under the "equal contract rights" provision in Section 1981. Humphries' Title VII claims were dismissed, and the Supreme Court was presented with the question of whether Section 1981 encompasses retaliation claims. The Supreme Court answered "Yes."

Writing the majority opinion for the 7-2 Court, Justice Breyer expressly based the decision on *stare decisis*. In summary, Justice Breyer recited that in 1969, the opinion in *Sullivan v. Little Hunting Park, Inc.*, 369 U.S. 229, recognized that the nearly identical language of § 1982 encompassed a retaliation action, and that the Court has long interpreted Sections 1981 and 1982 alike. Further, Breyer noted that in response to the 1989 *Patterson* opinion which excluded conduct where retaliation may be found, Congress had enacted legislation superseding *Patterson* and explicitly defined § 1981 to encompass post-contract-formation conduct. Finally, Justice Breyer determined that since 1991, the lower courts have interpreted § 1981 to encompass retaliation claims. Accordingly, Humphries' claim that he was the victim of retaliatory action for trying to help another employee suffering from direct racial discrimination is protected under § 1981.

In dissent, Justice Thomas (joined by Justice Scalia) noted that the majority's holding cannot be based on the text of the statute nor was it justified by *stare decisis.* The relevant statute, which states in relevant part that "[a]ll persons…shall have the same right…to make and enforce contracts…as is enjoyed by white citizens," does not clearly provide for a cause of action based on retaliation; rather, it is a "straightforward ban on racial discrimination in the making and enforcement of contracts." Justice Thomas, citing the 2006 *Burlington* opinion, distinguished between retaliation and discrimination thusly: "Retaliation is not discrimination based on race. When an individual is subjected to reprisal because he has complained about racial discrimination, the injury he suffers is not on account of his *race*; rather, it is the result of his *conduct*." Justice Thomas seems to imply that if the language of the text is clear, reliance on prior decisions is not required, especially when those prior decisions (including those relied upon by the majority, such as *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005)) are erroneous.

IV. SECTION 1983

***Whitt v. Stephens County*, 529 F.3d 278 (5th Cir. 2008)**

In an action for allegedly causing or failing to prevent the jailhouse death of Plaintiff's son, summary judgment for the Defendants was affirmed where the Court found that the denial to leave to amend the complaint to name five of the "John Doe" defendants was proper since the statute of limitations rendered the amendment futile, and there was insufficient evidence for a jury to conclude that the defendant sheriff personally caused the death or acted with deliberate indifference.

The father of a pretrial detainee who hung himself while incarcerated at County Jail brought this 42 U.S.C. § 1983 action against the county, county sheriff and unknown jail officials. District court granted summary judgment in favor of the jail officials and the sheriff in their official capacities and the father appealed. The district court denied the father's motion for leave to amend the complaint to identify the unknown jail officials and granted summary judgment in favor of the defendants on the remaining claims. The father again appealed.

The 5th Circuit held that the amended complaint to substitute the name county officials or unknown jail officials did not relate back to the original complaint, the sheriff was not liable under § 1983 and the county was not liable.

In April 2004, police officers arrested 23-year-old Jamie Whitt on three misdemeanor charges and took him to the Stephens County Jail. Whitt was in the Stephens County Jail for approximately 7 hours before found hanging by a belt from the ceiling of his jail cell.

When Whitt was booked in the jail around 2:00 p.m., and his items of clothing were

inventoried, there was no notation of a belt. He was also administered a mental health questionnaire where he answered "no" to almost all the questions, including whether he had ever attempted suicide or had suicidal thoughts. He did, however, answer "yes" to a question of "Have you experienced a recent loss or death of a family member or friend or are you worried about major problems other than your legal situation?" Contrary to normal jail protocol, the jailor did not report the answers to his supervisors and assigned Whitt to a general holding cell.

The log book showed hourly observations of Whitt for most of the afternoon; however, somewhere between 5:00 p.m. and 7:00 p.m. inmates heard noises coming from his cell and statements such as "Leave me alone. Stop. Leave me alone," as well as a bunch of sounds like slamming the mats around and noises like grunting. This jail had a surveillance camera in the hallway outside of his cell which should have recorded what had happened but the only copy of the surveillance recording contains several "green out" periods during which the counter progresses but the screen displays solid green or solid white. The critical time cannot be seen on the tape. The sheriff claimed that these portions of the tape disappeared when it was copied at the sheriff's office. Another strange fact was that Whitt, who weighed 290 pounds and was six feet tall, was found hanging from a pipe on the ceiling and the belt from which he hung was only thirty-seven inches long. It also appears that no one ever checked Whitt's pulse at any time or attempted to resuscitate him prior to him being declared dead.

The Court dismissed as untimely Whitt's federal claims against the John Does arguing that the two year statute of limitations had run and that the only exception is if they "relate back" to the original filing of the complaint pursuant to Rule 15(c). The 5th Circuit has previously held that an amendment to substitute a named party for a John Doe does not relate back under Rule 15(c). Thus, the Court's denial of the motion for leave to amend was proper.

The Court next concluded that a reasonable jury could not have found the sheriff personally responsible as he did not arrive at the jail until after Whitt was hanging around 7:00 p.m. Likewise, the Court found that the County could not properly be a defendant on Whitt's harassment theory as individual jailors or EMT's actions were not a result of respondent superior of vicarious liability under § 1983. A municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue, *i.*e. an unconstitutional policy or custom.

The county's failure to train officers in appropriate procedures supports will only support a § 1983 claim "only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the officers come into contact." Relating to suicide prevention in prisons, municipalities must provide custodial officials with "minimal training to detect obvious medical needs of detainees with known, demonstrable, and serious medical disorders" but a "failure to train custodial officials in screening procedures to detect latent suicidal tendencies does not rise to the level of a constitutional violation."

