RECENT FEDERAL CASES OF INTEREST TO CITIES

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I. FIRST AMENDMENT

Doe v. Reed, 130 S.Ct. 2811 (2010)

Chief Justice Roberts wrote this 8-1 majority opinion holding that signatories to referendum petitions do not typically have a constitutional right to keep their identities private. However, the majority also held that courts should consider in any given case whether a particular referendum presents sufficiently unique circumstances that anonymity is required. In the instant case, a claim to anonymity was allowed to proceed in the lower courts on a Washington referendum on gay rights.

Opponents to a 2009 Washington law expanding the rights of same-sex domestic partners collected the requisite number of signatures (4% of the electorate) supporting a referendum to repeal the law, qualifying it to the ballot. Proponents of the referendum filed suit to block the application of another Washington law which treats referendum petitions as public records subject to disclosure.

The Supreme Court held that the referendum disclosure law is subject to First Amendment scrutiny. Placing one's signature on a petition is an expressive act implicating the First Amendment. However, the level of scrutiny must also account for a state's ability to implement voting systems, and the Court further observed that disclosure itself does not itself prevent political speech. Thus, disclosure of referendum petitions generally passes constitutional muster because it helps to combat fraud, eliminate mistakes, and promotes governmental transparency and accountability.

The Court left open the possibility that the proponents of the referendum could prevail on remand with respect to this particular referendum, holding that the proponents' claim that disclosure would have the purpose and effect of facilitating harassment of individual signatories should be addressed in the context of that narrow claim. However, while the referendum proponents' "as applied" challenge remains viable, the majority of Justices express significant doubt as to the chances of that claim's success on remand. Of significance is this Court's apparent willingness—or at least the willingness of five members of the Court—to uphold disclosure regimes relating to elections.

Christian Legal Society v. Martinez, 130 S.Ct. 2971 (2010)

The Christian Legal Society sought official recognition from Hastings College of Law as a registered student organization ("RSO") to receive certain benefits, including use of school funds, facilities and channels of communication. In exchange, RSOs are required to comply with the school's non-discrimination policy, which encompassed religion and sexual orientation; that is, they must agree to accept all students who wish to participate, become a member or seek leadership positions.

The CLS' application was rejected because its bylaws incorporated a "Statement of Faith" requiring its members to conduct their lives in accord with certain principles, including the belief that sexual activity should not occur outside of marriage between a man and a woman, and persons who engage in "unrepentant homosexual conduct" were excluded from affiliation. These bylaws did not comply with Hastings' open access policy.

CLS filed suit under § 1983 alleging that the denial of RSO status violated its First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. Critical to the Supreme Court's decision of the case was a stipulation by the CLS that the policy was an "all comers" policy—that recognition was available to any student group at Hastings that allowed any student to take part in the group.

With this background, the Supreme Court issued a sharply split 5-4 opinion authored by Justice Ginsburg, finding that Hastings had created a viewpoint-neutral "limited public forum," and that it was constitutionally entitled to provide equal access to that forum only to

groups with open membership, in order to foster non-discrimination.

The dissenters (Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas) read the record of the case much differently, finding that the CLS was excluded from the policy as written, and that the policy singled out student groups for exclusion based on their beliefs. The CLS was the only group ever to be granted RSO status under the policy, and the "all comers" policy was supposedly never found until after discovery in the case was initiated.

***Morgan v. Swanson*, 610 F.3d 877 (5th Cir. 2010)**

Parents of elementary school students filed suit against two Plano ISD school principals alleging that the principals' ban on the distribution of religious messages by the students to other students while on school property resulted in "religious viewpoint discrimination." Both principals filed motions to dismiss based on qualified immunity and were denied. The Fifth Circuit affirmed holding that principals were not entitled to qualified immunity.

This case involves the distribution of religious messages at Christmas time. The children brought sealed goodie bags to school to give to their fellow students. The bags contained, among other items, a pencil with the message "Jesus is the reason for the season." Before the students were allowed to pass out the bags, school officials opened the bags, found the pencils and confiscated them. The pencils were then banned from school property. Two years later, a similar incident occurred over the distribution of candy canes that were given out along with a card explaining the Christian origin of the candy. The ban began to expand to the point to where the students were not allowed to use the term "Christmas" in conjunction with any school event or activity.

After suit was filed by several parents, the two principals moved for dismissal based on qualified immunity. The principals argued that (1) the Constitution does not prohibit viewpoint discrimination against religious speech in elementary schools and (2) the Plaintiffs' claims should be dismissed because they have failed to allege any conduct which constitutes a violation of Plaintiffs' clearly established constitutional rights.

The Supreme Court has long recognized that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S.* 503, 506 (1969). Likewise, for 67 years, the Supreme Court has recognized that school officials are subject to the Constitution and the Free Speech clause. The principals attempted to distinguish Supreme Court precedent by arguing that none of the cases stated that "elementary school" students are protected by the Free Speech clause. The Fifth Circuit held that Free Speech applies to all students while at school.

The principals further argued that, regardless of whether Free Speech applied to elementary students, they are entitled to qualified immunity because the law does not clearly establish that the Constitution prohibits viewpoint discrimination against religious speech in elementary schools. The Fifth Circuit pointed out that this Court has already held in a related case that elementary students are entitled to First Amendment rights. Thus, because the law was already clearly established, the immunity defense fails since a reasonably competent public official should know the law governing his conduct.

***Comer v. Scott*, 610 F.3d 929 (5th Cir. 2010)**

Terminated employee, who had served as Texas Education Agency's (TEA) Director of Science for curriculum division, filed complaint against Commissioner of TEA and TEA for declaratory and injunctive relief, alleging that her termination under DEA neutrality policy violated due process and Establishment Clause. The Fifth Circuit was presented with the question of whether the TEA neutrality policy constitutes an establishment of religion in

violation of the First Amendment's Establishment Clause.

The TEA neutrality policy requires staff to remain neutral and refrain from expressing any opinions on any curricular matter subject to the Texas State Board of Education's ("Board") jurisdiction. The Board is statutorily tasked with establishing the curriculum. The TEA is an independent state actor. However, because the Board has no staff of its own, the Commissioner of Education provides TEA staff to assist the Board with administrative, procedural and clerical tasks necessary to develop the curriculum.