***McIntosh v. Partridge*, 540 F.3d 315 (5th Cir. 2008)**

A former state employee employed as a dentist in a state-operated residential facility for disabled persons brought this § 1983 action against his former supervisor after being terminated following his return of active military service. The Plaintiff claimed violations of due process, Uniformed Services Employment and Reemployment Rights Act (USERRA) and common-law defamation. The district court granted the summary judgment for the supervisor and the plaintiff appealed. The Fifth Circuit affirmed the ruling in part and vacated it in part.

McIntosh was the director of dentistry and the treating dentist for the residents at the Richmond State School (RSS). David Partridge was the medical director of the school and direct supervisor. McIntosh was a member of the U.S.

Navy Reserve and was called to active duty in October 2004 causing Richmond to contract with another dentist while McIntosh was on his tour of duty. During his absence, it was noted that many of the patients' teeth were in poor condition and it was believed that McIntosh quality of dental care at RSS was lacking.

When McIntosh returned from duty, he was placed on administrative leave pending an investigation into charges of professional incompetence and violations of the applicable standard of care. In addition, he was reported to the state board of dental examiners. McIntosh requested a hearing from Richmond to review a suspension, but none was held.

McIntosh then brought suit against Partridge, both individually and in his official capacity as medical director of Richmond. Meanwhile, Richmond hired an independent investigator to look at the allegations against McIntosh and after the report was completed provided him with an opportunity to present a response either in writing or in person. McIntosh declined the offer initially but subsequently submitted a written response. Following his written response, he was terminated at which time he filed a formal grievance with the Health and Human Services Commission which was subsequently abated pending the resolution of this lawsuit.

The defamation claim against McIntosh was dismissed. One of the arguments made by Plaintiff was that the federal district court did not have jurisdiction over this matter. The Fifth Circuit reviewed the Eleventh Amendment immunity determinations like other questions of subject matter jurisdiction with a *de novo* review. The court after examining the text of the statute both in its current and previous forms saw no "unmistakably clear" intention by Congress to waive the sovereign immunity by allowing individuals to bring USERRA claims against states as employers in federal court; and therefore, the court did not hear the USERRA claim.

The Court next addressed the Plaintiff's due process and equal protection claims against Partridge both in his individual and official capacities. The court noted that Partridge was entitled to qualified immunity in his individual capacity and the claims against him in his official capacity were barred by Texas's sovereign immunity. The court noted that once qualified immunity is invoked, it becomes the plaintiff's burden to rebut it. In order for the Plaintiff to rebut the qualified immunity argument, the plaintiff must identify for the record a sufficient factual basis for a reasonable jury to conclude: (1) that the defendant violated the plaintiff's constitutional rights; and (2) the violation was objectively unreasonable. The reasonableness inquiry asks whether the rights are sufficiently clear that a reasonable official would understand that what he is doing is violating that constitutional right. The court noted that the fundamental issue in a due process claim is not whether the state officials violated state law, but whether here McIntosh received sufficient process to meet the requirements of the federal due process clause before his suspension with pay.

To determine what is due process, the Supreme Court looked at three factors. The first was the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest. As McIntosh's job interest was important, he was suspended with pay, so his hardship is minimal. The Court found that his placement on paid leave without a hearing did not violate the due process rights. The court said that even if he had met his burden, he did not adequately address the qualified immunity argument asserted by Partridge. The court also found that McIntosh waived his equal protection claim arguments because they were inadequately briefed and were too vague.

***Brown v. Miller,* 519 F.3d 231 (5th Cir. 2008)**

Brown, a black male, was convicted in 1984 of rape and sentenced to life in prison. Twenty years later, DNA testing cleared his

name and he was released from jail. Brown filed suit against, among others, Miller, the lab technician who had performed an "ABO test" on Brown, alleging a Section 1983 claim for violating Brown's due process rights. Miller filed a motion to dismiss, claiming that Brown had failed to state a claim and that Miller was entitled to qualified immunity. The trial court denied Miller's motion and he appealed.

The Fifth Circuit affirmed the district court's denial of Miller's motion to dismiss. In doing so, the Court held that the deliberate or knowing creation of a misleading and scientifically inaccurate serology report amounted to a violation of a defendant's due process rights, and that a reasonable laboratory technician in 1984 would have understood that those actions violated those rights. The Court further held that the law was sufficiently clear in 1984 that a state crime lab technician would have known that suppression of exculpatory blood test results would violate a defendant's rights. Accordingly, the Fifth Circuit held that the district court did not err in denying the qualified immunity defense.

Jordan v. Ector County, 516 F.3d 290 (5th Cir. 2008)

Jordan was an employee of the Ector County District Clerk's office. In 2002, she ran for District Clerk against another employee. Although Jordan lost, she did not quit her job and remained in the Clerk's office. The new District Clerk, however, did demote Jordan from Chief Deputy to Assistant Chief Deputy. In 2005, a state's attorney needed an order signed quickly but the file was locked in the judge's office. Jordan had a security officer unlock the judge's office, entered the office, and removed the file. The judge became upset at Jordan's action and complained to the District Clerk. The District Clerk fired Jordan. Notably, this event occurred with the looming 2006 election, in which the District Clerk assumed Jordan was going to run for office again.

Jordan filed suit under Section 1983 alleging violations of her First Amendment rights, due process, and equal protection. The due process claim was dismissed before trial. At trial, Jordan got a directed verdict on her equal protection claim but was denied a verdict on her First Amendment claim. Defendants appealed the final judgment.

In reviewing the case, the Fifth Circuit noted that in order for a public employee to prevail on a First Amendment retaliation claim, she must prove that (1) she suffered an adverse employment decision; (2) she was engaged in protected activity; and (3) the requisite causal relationship between the two exists. Further, in order for a government employee's speech to be protected, the speech must address a matter of public concern. The Fifth Circuit noted that Jordan's 2002 run for office involved matters of public concern. Combined with the fact that Jordan's political affiliation differed from the District Clerk's, the 2006 upcoming election was a source of protected political activity. Although Jordan never officially stated that she was running for office, there were subtle signals that Jordan continued to be a political rival to the District Clerk. Accordingly, the Fifth Circuit, in affirming the final judgment, concluded that Jordan was within the reach of the First Amendment, further noting that the First Amendment can protect against distant retaliation.

Southwestern Bell Telephone, LP v. City of Houston, 529 F.3d 257 (5th Cir. 2008)

The City of Houston enacted an ordinance which required owners of facilities located in right-of-ways to bear the cost of relocating their equipment to accommodate public-works projects. In compliance with this ordinance, AT&T relocated its facilities in a public-right-of-way in connection with a City drainage improvement plan. AT&T then filed suit, asserting a claim under the Federal Telecommunications Act ("FTA") through Section 1983, seeking to recover the cost for the relocation ($420,000). The district court dismissed the lawsuit, holding that no private right exists under the FTA that can be enforced under Section 1983. The court also held that the City's ordinance fell under the FTA's safe-

harbor provision and therefore was not preempted.

On appeal, the Fifth Circuit focused on whether the FTA created an individually enforceable right in the class of beneficiaries to which AT&T belonged. Because neither applicable section of the FTA focused on the rights granted to telecommunications providers, the Court determined that Congress did not intend to create a private right, enforceable under Section 1983, for claimed violation of the FTA. Further, with respect to preemption, the Court held that the City's ordinance fell under the safe-harbor provision of Section 253(c) of the FTA which states that "Nothing in [Section 253] affects the authority of a State or local government to *manage the public rights-of-way*."

Rothgery v. Gillespie County, 128 S.Ct. 2578 (2008)

In this 8-1 opinion penned by Justice Souter, the Supreme Court held that a defendant's Sixth Amendment right to counsel attached after his initial appearance before a magistrate when he was informed of the charges against him, a probable cause determination was made, and bail was set.

Rothgery was arrested and taken before a magistrate judge for an Article 15.17 hearing, at which the magistrate made the Fourth Amendment probable cause determination, bail was set, and Rothgery was formally advised of the charges brought against him: felon in possession of a firearm. The magistrate committed Rothgery to jail, and he was released after posting bond. Rothgery made several requests—oral and written—for appointed counsel, as he could not afford counsel, but those requests were not granted. Rothgery was later indicted and rearrested, whereupon his bail was increased and he was jailed. A lawyer was then appointed and secured the dismissal of the indictment, as Rothgery did not have a previous felony conviction.

Rothgery brought a § 1983 action against Gillespie County, claiming that if a lawyer had been appointed within a reasonable time after the Article 15.17 hearing, he would not have been indicted, rearrested or jailed, and further that the denial of appointed counsel to indigent defendants out on bond violated the Sixth Amendment right to counsel. The Supreme Court held that the Article 15.17 hearing, which was an initial appearance before a judicial officer, marks the point of attachment of the Sixth Amendment right to counsel, thus triggering the obligation for the State to appoint counsel within a reasonable time after the request is made. In reaching this conclusion, the Supreme Court rejected the "prosecutorial awareness" justification relied on by the Fifth Circuit; that is, the fact that no prosecutor was aware of or involved in Rothgery's Article 15.17 hearing was of no consequence to whether the criminal defendant was entitled to counsel. The Supreme Court further rejected the County's other arguments put forth in support of the delay in appointing counsel, holding that the initial appearance after being charged signified a sufficient commitment to prosecute, regardless of the prosecutor's lack of involvement or a "formal" complaint.

Justice Souter noted the narrowness of the Court's decision, as the Court did not address what constitutes a reasonable time for the appointment of counsel once the right has attached and the request has been made by the criminal defendant. Specifically, the Court did not determine whether the six month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, nor did it determine the standards to apply in this determination. In dissent, Justice Thomas argued that a criminal prosecution could not begin without the involvement of a prosecutor, and thus there could be no right to counsel which would attach after the initial hearing. Two separate concurrences also noted the narrowness of the Court's holding, and in one concurrence Chief Justice Roberts and Justice Scalia agreed that Justice Thomas' arguments were "compelling." The case has been vacated and remanded to the Western District of Texas for further proceedings.

***United States v. Cano,* 519 F.3d 512 (5th Cir. 2008)**

Cano was stopped in Taylor County and appeared extremely nervous when asked about his identity and ownership of his vehicle. The deputy sheriff inquired about Cano's arrest history, and Cano replied he had been arrested for assault. Further investigation revealed a much more extensive arrest history (including aggravated assault, robbery, and drug charges, as well as suspicious insurance and registration papers. Cano consented to a search, and a police narcotics dog identified drugs in the car.

Cano was arrested and charged, and, while represented by counsel, filed a motion to proceed *pro se*, which was ultimately denied. Cano also moved to suppress evidence, arguing the sheriff's deputies ignored the revocation of his consent while searching his vehicle. Cano was convicted of conspiracy to possess with intent to distribute and possession with intent to distribute five kilograms or more of cocaine.