Comer was the TEA's Director of Science for the Curriculum Division and was charged with providing non-regulatory guidance concerning the state curriculum. Comer received an email to her TEA account about an upcoming presentation on teaching creationism in public schools and forwarded the email to 36 science teachers. Comer's supervisor determined that Comer's action of forwarding the email violated the TEA's neutrality policy as well as a prior directive prohibiting Comer from communicating with anyone outside the TEA in any way that implied an endorsement on curriculum.

In analyzing Establishment clause challenges, the Supreme Court has established a three prong framework: (1) "the statute must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion; and (3) "the statute must not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Comer focused her argument exclusively on the second prong, arguing that the TEA's neutrality policy's primary effect was to endorse religion. Comer focused on a Supreme Court decision that held that a Louisiana law proscribing the teaching of evolution, unless accompanied by a lesson on creationism, violated the Establishment clause. The Fifth Circuit found no evidence that indicated the TEA's neutrality policy's "principal or primary effect" is to advance religion. The Court stated that it had no evidence before it that ordinary Texas citizens would look to TEA employees for authoritative statements on what the fifteen elected Board members might or might not one day endorse. Thus, the Court found it hard to imagine circumstances in which a TEA employee's inability to publicly speak out for or against a potential subject for the Texas curriculum would be construed or perceived as the State's endorsement of a particular religion. Accordingly, the Court concluded that the TEA's neutrality policy does not violate the Establishment clause of the First Amendment.

***DePree v. Saunders*, 588 F.3d 282 (5th Cir. 2009)**

DePree, a professor at the University of Southern Mississippi, was relieved of all teaching functions and service obligations to the University as a result of letters from fellow professors written to the Dean of the University describing DePree's behavior as disruptive and intimidating. The Dean wrote DePree a letter explaining this, and referred the complaints to the Provost for further proceedings, but still allowed DePree to continue his research at the university library. DePree filed suit within weeks after receiving the letter, alleging First Amendment retaliation, Due Process violations, and various state law claims. After DePree filed suit, DePree's pay, benefits, title and tenure remained as they were before those events occurred, but DePree refused to undergo a mental health evaluation at the recommendation of the University Ombudsman.

The district court granted the Appellees' motion for summary judgment, holding the DePree failed to show a constitutional violation because he had not been subjected to an adverse employment action and did not have a protectable property interest in teaching as opposed to research. The court also rejected his state law claims on the merits and alternatively, on the basis of state law qualified immunity. The Fifth Circuit affirmed the judgment against all defendants sued in their individual capacity. Even if the professor's speech was constitutionally protected, the University president was entitled to qualified immunity

because her conduct did not violate a clearly established constitutional right. No clearly established law informed her that the particular discipline she imposed, which fell far short of demotion or removal, constituted an adverse employment action. Regardless of any evidence of retaliatory animus, the professor offered no evidence that the other defendants exerted influence over the president in such a way as to co-opt her decision-making. The professor had not pointed to any Mississippi law or contract between him and the University stating that he had a property interest in teaching.

The judgment denying injunctive relief was reversed and remanded by the Fifth Circuit. Whether there is an actionable adverse action, and whether the Dean could have legitimately disciplined DePree for his conduct despite some element of First Amendment retaliation are factually complex. The late intervention of the Ombudsman report and the Dean's response to it has created a factual moving target. Due to these uncertainties, the Fifth Circuit remanded DePree's injunctive claim.

***Morgan v. Plano Independent School District*, 589 F.3d 740 (5th Cir. 2009)**

In the years leading up to 2004, the public school board in Plano, prohibited various students from distributing pencils inscribed with "Jesus is the reason for the season," candy canes with cards attached describing their Christian origin, and tickets to events at a nearby church. The Plano Independent School District (PISD) believed that distributing the materials at school would distract students and thus undermine the overall learning environment. The parents of several schoolchildren sued the PISD, claiming that the prohibition on distributing non-curricular materials at school violated their children's First Amendment right to free speech. In response to the lawsuit, PISD amended its policy in 2005. Under the revised policy, students could distribute the items at specific times: during the 30 minutes before and after school, at recess, and at three annual school-sanctioned parties. In response, the parents alleged that this new policy, in addition to the original one, unconstitutionally abridged their children's free speech rights. The trial Court rejected the parents' who appealed to the Fifth Circuit.

The Fifth Circuit agreed that the 2005 policy did not violate the First Amendment and therefore upheld it. The court explained that the right to free speech under the First Amendment is not absolute; if PISD has an important goal that cannot be achieved without a minor speech restriction, the speech restriction may be constitutional. In this case, PISD's goal of providing a focused learning environment justified regulating the distribution of religious materials. By including the important exceptions, PISD successfully characterized the 2005 policy as a "time, place, and manner" restriction. When a governmental actor (in this case the PISD) restricts the time, place, and manner of speech—but does not ban it outright—such restrictions are more likely to pass constitutional muster.

***United States v. Stevens*, 130 S.Ct. 1577 (2010)**

In an opinion written by Chief Justice Roberts, the Supreme Court ruled that the First Amendment protects expressions of animal cruelty depicted in videotapes and other commercial media. Noting that it had previously withdrawn "a few historic categories" of speech from the First Amendment's shield, the Court concluded that "depictions of animal cruelty should not be added to the list." This decision nullified a 1999 federal law passed by Congress in an attempt to curb animal cruelty by forbidding its depiction. That law, the Court said, sweeps too broadly. Justice Roberts stressed that it was not restricting the power of government to punish actual acts of animal cruelty, and it noted that such prohibitions have "a long history in American law." However, there was no similar history behind Congress's attempt to ban portrayals of acts of cruelty to creatures.

Stevens, an author and documentary film producer, sells information on and handling equipment for pit bulls. Undercover federal agents had bought from him copies of films

documenting dog fights in Japan and in the U.S. Stevens claimed that the aim of his publications was to provide historical perspective on dog fighting. On the basis of the films, which depicted considerable cruelty, and other materials found in Stevens' home, he was charged with and convicted of violating the 1999 law, and was sentenced to 37 months in prison. A federal judge rejected his First Amendment challenge to the law, but the en banc Third Circuit Court struck it down. The Supreme Court upheld the challenge to the law in an 8-1 decision.