Cano did not challenge the effectiveness of his consent, but rather its scope, at the suppression hearing. As these arguments are distinct, the Fifth Circuit held that Cano waived his argument and upheld the conviction. Of greater import to the Fifth Circuit was Cano's right to proceed *pro se*. Cano initially sought hybrid representation, where he would serve as co-counsel with appointed counsel. As there is no constitutional right to such representation, this was appropriately denied. However, Cano later sought to relieve his counsel entirely, but this motion was never heard by the trial court. The Fifth Circuit held that it was error for the trial court to deny the motion to proceed *pro se* without a hearing, and accordingly, Cano's sentence was vacated, and the case was remanded to the trial court for resentencing after a *Faretta* hearing.

***Waltman v. Payne,* 535 F.3d 342 (5th Cir. 2008)**

Waltman held a hunting lease in Mississippi on which he planted kenaf—a legal wildlife food product closely resembling marijuana which attracts deer and other wildlife. Law enforcement officials, believing the plants to be marijuana despite a negative THC field test, cut down 500 of the plants and destroyed them. Waltman contacted the sheriff's office, advised them of his interest in the land and the nature of kenaf. After his notice of claim letter went unanswered, Waltman sued the sheriff in his official and individual capacities, asserting a variety of claims pursuant to § 1983. The district court granted summary judgment on qualified immunity as to the federal claims and dismissed the state claims without prejudice.

The sole issue on appeal was qualified immunity. To rebut the sheriff's qualified immunity defense, Waltman must show: (1) that he has alleged a violation of a clearly established constitutional right, and (2) that the deffendant's conduct was objectively reasonable in light of clearly established law at the time of the incident. Waltman claimed Payne's directing of the unreasonable search and seizure of the kenaf plants violated the Fourth Amendment.

The Fifth Circuit held that Payne's entry on the property was a legal search under the open fields doctrine. Further, the warrantless seizure was justified under the plain view doctrine, as a number of factors led Payne to believe the plants were marijuana, including the investigation by narcotics specialists from the DEA with special training and experience in identifying and eradicating marijuana, the placement of the plants between power lines (a popular location for illegal crops), the interspersion of the kenaf among other plants, and the physical appearance of the plants. The court was not persuaded by two items which Waltman argued made a finding of probable cause unreasonable: the negative THC field test and one officer's testimony that a preponderance of the plants were not marijuana.

The Fifth Circuit also rejected Waltman's Fourteenth Amendment claim that he was deprived of due process by seizing the plants without a warrant, as that claim was only an extension of the Fourth Amendment claim. Finally, the Fifth Circuit found that as Waltman had not exhausted his potential state judicial

procedures relating to his takings claim, such a claim was not ripe and it was dismissed for lack of subject matter jurisdiction without prejudice to Waltman's right to seek compensation in other venues.

***Mayfield v. Texas Dept. Criminal Justice,* 529 F.3d 599 (5th Cir. 2008)**

Mayfield, a prisoner in the Hughes Unit of the Texas Department of Criminal Justice, practices the Odinist/Asatru faith, an ancestral, polytheistic, Northern European folk religion. This practice involves group worship meetings involving the use of certain religious paraphernalia, including carved runestones, as well as individual study of runestones. While group meetings should be conducted, at a minimum, on a monthly basis, the TDCJ does not permit regular meetings because they must be attended by a security-trained, religious volunteer—the closest one of which lives in Arkansas.

Mayfield requested—and was denied on several occasions—permission to hold Odinist meetings without this volunteer. In addition, TDCJ did not allow the Odinists access to personal runestones except for when the trained outside volunteer brought them into the prison. After exhausting his administrative remedies, Mayfield brought this suit, claiming the defendants placed impermissible burdens on the Odinists at the Hughes Unit. Mayfield's action was brought under Section 1983, alleging a violation of Mayfield's First Amendment right to free exercise of religion, as well as a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which protects the religious practices of prisoners.

The District Court dismissed all claims against the TDCJ and its employees in their individual capacities on sovereign immunity grounds, and the claims against the employees individually on the basis of qualified immunity. The Fifth Circuit reversed the dismissal of the claims against the employees based on sovereign immunity, noting that as Mayfield sought declaratory and injunctive relief against the officials, those claims were not barred by sovereign immunity. However, the claims against the officials in their individual capacities were properly dismissed, as the Prison Litigation Reform Act prevented claims for compensatory damages for violations of federal law where no physical injury is alleged.

In considering Mayfield's Section 1983 claim that the TDCJ violated his First Amendment right to free exercise of religion, the Fifth Circuit found that there were issues of fact relating to the neutrality of the application of the volunteer policy to the Odinists. Specifically, there was some evidence that while a volunteer was required to conduct Odinist meetings, no such volunteer was required for other religious groups (including a Native American religion). While Mayfield had access to alternative means of worship, and allowing the Odinists to meet without a volunteer could compromise prison security if officers were pulled from regular duty to monitor religious services, the Fifth Circuit held that summary judgment on the First Amendment Claim was not appropriate.

Of additional note, the Fifth Circuit upheld the district court's summary judgment in favor of TDCJ on Mayfield's sec 1983 claim concerning personal possession of runestones, observing that accomodating such a request would burden security personnel, pose a risk of gambling, trafficking and trading activities, and undercut TDCJ's attempts to monitor and control gang activity. However, the TDCJ's banning of rune-related literature did not rationally relate to a legitimate penological interest, and accordingly summary judgment on this point was reversed.

The Fifth Circuit noted that the RLUIPA claims carry a higher burden, in that the statute requires that the government justify a "substantial burden on the religious exercise" by demonstrating that the imposition of the challenged government action is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. Under the same factual background, Mayfield's claims regarding the volunteer policy and runestones should have survived summary judgment. In essence, the disparate application

of the volunteer policy and the limited access of Odinists to alternative means of worship provide a reasonable basis for a finder of fact to conclude that the volunteer policy imposes a substantial burden on Odinists, and there were unresolved issues of fact which called into question whether the application of the policy was narrowly tailored to a legitimate interest. Furthermore, the policy of disallowing runestones could not be shown to be narrowly tailored to serve a compelling governmental interest, as prison regulators cannot compare a not-previously-disallowed religous exercise (possession of runestones) to another disallowed behavior (possession of gambling-related items). Accordingly, dismissal of Mayfield's RLUIPA claims was dismissed.

V. WARRANT ISSUES

U.S. v. Mata, 517 F.3d 279 (5th Cir. 2008)

In Mata, the Fifth Circuit examined the "protective sweep" exception to the Fourth Amendment, which prohibits warrantless searches. In this case, police officers were observing a business where they knew a truck full of marijuana was located. When the truck started to leave the premises, the police blocked the truck, identified themselves as police, and ordered the individuals standing outside the truck to stop. Immediately after the raid, the police performed a "safety personnel sweep," based on the concern that other suspects may have been present and which could have posed a danger to the officers. During the sweep, the officers did not find any individual officers but did find in plain view substantial amounts of marijuana and firearms. After the sweep, the officers left the building and waited for a search warrant. The warrant never arrived. However, the owner of the building and his wife did arrive on the scene. Mata, the owner, gave verbal consent to search the building but refused to sign the consent form. Mata's wife, however, did sign the form.

At pretrial, Mata filed a motion to suppress evidence, arguing that the search was warrantless and relied on legally invalid consent. The motion was denied and Mata was later convicted. Mata appealed the district court's denial of his motion to suppress, arguing that the protective sweep exception to the Fourth Amendment did not apply because the officers lacked any specific, articulable facts required under the exception. He further argued that his consent was invalid, the fruit of the illegal seizure, and not free and voluntary. He further argued that his wife's consent was invalid because the seizure of the marijuana occurred before she arrived. The government countered that the initial search was valid because it was incident to arrest and that the Mata's consented to the search of their property.

The Fifth Circuit found that the protective sweep exception was applicable because the officers had articulable facts plus rational inferences that allowed a reasonable officer to suspect that an individual dangerous to the officers was located in the area. The Court began its analysis by stating that the government need not prove that the sweep was incident to a lawful arrest. Further, the Court found that the officers' entrance was lawful because there was exigent circumstances allowing the officers to enter without a warrant (the officers thought the truck was a "load vehicle" and if they didn't stop it, some or all of the marijuana would be gone). Further, the Court found that the officers could not have obtained a warrant prior to the search because a warrant requires a specific description of the place to be searched – the officers arrived at the location only two hours before the white truck tried to leave. The Court further found that the officers knew with absolute certainty that suspect individuals possessed contraband and therefore were justified in conducting a protective sweep.

With regards to the consent issue, the Fifth Circuit concluded that Mata's verbal consent was voluntary – he was not under arrest, the police did not use coercive procedures, no officer had his gun drawn or threatened Mata. Although Mata refused to sign the consent form, he did not withdraw his verbal consent to search. Accordingly, the Court found that the consent to search was voluntary and thus valid.

VI. MISCELLANEOUS CASES

Ali v. Federal Bureau of Prisons, 128 S.Ct. 831 (2008)

While preparing to transfer to a new prison, prisoner Abdus-Shahid Ali temporarily left two bags of his possessions with a police officer. When Ali's bags arrived at his new cell, Ali noticed several items were missing. Ali filed an administrative tort claim with the Bureau of Prisons seeking to recover the missing items. After the claim was denied, Ali filed his claim in U.S. District Court where it was dismissed for lack of jurisdiction based on the government having sovereign immunity from tort claims under the Federal Tort Claims Act. The Eleventh Circuit affirmed, holding that the "detention of goods exception" in the Act, which excepts from waiver of immunity any claim arising in respect to the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, was a broad grant of sovereign immunity covering any instance of detention of goods by law enforcement officers.

The Supreme Court, in affirming the Eleventh Circuit's decision, held that the use of the word "any" should be given its normal interpretation, encompassing all federal officers whether or not they were involved in enforcing customs or excise laws.

Gonzalez v. United States, 128 S.Ct. 1765 (2008)

Before petitioner's federal trial on felony drug charges, his counsel consented to the Magistrate Judge presiding over jury selection. Petitioner was not asked for his own consent. After the Magistrate Judge supervised voir dire without objection, a District Judge presided at trial, and the jury returned a guilty verdict on all counts. Petitioner contended for the first time on appeal that it was error not to obtain his own consent to the Magistrate Judge's voir dire role. If the parties consent, a federal magistrate judge may preside over the voir dire and jury selection in a felony criminal trial. *Perez v. United States*, 501 U.S. 923, 933 The Fifth Circuit affirmed the convictions, concluding, *inter alia*, that the right to have a district judge preside over voir dire could be waived by counsel.

The Supreme Court held that express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial, pursuant to the Federal Magistrates Act, 28 U.S.C. § 6.36(b)(3), which states: "A magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." Such "additional duties" include presiding at voir dire if the parties consent, but not if there is an objection. Generally, where there is a full trial, there are various points at which rights either can be asserted or waived. This Court has indicated that some of these rights require the defendant's own consent to waive. See, *e.g.*, *New York v. Hill*, 528 U.S. 110, 114-115. The Court held in *Hill*, however, that an attorney, acting without indication of particular consent from his client, could waive his client's statutory right to a speedy trial because "[s]cheduling matters are plainly among those for which agreement by counsel generally controls."