As written, the Court said, the law "creates a criminal prohibition of alarming breadth." Noting that the government had given assurances that it would enforce the law only against commercial portrayals of "extreme cruelty," the Chief Justice wrote that the Court would not uphold an unconstitutional law "merely because the government promises to use it responsibly."

The Court found that the 1999 law regulated expression on the basis of its content or message, which made the law invalid under the First Amendment, unless the government can overcome that presumption. Chief Justice Roberts wrote: "The Government proposes that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." Calling that "a free-floating test for First Amendment coverage" and a "highly manipulable balancing test," the Court found the test "startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it."

Justice Alito, in dissent, argued that the Court should not have used the overbreadth approach, but rather should have analyzed the 1999 law as it was enforced specifically against Stevens in this particular case—that is, the law as applied to this set of facts. While disagreeing with his colleagues that the law swept too broadly, Alito said that the Court should have sent the case back to the Third Circuit to decide whether Stevens' videotapes were illegal under the law.

***RTM Media, LLC v. City of Houston*, 584 F.3d 220 (5th Cir. 2009)**

The City of Houston sued RTM, an outdoor advertising company which owned fifty-nine billboards in the City, in state court for alleged violations of the sign code and for public nuisance. In response, RTM brought suit in federal court alleging that the code violated the First Amendment because of its alleged disparate treatment of commercial and non-commercial speech, and RTM alleged that the Code could not be enforced against billboards that have been separately licensed by the state. RTM claimed that the signs are located in the City's extraterritorial jurisdiction (ETJ) and that the Texas Department of Transportation had issued state permits for them. Therefore, RTM argued, the City did not have the right to regulate the signs in the ETJ, and that such attempt amounts to a due process violation.

The City sign code classifies signs depending on whether they provide information related to the premises on which they are located, and it requires the abatement of off-premises signs but excludes from regulation all "noncommercial" signs. The code defines a noncommercial sign as "a structure that is used exclusively and at all times...for messages that do not constitute advertising" or commercial advertising.

The District Court initially granted RTM's request for preliminary injunction, but a year later granted summary judgment for the City, explaining that commercial signs are far more numerous than are noncommercial ones, which provides "an adequate rationale for treating them differently given the objective of reducing visual clutter and distraction along

public roadways." As the court affirmed the code's constitutionality, it abstained on the ETJ issue. RTM appealed, again alleging that the code violated the First Amendment and that the court should not have abstained.

Relying on *Metromedia, Inc. v. City of San Diego,* the Fifth Circuit explained: "A restriction on otherwise protected commercial speech is valid only if it seeks to implement a substantial governmental interest, directly advances that interest, and reaches no further than necessary to accomplish the given objective." The Fifth Circuit further opined that pursuant to *Metromedia,* "a billboard ordinance may permit on-premise commercial advertisement while banning off-premise commercial advertisement; the ordinance may not distinguish among non-commercial messages on basis of their content; and where a city permits commercial billboards it must also permit non-commercial ones."

RTM relied on the Supreme Court case of *City of Cincinnati v. Discovery Network* which "held that because the city could not justify banning commercial news racks based on the severity of their contribution to the city's problems . . ., the city could not resort instead to an irrelevant devaluation of commercial speech." The Fifth Circuit explained that *Discovery Network* was different since in that case the ordinance "was designed to combat littering rather than clutter," while here the code was designed to "address the safety and aesthetic concerns associated will billboards." Second, in that case the City "failed to regulate news racks' size, shape, appearance, or number" while here, Houston had established rules about all four. Third, Houston produced "substantial evidence that (1) the vast majority of area billboards are commercial and (2) the sign code has been effective reducing signage by approximately half over a twenty-eight-year period." The court held the City demonstrated that its approach to the billboards was carefully calculated and "because of their number, commercial billboards pose a greater nuisance than do noncommercial ones." Accordingly, the Code did not violate the First Amendment, and summary judgment for the City was affirmed.

***A.M. v. Cash*, 585 F.3d 214 (5th Cir. 2009)**

Students of Burleson High School challenged the school's policy prohibiting the display of the Confederate flag on school grounds after being required to cease carrying purses adorned with the Confederate battle flag. The students sought injunctive relief on the ground that the policy and its enforcement violated their right to free speech and expression guaranteed by the First and Fourteenth Amendments. The district court granted summary judgment to the defendants under the U.S. Supreme Court's *Tinker v. Des Moines Independent Community School District* opinion, 393 U.S. 503 (1969), and the Fifth Circuit affirmed.

Burleson High School had adopted the policy after several incidents of racial tension and hostility at the school, including at least one incident involving a Burleson High School student shoving a Confederate flag in the face of several members of an all-black volleyball team from a visiting school. The Confederate purse-carrying students contended that the policy violated their free-expression rights, also alleging that the enforcement of the policy constituted viewpoint discrimination, as the Confederate flag was singled out for unfavorable treatment, while other students were permitted to wear other racially tinged clothing, such as Malcolm X and Mexican-nationalist T-shirts.

In *Tinker*, the Supreme Court ruled that school officials in Iowa violated the First Amendment rights of several students when they enforced a ban on black armbands students had worn in part to protest U.S. involvement in Vietnam. *Tinker* established the standard that school officials can punish student expression only if they can reasonably forecast that such student expression will cause a substantial disruption or material interference with school activities. In this case, a three judge panel of the Fifth Circuit held that the trial court had applied the *Tinker* standard correctly: "Applying the *Tinker* standard to the instant case, defendants reasonably anticipated that visible displays of the Confederate flag would cause substantial

disruption of or material interference with school activities." Further, "there is ample, uncontroverted evidence that elements of the BHS student body have continually manifested racial hostility and tension."

Plaintiffs had argued that the school officials had to show more than simply generalized racial tension, but also a direct connection between the flag and disruptive activities. The Fifth Circuit disagreed: "*Tinker* does not require a showing of past disruption; administrators can also meet their burden by establishing that they had a reasonable expectation, grounded in fact, that the proscribed speech would probably result in disruption."