Similar to the scheduling matter in *Hill*, acceptance of a magistrate judge at the jury selection phase is a tactical decision well suited for the attorney's own decision. The presiding judge has significant discretion over jury selection both as to substance-the questions asked-and tone-formal or informal-and the judge's approach may be relevant in light of the approach of the attorney, who may decide whether to accept a magistrate judge based in part on these factors. As with other tactical decisions, requiring personal, on-the-record approval from the client could necessitate a lengthy explanation that the client might not understand and that might distract from more pressing matters as the attorney seeks to prepare the best defense. Petitioner argues unconvincingly that the decision to have a magistrate judge for voir dire is a fundamental choice, or, at least, raises a question of constitutional significance so that the Act should be interpreted to require explicit consent.

Serious concerns about the Act's constitutionality are not present here, and petitioner concedes that magistrate judges are capable of competent and impartial performance when presiding over jury selection.

***Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519 (5th Cir. 2008)**

In December 2003, the Environmental Conservation Organization ("ECO") filed a citizen suit against the City of Dallas in order to remedy alleged violations of a MS4 permit (a Clean Water Act permit that allows the City to operate a separate storm sewer system). In February 2004, the EPA issued an administrative compliance order to the City that identified various violations of the City's MS4 permit and the Clean Water Act. Shortly after the order was issued, the City and the EPA began negotiating a settlement. Once the settlement agreement was finalized, the EPA filed an enforcement action against the City in federal court, which resulted in the entry of a consent decree in August 2006.

During the time of the negotiations between the EPA and the City, ECO's suit remained pending. After the consent decree was entered, the court directed the City to file a motion for summary judgment against ECO so that the court could determine whether the consent decree precluded ECO's action. The City complied and the district court granted the motion based on res judicata.

On appeal, the Fifth Circuit stated that this was not a "textbook case" for immediate res judicata dismissal. Instead, the Fifth Circuit addressed whether the district court was bound to dismiss the ECO suit because it was rendered moot by the consent decree. If a case has been rendered moot, a federal court has no constitutional authority to resolve the issues that it presents. Acknowledging that the primary purpose of a citizen suit is to spur agency enforcement of law, the court found that ECO's suit was moot since the decree adequately addressed the same violations alleged in ECO's suit.

***Hagan v. Echostar Satellite, LLC*, 529 F.3d 617 (5th Cir. 2008)**

Hagan, a manager for Echostar, was terminated for lack of performance when he told his technicians that Echostar's new work schedule would decrease the technician's overtime pay. Echostar later listed insubordination as an additional reason. Hagan filed suit against Echostar, claiming a violation of the Fair Labor Standards Act ("FLSA") in that Hagan was engaged in a protected activity and Echostar's firing was in retaliation. After the jury was unable to come to a verdict, the district court ruled on a pending motion for judgment as a matter of law in favor of Echostar.

The Fifth Circuit's review was limited to whether Hagan's behavior constituted a filing of a complaint under the FLSA, which would constitute protected activity. Because there was no "formal" complaint filed, the Court looked to see if Hagan's activity amounted to either an "informal" complaint or a stepping out of Hagan's role as manager and taking an adverse position to Echostar. The Court found that neither requirement was met in this case. With respect to an informal complaint, the Court stated that Hagan had to voice a concern about a violation of law on the part of Echostar. However, when Hagan's technicians asked if he thought Echostar was illegally changing their overtime hours, Hagan said no. Further, with respect to stepping over the line, Hagan never took an action adverse to Echostar. Instead, Hagan explained to his technicians why Echostar thought it was necessary to change the work schedule. Accordingly, the Court concluded that Hagan's actions did not constitute an informal complaint and therefore Hagan did not participate in protected activity under the FSLA.

***Richlin Security Service Co. v. Chertoff,* 128 S.Ct. 2007 (2008)**

Richlin contracted with the former Immigration and Naturalization Service to provide guard services for detainees at LAX. The parties' two contracts misclassified Richlin's employees, causing the Department of Labor to

seek back wages from Richlin for its employees. After extensive litigation, Richlin prevailed with the Department of Transportation's Board of Contract Appeals in obtaining an award forcing the Government to make payments to cover that liability. Richlin then sought reimbursement of its attorney's fees, expenses and costs pursuant to the Equal Access to Justice Act ("EAJA"). At issue before the Supreme Court was whether Richlin, as a prevailing party in a case brought by the Government, could recover paralegal fees at market rate or only at the actual cost to the party's attorney.

The Supreme Court held that when the requirements of the EAJA are otherwise met, a prevailing party could recover paralegal fees from the federal goverment at prevailing market rates, rather than at the actual cost to the party's attorney. Justice Alito's opinion relies upon the plain language of the statute as decisive, and rejects the government's argument that Congress intended paralegal fees to be reimbursed as "other expenses" reimbursable at "reasonable cost." Even if paralegal fees were considered costs, the opinion continues, "reasonable cost" would generally be deemed to be the prevailing market rate, when such a rate could be determined. In portions of the opinion not joined by Justices Scalia and Thomas, the Court also deemed unpersuasive the legislative history and policy arguments advanced by the federal government.

***Wright v. Harris County,* 536 F.3d 436 (5th Cir. 2008)**

O'Neal died shortly after leaving County custody after an arrest of suspected possession of a controlled substance. Wright, the administrator of O'Neal's estate sued Harris County for wrongful death under § 1983. At trial, the County used a peremptory strike to eliminate a black venireman, whereupon Wright asserted a *Batson* challenge. The County responded that it struck the venireman because she had only a high school education, she was not paying attention, and she was mumbling to herself. Wright did not contend that the County's reasons were pretextual or otherwise rebut the explanation.