II. EQUAL PROTECTION AND DUE PROCESS

McDonald v. City of Chicago, 130 S.Ct. 3020 (2010)

In this challenge to various Illinois city handgun bans and related city ordinances, the Supreme Court held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment.

In overturning Chicago's ban on handgun possession by almost all private citizens, the Court declined to allow an unlimited right to weapons ownership; rather, the right is limited to weapons in "common use" and des not extend to "dangerous and unusual" weapons. The Court did not specifically determine whether the Chicago law comported with the Second Amendment, but rather left to a lower court the question of whether the onerous registration regime was constitutional. The opinion has already been criticized for failing to specify a standard of review for challenges to firearm legislation.

Terry v. Hubert, 609 F.3d 757 (5th Cir. 2010)

Two weeks after Hurricane Katrina, Terry was arrested for looting and transported to a correctional center. Three days later, Terry appeared before a judge in makeshift quarters, bond was set, and a show cause hearing was set one month later. The show cause hearing never occurred. Due to the chaos after Katrina, the Louisiana Supreme Court extended the indictment/information deadline for certain classes of crimes until January 6, 2006. The deadline passed and Terry was not indicted. Terry and his mother began writing letters to the warden asking why he wasn't being released since he was not indicted. He also complained that he had not seen an attorney and the law library had not responded to his requests for a writ of habeas corpus form. He was released on April 4, 2006 pursuant to a court order dismissing all charges. Terry then filed a Section 1983 action against the warden, Hubert, alleging violations of his First Amendment right to access the courts and his Fourteenth Amendment right to due process.

Prisoners have a constitutional right of access to the courts but that right does not guarantee a particular methodology. Inmates must demonstrate that the shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. The Court found that Terry had the ability to file a legally sufficient claim challenging his confinement based on the fact that he had access to writing and mailing materials as evidenced by his multiple letters to the warden, numerous state officials, and the courts. Within one day of Terry's request to the warden for help from inmate counsel, his request was satisfied. Moreover, Terry knew what to write in order to make out a legally sufficient claim - he did not need a writ of habeas corpus form. Because he was not prejudiced in his ability to file a legally sufficient claim, the warden was entitled to qualified immunity - he did not violate Terry's right of access to courts.

Terry's due process claim was based on the allegation that he was never charged with a crime. In addition to taking judicial notice that the state's criminal system was not operating under "normal" circumstances after Katrina, the Court also pointed out that a detainee is held for legal process when he is bound over by a magistrate. Terry was afforded a bond hearing;

thus, the warden could reasonably have concluded that Terry's detention was pursuant to that process. The Court concluded that, in light of the circumstances surrounding Terry's incarceration, a due process violation would not have been sufficiently clear to a reasonable public officer and thus the warden is entitled to qualified immunity.

***Hill v. Carroll County, Miss.*, 587 F.3d 230 (5th Cir. 2009)**

Police responded to a call about a fight between two women. Loggins, who was one of the women, attacked one of the deputies with his own flashlight, which prompted him to handcuff Loggins' wrists behind her back. Loggins continued to kick and curse at the deputy, so he attached leg restraints to Loggins. After several attempts to place Loggins in the patrol car failed, the deputies placed Loggins in four-point restraints and lifted her into the back seat of the patrol car. Loggins was driven to the Carrollton courthouse, where she was then transferred to Deputy Jones's vehicle. Loggins rode facedown in the back of Jones's air-conditioned car on the half-hour trip to the jail. At some point during the trip Loggins became quiet, and on arrival, Jones found Loggins unresponsive and without a pulse. She was later pronounced dead at the hospital.

Hill, the administrator of Loggins' estate, sued under § 1983 for violations of Loggins' Fourth Amendment rights. The district court found that the officers were entitled to qualified immunity.

The Fifth Circuit found that no reasonable jury could have found that the deputies used excessive force to subdue Loggins, which relieved the deputies as well as Carroll County of § 1983 liability. Only if there was evidence of drug abuse or drug-induced psychosis could there be a triable fact issue in this case. Summary judgment was warranted on Hill's excessive force claim because she failed to develop a material fact issue that the deputies' use of four-point restraints was unnecessary, excessively disproportionate to the resistance they faced, or objectively unreasonable in terms of its peril to Loggins. The Fifth Circuit affirmed the district court's judgment in favor of the defendants.

***United States v. Rangel-Portillo*, 586 F.3d 376 (5th Cir. 2009)**

Defendant appealed his conditional plea of guilty on the grounds that the District Court erred in denying his motion to suppress evidence obtained as the result of an unconstitutional stop by a United States Border Patrol agent.

U.S. Border Patrol Agent Soliz stopped an Explorer for an immigration check based on several factors: the driver repeatedly making eye contact with Soliz; the passengers failed to converse with one another and sat rigidly; the Wal-Mart that the Explorer pulled out of is frequently used as a staging area for alien smuggling; the Explorer was observed driving in tandem with another vehicle; the absence of shopping bags in the Explorer; and the fact that the passengers were sweaty. Upon inspection, Soliz discovered that all three passengers were illegally in the United States.

Defendant filed a pretrial motion to suppress the evidence that the agents obtained as a consequence of his detention, arguing that the agents lacked reasonable suspicion to stop his vehicle and that the evidence that they recovered as a result of the stop was inadmissible. The district court denied this motion on its merits, and the defendant entered a conditional plea of guilty.

"To temporarily detain a vehicle for investigatory purposes, a Border patrol agent on roving patrol must be aware of 'specific articulable facts' together with rational inferences from those facts, that warrant a reasonable suspicion that the vehicle is involved in illegal activities, such as transporting undocumented immigrants." *U.S. v. Chavez-Chavez*, 205 F.3d 145, 147 (5th Cir. 2000). The Fifth Circuit concluded that the detention of Rangel-Portillo's vehicle lacked reasonable suspicion because no other factors in addition to the proximity of the stop to the border were given supporting a finding of reasonable

suspicion. The district court's denial of the defendant's motion to suppress is in error, and the holding was vacated and remanded.

***Manis v. Lawson*, 585 F.3d 839 (5th Cir. 2009)**

Sergeant Vinson and Officer Zemlik were called to the scene of an idling Jeep Cherokee at 3:00 a.m., inside of which Manis was sleeping. The officers identified themselves while trying to wake up Manis, and apparently he immediately began shouting obscenities and flailing his arms aggressively at the officers. Manis, who was still seat-belted, repeatedly tried to reach underneath the front seat, which prompted the officers to draw their weapons. Manis ignored them, and when he retrieved some object and began to straighten up, Zemlik fired four rounds, killing Manis. No weapon was recovered, and an autopsy showed that Manis was drunk and under the influence of cocaine and barbiturates at the time of his death.

Manis' surviving children brought § 1983 action against Zemlik for use of excessive force. The district court denied Zemlik's motion to sustain qualified immunity, only to conclude that material fact issues exist. Plaintiffs' factual assertions did not dispute the only fact material to whether defendant was justified in using deadly force: that the decedent reached under the seat of his vehicle and then moved as if he had obtained the object he sought. In light of the decedent's undisputed actions, defendant's use of force was not excessive. Even if the court found to the contrary, summary judgment in favor of defendant would still have been appropriate because his conduct was objectively reasonable in light of the clearly established legal rules at the time of the shooting.

The Fifth Circuit found no constitutional violation, and even if Zemlik did use excessive force, he is nonetheless entitled to qualified immunity because his conduct was not objectively unreasonable in light of the clearly established law at the time of his actions. Reversed and remanded to the district court for entry of summary judgment.

***Jones v. Cain*, 600 F.3d 527 (5th Cir. 2010)**

Jones was convicted of second-degree murder in November 2001, and the Louisiana trial court sentenced him to life in prison without the possibility of parole. A witness to the shooting, Artberry, gave two recorded statements to Detective Tucker, in which he identified Jones as the shooter, who he later identified in a photo lineup. Tucker then recorded a third interview with Artberry at his home. Artberry identified Jones in court during a suppression hearing, and Jones's counsel cross-examined Artberry about his statements concerning the photo line-up but not about the recorded statements he had given the police.

Artberry died before the trial. The trial court denied Jones's motion to exclude Artberry's suppression hearing testimony, which the state intermediate appellate court and supreme court affirmed. The State sought to introduce Artberry's first two recorded statements during its direct examination of Detective Tucker, which was the first time Jones's defense counsel learned of their existence. Defense counsel moved for a mistrial, which the district court granted by reversing its pretrial suppression ruling. The state intermediate appellate court affirmed, because the defense had not had an opportunity to fully and effectively cross examine Artberry at the suppression hearing. The Louisiana Supreme Court reversed, holding that Jones had a fair opportunity to cross-examine Artberry at the suppression hearing and that Artberry's hearing testimony satisfied Louisiana's hearsay exception for prior recorded testimony.

The district court properly found that a state court unreasonably applied clearly established federal law by holding that no Sixth Amendment violation occurred when the jury heard recorded testimony from a deceased witness (the declarant) to the murder. The substance of the declarant's statements was related through a police detective, and then the statements themselves, which included a detailed description of the events leading up the murder, were played to the jury. The

combination of the playing of the recordings, the detective's testimony about the declarant's statements, and his later reliance on the statements to explain his understanding of exactly how the shooting occurred, showed that the declarant's hearsay statements were admitted and used for their truth and thus implicated Confrontation Clause concerns. But the state court failed to consider these concerns. That lapse was constitutional error because the declarant's testimony lacked particularized guarantees of trustworthiness and did not fall within a firmly rooted hearsay exception. Thus, the use of the declarant's testimony violated the prisoner's Sixth Amendment right to confront the witnesses against him.

***United States v. Scroggins*, 599 F.3d 433 (5th Cir. 2010)**

Officers went to Defendant's house and arrested his fiancée outside. The fiancée asked to re-enter the house to retrieve different clothing and was told the officers had to accompany her. The fiancée and the officers went inside and immediately encountered Defendant, who fled into a bedroom. Officers heard a loud thump, ordered Defendant to the floor, handcuffed him, frisked him, found a pistol magazine, performed a security sweep of the house, and observed two guns in plain view.

Before trial, Defendant moved to suppress the firearms and other evidence, alleging that his detention and the officers' entry into the home violated the Fourth Amendment's prohibition on unreasonable searches and seizures. The district court denied Defendant's motion during a suppression hearing. The issue in front of the Fifth Circuit is whether effective consent was given for a search of the premises. The Fifth Circuit determined that suppression was not warranted because (1) the fiancée implicitly consented to the officers entering the home and Defendant's manufactured consent theory was rejected, (2) the officers were justified in conducting a protective sweep upon entry, (3) the seizure and questioning of Defendant was constitutional under the protective sweep doctrine since officers had articulable grounds for concern that he presented a danger, (4) and the protective sweep of the house was permissible since the officers had reasonable, articulable grounds to continue to suspect danger after detaining Defendant.

***United States v. Banuelos-Romero*, 597 F.3d 763 (5th Cir. 2010)**

Trooper Dollar of the Texas Department of Public Safety was patrolling Interstate 40, and noticed Defendant's vehicle cross onto the shoulder. He stopped Defendant's vehicle because he was concerned that Defendant was falling asleep or intoxicated. Dollar noticed fresh adhesive on the windshield, noticed scarring on screws holding a plastic piece between the hood and windshield, and noticed that Mercury emblems had been removed from the car and replaced with Ford emblems. Dollar found this suspicious because he knew from his training that the Mercury Grand Marquis is a popular drug-smuggling car because it has a hidden compartment, known as a "firewall," located between the dashboard and the engine of the vehicle. He also knew that the firewall on the Grand Marquis is only accessible by removing the windshield or dashboard. The car was searched and methamphetamine was found in the firewall.

Defendant was charged with possession of methamphetamine with intent to distribute, and he moved to suppress evidence of the methamphetamine, arguing that Dollar and DPS violated his Fourth Amendment right against unreasonable searches and seizures. The magistrate judge denied the motion to suppress because the totality of the circumstances gave DPS probable cause to search the vehicle, which, in addition to exigent circumstances created by the vehicle's presence on the side of the interstate, fit the automobile exception to the Fourth Amendment's warrant requirement.