Later in the trial, a white juror fell asleep, and upon further review the trial court determined that juror had not finished high school and commented that it's *Batson* ruling "may have been erroneous." After a jury verdict for the County, Wright moved for new trial, reasserting the *Batson* challenge and arguing that the County's explanation was pretextual. The court reversed its *Batson* ruling but upheld the jury verdict.

On appeal, the Fifth Circuit held that Wright's *Batson* challenge had been waived and the judgment was affirmed. Wright had access to the jury questionnaires and could have discerned that other jurors had not finished high school, but at the time the challenge was first raised Wright did not dispute either of the County's reasons for the strile. Because he waited until the Motion for New Trial to rebut the County's explanation of the peremptory strike, the challenge was waived.

***District of Columbia v. Heller*, 128 S.Ct. 2783 (2008)**

Heller, a D.C. policeman, applied to register a handgun he wished to keep at home but the District refused. Heller filed suit, challenging the constitutionality of a D.C. law that banned handgun possession and which also required residents to keep lawfully owned firearms unloaded and dissembled or bound by a trigger lock. The Supreme Court held that the Second Amendment protects an individual's right to possess a firearm and to use that firearm for traditionally lawful purposes such as self-defense within the home. The Court further held that the total ban of handguns in the home for self-defense violates the Second Amendment. Additionally, the District's requirement regarding trigger locks and the disassembling of firearms makes it impossible for a citizen to use the firearm for its lawful purpose – self-defense of the home – and likewise violates the Second Amendment.

VII. CRIMINAL LAW

U.S. v. Ressam, 128 S.Ct. 1858 (2008)

Ahmed Ressam, the so-called "Millennium Bomber," attempted to enter the United States at Port Angeles, Washington by car ferry in December 1999. Explosives were hidden in the trunk of his rental car, which he intended to detonate at LAX on New Year's Eve. Ressam was questioned by a customs official and asked to complete a customs declaration form. Ressam gave false information regarding his name and citizenship, and the explosives were discovered in the spare tire well upon inspection. Ressam was convicted of the felony making a false statement to a U.S. Customs official and carrying an explosive "during the commission of" that felony. A split panel of the Ninth Circuit Court of Appeals set aside that conviction, reading the word "during" to include a requirement that the explosive be carried "in relation to" the underlying felony.

The Supreme Court reversed the Ninth Circuit and restored the conviction and sentence. Determining that the term "during" connotes a "temporal link," the Court held that Ressam's carrying of the explosives was contemporaneous with the underlying felony (knowingly making false statements to customs officials), and thus the explosives were carried "during" the violation. The Supreme Court further concluded, after analyzing the statute violated and a similar firearm statute, that Congress did not intend that there be a relationship—other than temporal—between the explosive carried and the underlying felony. The sole dissenter—Justice Breyer—argued that while "during" does require a temporal link, other limitations may also be implied as well; that is, the context of the statute requires more of a relationship between carrying the explosives and the felony.

Virginia v. Moore, 128 S.Ct. 1598 (2008)

In February 2003, two City of Portsmouth police officers stopped a car driven by David Lee Moore. They had heard over the police radio that a person known as "Chubs" was driving with a suspended license, and one of the officers knew Moore by that nickname. The officers determined that Moore's license was in fact suspended, and arrested him for the misdemeanor of driving on a suspended license. The officers subsequently searched Moore and found that he was carrying 16 grams of crack cocaine and $516 in cash.

Under state law, the officers should have issued Moore a summons instead of arresting him. Driving on a suspended license, like some other misdemeanors, is not an arrestable offense. Rather than issuing the summons required by Virginia law, police arrested Moore for the misdemeanor of driving on a suspended license. Moore was tried on drug charges. The trial court declined to suppress the evidence on Fourth Amendment grounds. Moore was convicted. Ultimately, the Virginia Supreme Court reversed, reasoning that the search violated the Fourth Amendment because the arresting officers should have issued a citation under state law, and the Fourth Amendment does not permit search incident to citation.

The Supreme Court held that the police did not violate the Fourth Amendment when they made an arrest that was based on probable cause but prohibited by state law, or when they performed a search incident to the arrest.

Because statutes and common law do not support Moore's view that the Fourth Amendment was intended to incorporate statutes, this is "not a case in which the claimant can point to a clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since." *Atwater v. Lago Vista,* 532 U.S. 318, 345.

Where history provides no conclusive answer, the Supreme Court has analyzed a search or seizure in light of traditional reasonableness standards "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v.*

Houghton, 526 U.S. 295, 300. Applying that methodology, the Supreme Court has held that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. The Court's decisions counsel against changing the calculus when a State chooses to protect privacy beyond the level required by the Fourth Amendment.

The Court adheres to this approach because an arrest based on probable cause serves interests that justify seizure. Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation. A State's choice of a more restrictive search-and-seizure policy does not render less restrictive ones unreasonable, and hence unconstitutional. While States are free to require their officers to engage in nuanced determinations of the need for arrest as a matter of their own law, the Fourth Amendment should reflect administrable bright-line rules. Incorporating state arrest rules into the Constitution would make Fourth Amendment protections as complex as the underlying state law, and variable from place to place and time to time.

The Court rejected Moore's argument that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. Officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence. *United States v. Robinson,* 414 U.S, 218. While officers issuing citations do not face the same danger, and thus do not have the same authority to search. the officers arrested Moore, and therefore faced the risks that are "an adequate basis for treating all custodial arrests alike for purposes of search justification.

***Powell v. Quarterman*, 536 F.3d 3265 (5th Cir. 2008)**

In September 1978, Powell was convicted and sentenced to death for the murder of a police officer. After multiple appeals, remands, and two more trials, Powell appealed yet again, claiming, among other things, that his Fifth and Fourteenth Amendment rights had been violated when an emergency room doctor, who did not provide a Miranda warning to Powell when he examined him following Powell's arrest, testified for the prosecution about Powell's answers to the doctor's questions.