The Fifth Circuit affirmed, holding that Dollar had an objective basis for suspecting legal wrongdoing based on the fresh sealant, strong silicone odor, and scarred screws that strongly indicated the windshield had been recently replaced, which formed the basis of his reasonable suspicion. This allowed him to

continue the detention until he confirmed or dispelled the suspicion that there was contraband held in the vehicle. The trooper also had probable cause to search the vehicle based on the replacement of the windshield, the alteration of the emblems on the car, and the trooper's observation that Defendant and his passenger were acting suspiciously, so that Defendant's consent was not necessary for a search. This court has previously held that evidence of a non-standard hidden compartment supports probable cause. *United States v. Estrada,* 459 F.3d 627, 633 (5th Cir. 2006).

III. EMPLOYMENT LAW

Lewis v. City of Chicago, 130 S.Ct. 2191 (2010)

In this mirror image to the previous term's *Ricci v. DeStefano,* minority firefighter applicants filed a disparate impact claim based on the City's use of results of a performance exam. In a unanimous opinion by Justice Scalia, the Supreme Court held that the petitioners' disparate impact claims were not barred by the statute of limitations, and further the Court expanded the range of circumstances in which disparate impact claims can be raised.

In 1995, the City's firefighter application process began with a written examination, based on which the applicants were separated into three groups: those who were "well-qualified," scoring 89% or higher; those who were "qualified," between 65% and 88%; and those scoring less than 65% who were deemed "unqualified." The City chose incoming firefighter classes by random selection of the "well qualified" applicants and subjected them to further screening; the City informed the "qualified" candidates that their applications would be kept but it was unlikely they would be asked to apply further. In the specific examination at issue, there were no "well qualified" minority applicants.

The petitioners in this case were minority candidates from the "qualified" group. They contended the examination had a discriminatory disparate impact in violation of 42 U.S.C. § 2000e-2(k)(1)(A)(i). The district court dismissed the claims based on the statute of limitations incorporated in the statute, which required that the petitioners bring their claims to the EEOC within 300 days of a violation (determined to be the establishment of the allegedly discriminatory policy—the administration of the test and the decision of how the results would be used to select candidates), which everyone agreed they did not do.

The Supreme Court held that the applicants could nevertheless bring their suit against the City as long as any disparate impact cause of action accrued during the 300 day statutory period. The Court rejected the concept that establishment of the policy itself triggered the period; rather, a disparate impact violation occurs whenever the particular employment practice is used and causes a disparate impact. That is, the "use" of a discriminatory practice is actionable, separate and apart from the adoption of the policy. Further, each time the City used the test results to make hiring decisions, it constituted a separate "use" of the policy, thus extending the statutory limitations period. In reaching this conclusion, the Court noted that reaching a contrary opinion would allow employers to engage in discriminatory practices with impunity merely because the discriminatory policy was well-established.

City of Ontario v. Quon, 130 S.Ct. 2619 (2010)

The City issued Quon, a city police sergeant, and other SWAT team members pagers capable of sending text messages. Usage was limited and excess usage resulted in fees. The City required all of those to whom it issued pagers to acknowledge the City's computer usage policy, in which the City reserved the right to monitor all network activity and expressly stated that "Users should have no expectation of privacy or confidentiality when using these resources." While the policy did not expressly address the pagers, the City made it clear to Quon and others that it would treat text messages the same way it treated e-mails.

After Quon exceeded his usage allotment, he was warned that his messages could be audited, and Quon repaid the City for his overage charges. Quon continued to exceed his usage limit in subsequent months, and each time he repaid the City. Eventually, an audit of the accounts intended to determine whether the character limit was too low for work-related messages revealed that Quon was using the pager to send and receive personal (and sometimes sexually explicit) messages to his wife and girlfriend, among others. An investigation also showed that he sent personal messages while on duty, and he was disciplined.

Quon brought § 1983 claims against the City complaining that obtaining and reviewing his text messages violated the Fourth Amendment. The District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages and focused its review on the intent of the audit, holding that as the audit was conducted to determine the efficacy of the usage limits, there was no Fourth Amendment violation. The Ninth Circuit reversed, determining that the search was not reasonable and that there were less intrusive means to verify the utility of the message limits.

The Supreme Court determined that even assuming Quon had a reasonable expectation of privacy, the search of the text messages was reasonable. Given the "special needs" of the workplace, a warrantless search by a government employer, when conducted for the investigation of work-related misconduct, is reasonable if it is justified at its inception, and the measures adopted are reasonably related to the objectives of the search. Here, the search was justified at inception because there were reasonable grounds for suspecting that the search was necessary for a noninvestigatory work-related purpose—that is, to analyze the usage limit of the City's wireless contract. The scope of the search was reasonable because it was an efficient and expedient way to determine whether the overages were caused by personal use or work-related messaging, and further because it was not intrusive. As he had been warned his messages were subject to audit, and as a police officer, he should have known his actions might come under legal scrutiny. Finally, the Court refused to declare that the City was required to implement the least intrusive search practicable. Accordingly, the Court reversed the Ninth Circuit and remanded the case.

***Alaniz v. Zamora-Quezada*, 591 F.3d 761 (5th Cir. 2009)**

Plaintiffs, four former employees, brought Title VII of the Civil Rights Act of 1964 sexual harassment claims against defendant doctor and his medical clinics. A jury verdict was entered against defendants, with punitive damages awarded. Defendants appealed. The doctor's repeated comments, propositioning, bodily contact sufficiently supported the verdict as to three employees. But, the fourth employee's *quid pro quo* claim (her only claim) was not supported by the evidence since her reassignment, at the same salary and benefits, was not a tangible employment action. All of the claims centered on allegations of continuous sex discrimination involving the same *modus operandi*; denying separate trials under Fed. R. Civ. P. 42(b) was not error. Evidence that the doctor harassed others was admissible as to *modus operandi* in making sexual overtures, a systemic pattern of discrimination. While some hearsay of others' harassment was admitted in error, six others testified the doctor harassed them and much of the hearsay was corroborated. Statements about the doctor's Mexican ethnicity were related to the evidence that the doctor made derogatory statements about American women, told his employees Mexican women habitually slept with their bosses, and that they were smart to do so. The instructions and the varying awards showed that the punitive damage awards were based on individual harms, not generalized harm to nonparties; a due process violation claim failed.

***Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010)**

Rent-A-Center ("RAC") requires its employees to sign an arbitration agreement as a condition to employment. There are two parts to the agreement: first, that employment disputes

be settled by arbitration, and next, that any challenge to the validity of the arbitration agreement be settled by an arbitrator. Jackson brought an employment discrimination claim against RAC, who insisted on arbitration of the claim under the first part. Jackson, asserting the agreement was unconscionable, challenged the second part of the agreement, and RAC sought to have that challenge submitted to the arbitrator.

In an opinion written by Justice Scalia, the Supreme Court held that if Jackson had raised a specific challenge to only the second part--the agreement to arbitrate the validity of the agreement--a court would have had to decide the challenge. However, here, as the employee's unconscionability argument applied equally to the agreement to arbitrate all employment disputes, the general question should be submitted to an arbitrator.

***Moss v. BMC Software Inc.*, 610 F.3d 917 (5th Cir. 2010)**

In September 2006, Moss, 68, submitted his application for an in-house Staff Legal Counsel position with BMC, a company that develops, licenses, and markets software. After Moss applied for the position, he received no response from BMC. Stallworth stated that she rejected Moss' application because he did not have relevant experience and was therefore not qualified for the position. BMC continued to seek applications, and received an application from Monika Lim. BMC hired Lim, who was substantially younger than Moss.

In March 2007, Moss filed a charge of age discrimination against BMC with the Equal Employment Opportunity Commission (EEOC). The district court granted summary judgment in favor of BMC, concluding that although Moss established a *prima facie* case of discrimination, BMC had advanced a legitimate, non-discriminatory reason for not hiring Moss. The district court held that, as a matter of law, Moss failed to show that he was clearly more qualified than Lim in order to establish pretext, nor had he proffered any direct evidence of discrimination.

Moss asserts that the district court erred in granting summary judgment because it improperly discounted his evidence that BMC's articulated reasons for not hiring him were pretext and because it improperly disregarded evidence of a discriminatory intent.

To establish an ADEA claim, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the 'but-for' cause of the challenged employer decision."

Applying the framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), "[a] plaintiff relying on circumstantial evidence must put forth a prima facie case, at which point the burden shifts to the employer to provide a legitimate, non-discriminatory reason for the employment decision." *Berquist v. Washington Mut. Bank*, 500 F.3d 344, 349 (5th Cir. 2007). If the employer articulates a legitimate, non-discriminatory reason for the employment decision, the plaintiff must then be afforded an opportunity to rebut the employer's purported explanation, to show that the reason given is merely pretextual. *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 378-79 (5th Cir. 2010).

A plaintiff may show pretext "either through evidence of disparate treatment or by showing that the employer's proffered explanation is false or 'unworthy of credence.' " *Id*. A showing that the unsuccessful employee was " 'clearly better qualified' (as opposed to merely better or as qualified) than the employees who are selected" will be sufficient to prove that the employer's proffered reasons are pretextual. *EEOC v. La. Office of Cmty. Servs.*, 47 F.3d 1438, 1444 (5th Cir. 1995).

The parties agreed that Moss made out a *prima facie* case of age discrimination and that BMC asserted a legitimate, nondiscriminatory reason for hiring Lim. The contested issues arise under the pretext stage of the analysis. Moss first asserted that he had presented sufficient evidence to create a genuine issue of material

fact as to whether he was clearly better qualified than Lim for the Staff Legal Counsel position.

To show that he was "clearly better qualified" than Lim and raise a fact question as to whether discrimination was a factor in BMC's hiring decisions, Moss must present evidence from which a jury could conclude that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Deines v. Texas Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999). "[U]nless the qualifications are so widely disparate that no reasonable employer would have made the same decision," id., any "differences in qualifications are generally not probative evidence of discrimination," *Celestine v. Petroleos de Venezuela SA*, 266 F.3d 343, 357 (5th Cir. 2001). Thus, "the bar is set high for this kind of evidence." *Id.*

The Court also noted that an attempt to equate years served with superior qualifications was unpersuasive.

An employer's reliance on a previously unmentioned job requirement to justify a challenged hiring decision would raise a genuine issue of material fact as to pretext. *See Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1143 (9th Cir.2001) (holding that the fact-finder could regard an employer's explanation as pretextual when the person promoted became qualified for the position only after a change in the job requirements); *Williams v. Nashville Network*, 132 F.3d 1123, 1132-33 (6th Cir. 1997) (per curiam) (holding that the fact-finder might view the employer's explanation as pretextual when the employer's proffered reason for hiring another candidate was not a listed job requirement). Here, for example, BMC also cites Moss's lack of experience with open source licensing and Lim's experience as in-house counsel as influencing their conclusion that Lim was better qualified for the Staff Legal Counsel position. Neither experience with open source licensing nor experience as in-house counsel, however, were listed in the job announcement or BMC's internal job requisition form as responsibilities or desired qualifications; although these qualifications are likely relevant to the position, the Court did not consider them for purposes of summary judgment.

Moss argues that the evidence offered by BMC and relied on by the district court was not proper summary judgment evidence because it consisted of "[BMC's] own self-serving statements." But "[s]worn affidavits ... are certainly appropriate for review on a Rule 56 motion for summary judgment" and Moss has proffered no evidence suggesting this testimony to be less than truthful. *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 398 (5th Cir.2007). Moreover, Moss has not asserted in the district court or on appeal that additional discovery would produce a quality or quantity of evidence different from the current summary judgment record. Therefore, as the district court concluded, Moss lacks evidence of pretext, and as a matter of law would not be able to prove "that age was the 'but-for' cause of the challenged adverse employment action." *Gross*, 129 S.Ct. at 2352.