Police officers took Powell to an emergency room to be examined approximately 12 hours after his arrest. The doctor examined Powell in the presence of two officers and asked Powell if he had been using drugs. Powell argued on appeal that this questioning, without warning him of his Miranda rights, violated his Fifth and Fourteenth Amendment rights and cited to *Estelle v. Smith*, a case involving a psychiatrist. The Fifth Circuit disagreed, stating that the doctor was not acting as an agent of the State when he conducted the exam, was not court-appointed, was not a psychiatrist, and did not express an opinion as to Powell's psychiatric condition. The Fifth Circuit further stated that even if there had been error in admitting the doctor's testimony, the error was harmless because it did not have a substantial and injurious influence or effect on the verdict. There was no evidence that Powell was under the influence when he shot the police officer or threw the grenade and more than 12 hours had elapsed between Powell's arrest and the doctor's examination. Thus, the doctor's testimony that Powell had denied recent drug use did not necessarily or directly support the prosecutor's argument that Powell was in full control during his episode of violence.

***Richardson v. Quarterman*, 537 F.3d 466 (5th Cir. 2008)**

Richardson plead guilty to the 1999 murder of his wife, Mary Richardson. However, right before his trial began, Richardson filed a motion seeking to recuse the trial judge, Henry Wade, Jr., on the basis that Judge Wade's wife had known Mary Richardson. The motion was denied and Richardson was convicted. After unsuccessfully appealing his conviction in state court and filing a state habeas application, Richardson filed a federal writ of habeas under 28 USC §2254, arguing that Judge Wade should

have been recused from the case. The Fifth Circuit affirmed.

Judge Wade's wife was a member of the Junior League of Dallas with Mary Richardson. Other than working on a few committees together within the organization and attending the same parties, Judge Wade's wife described Mary as an acquaintance and not as a friend. Because the appellate court found that there was an appearance of bias but no actual bias on the part of Judge Wade (and thus deemed it harmless error), Richardson argued to the Fifth Circuit that the appearance of bias is a "structural error," i.e., a constitutional error subject to automatic reversal. Under the Due Process Clause, presumptive bias occurs when a judge may not actually be biased but has the appearance of bias. The Supreme Court has only found presumptive bias in three situations: (1) when the judge has a direct personal, substantial, and pecuniary interest in the outcome of the case, (2) when he has been the target of personal abuse or criticism from the party before him, and (3) when he has the dual role of investigating and adjudicating disputes and complaints. The Fifth Circuit stated that this case did not closely resemble any of these situations. Moreover, the Fifth Circuit stated that, although the appellate court had concluded there was an appearance of bias, that was an implied intermediate step of legal reasoning and therefore not relevant.

***US v. Casper*, 536 F.3d 409 (5th Cir. 2008)**

This case involves two separate warrantless searches that resulted in the arrest and conviction of Brian Casper. The Fifth Circuit addressed both searches and found no error and affirmed.

With respect to the first seizure, Fort Worth police stopped Casper for making an illegal right turn and arrested him for driving with a suspended license. The police also searched Casper's car, finding methamphetamine, marihuana, scales and other drug paraphernalia, and a handgun. Because the warrantless search was incident to a legal, custodial arrest, the Fifth Circuit conclude that the search did not violate Casper's Fourth Amendment rights.

The second seizure occurred after the Dallas police received an anonymous phone tip regarding an aggravated assault at a motel and a description that matched Casper and a truck he was driving. When the police arrived at the motel, they saw a person in a vehicle that matched the description given by the complainant and stopped the vehicle. Casper was ordered from the truck, handcuffed, and asked whether he had a weapon in his truck. Casper replied yes and while the officer searched the truck for the weapon, he uncovered drug paraphernalia, methamphetamine, and a dissembled shotgun. With respect as to the legality of the search, the government had to show that the police had reasonable suspicion to stop Casper. An informant's tip can provide reasonable suspicion if the government can establish the reliability and the credibility of the informant. In this case, because the informant's phone number appeared on caller id and the police were able to identify him, this increased the reliability and credibility of the caller, thereby creating reasonable suspicion. Accordingly, the Court found that "the officers had reasonable suspicion to justify an investigative stop of Casper, which permitted the protective search of Casper's truck that resulted in the probable cause necessary to justify his arrest, rendering the subsequent search of the vehicle permissible as incident to that arrest or as an inventory."

VIII. QUALIFIED IMMUNITY

***Dearmore v. City of Garland,* 519 F.3d 517 (5th Cir. 2008)**

A property owner challenged the constitutionality of a City ordinance relating to the maintenance of rental properties, alleging the minimum housing standards and inspection procedures violated the Fourth, Fifth and Fourteenth Amendments. Dearmore also sought injunctive relief to prevent enforcement of the ordinance. After amending his complaint, Dearmore obtained a preliminary injunction

enjoining the City from enforcing certain provisions of the ordinance, but the trial court dismissed other claims. Subsequently, the City advised Dearmore that it intended to amend the ordinance in accord with the Court's order, which it then did. Dearmore's remaining claims were dismissed as moot with prejudice.

At issue in this appeal was the Court's award of attorney's fees to Dearmore as a "prevailing party." An issue of first impression in the Fifth Circuit, the Court held that to qualify as a prevailing party under § 1988(b), a plaintiff (1) must win a preliminary injunction, (2) based upon an unambiguous indication of probably success on the merits as opposed to a mere balancing of equities, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits. Here, Dearmore met the newly announced test and the award of his fees in favor was affirmed.