Moss next argues that the district court erred by applying a heightened standard in comparing his qualifications to Lim's-a standard that has been rejected by the Supreme Court. In its summary judgment order, the district court stated that:

> A court can infer pretext if it determines that the plaintiff was "clearly better qualified (as opposed to merely better or as qualified) than the employee[ ] who [was] selected." *Office of Cmty. Serv.*, 47 F.3d at 1444. To demonstrate that the employee who was selected is clearly better qualified than the defendant, the plaintiff must show that "disparities in curricula vitae are so apparent as to jump off the page and slap [the fact finder] in the face." *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

The standard articulated in the first sentence, "clearly better qualified," is good law. *Burrell v. Dr. Pepper/Seven Up Bottling Group*,

Inc., 482 F.3d 408, 412 (5th Cir. 2007). In *Ash v. Tyson Foods, Inc.*, however, the Supreme Court held that the Eleventh Circuit "erred in articulating the standard for determining whether the asserted nondiscriminatory reasons for [the employer's] hiring decisions were pretextual" when it stated that "[p]retext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." 546 U.S. 454, 456-57, (2006) (internal citations and quotation marks omitted).

The district court erred by reciting the "slap you in the face" standard. Although the district court stated the incorrect standard, however, its careful and fact-specific analysis reflects that it actually applied the proper standard. Regardless, as discussed above, summary judgment was appropriate under the correct "clearly better qualified" standard. See *Holtzclaw v. DSC Comm'n. Corp.*, 255 F.3d 254, 258 (5th Cir. 2001) (a panel may "affirm summary judgment on any ground supported by the record, even if it is different from that relied on by the district court.").

Moss asserts that he presented ample evidence that age discrimination was a motivating factor in BMC's decision not to hire him, sufficient to survive summary judgment. In *Gross v. FBL Financial Services, Inc.*, however, the Supreme Court rejected the application of Title VII's "motivating factor" standard to ADEA cases. *Gross*, 129 S.Ct. at 2349-51. A plaintiff bringing an ADEA claim must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. *Id. at 2345*. In light of the Supreme Court's holding in *Gross*, to the extent that Moss alleges that discrimination was a motivating factor-rather than the "but for" cause-in BMC's decision not to hire him, his claims must fail.

Moss's final argument is that remarks by Stallworth serve as direct evidence of age discrimination. Specifically, Moss asserts that Stallworth's comment that she was searching for a lawyer at a "more junior" level than herself functions as direct evidence of discrimination. BMC claims that Stallworth's comment was facially neutral and not probative of age discrimination.

In some ADEA cases, evidence of pretext is not needed. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir.2004). In *Rachid*, for example, the plaintiff presented evidence that the decision maker told the plaintiff "... you're too old." *Id. at 315*. The court held that "such comments preclude summary judgment because a rational trier of fact could conclude that age played a role in [the employer's] decision to terminate [plaintiff]." *Id.* at 315-16. However, this court has also "repeatedly held that 'stray remarks' do not demonstrate age discrimination." *EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir.1996). "In order for an age-based comment to be probative of an employer's discriminatory intent, it must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee." *Id.* (citing *Bodenheimer*, 5 F.3d at 958). "Remarks may serve as sufficient evidence of age discrimination if they are: 1) age related, 2) proximate in time to the employment decision, 3) made by an individual with authority over the employment decision at issue, and 4) related to the employment decision at issue." *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 683 (5th Cir.2001).

Stallworth testified that her statement relating to hiring someone at a "more junior level" referenced the need to hire an attorney at a lower level in the organization, as opposed to the age of the desired candidate. She explained that after her "role changed" and her responsibilities increased at BMC, the Staff Legal Counsel position was created to assume some of her previous responsibilities, but that they did "not necessarily need someone with [her] level of general experience as [she] would be available to get involved in major matters if needed." As BMC notes, in this context "more junior level" could very well refer to an older individual who went to law school later in life or otherwise had less experience, who would come into the position at a "more junior level" than

Stallworth. In fact, Moss himself characterizes the position as "effectively an entry level position." After reviewing the record, we conclude that Stallworth's comment was consistent with the evidence regarding the position, the proposed salary of $8,000-$11,000 per month, and the hierarchy of BMC's legal department. Stallworth's comment was not "direct and unambiguous" or even age-related, and therefore not "probative of [BMC's] discriminatory intent." *Texas Instruments, Inc.*, 100 F.3d at 1181.

The Court of Appeals held that: Moss failed to establish he was clearly better qualified than younger applicant selected for the position; that the employer's failure to request an interview after applicant initially submitted his resume was not evidence of pretext; the fact that applicant's interview was shorter than younger applicant's interview was not evidence of pretext; and the statement of employer's associate general counsel, that she was searching for a lawyer at a "more junior" level, was not probative of employer's discriminatory intent.

***Kemp v. Holder, United States Department of Justice; AKAL Security, Inc.*, 610 F.3d 231 (5th Cir. 2010)**

Kemp was discharged from his position as a court security officer ("CSO") with the United States Marshals Service ("USMS") after failing to meet the minimum unaided hearing requirement established for CSOs.

Following his termination, Kemp filed suit against the defendants alleging violations of the ADA, the RA, and Louisiana anti-discrimination law. He also claimed that he had been terminated in violation of his equal protection and due process rights. The district court granted AKAL's summary judgment motion on all claims in November 2008, and it entered summary judgment in favor of the government on all claims in March 2009. Kemp appealed the grants of summary judgment as to his ADA and RA claims only.

Kemp argued that by terminating his employment due to his failure to meet USMS's established unaided hearing requirement, AKAL violated the ADA, and USMS violated the RA. Both of these statutes prohibit employment discrimination against qualified individuals with disabilities, but the statutes govern different entities: the ADA applies only to public entities, including private employers, whereas the RA prohibits discrimination in federally-funded programs and activities. The RA and the ADA are judged under the same legal standards, and the same remedies are available under both Acts.

The ADA provides that no covered employer shall "discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... discharge of employees." 42 U.S.C. § 12112(a). To prevail on his ADA and RA claims, Kemp must establish that (1) he is disabled within the meaning of the ADA, (2) he is qualified and able to perform the essential functions of his job, and (3) his employer fired him because of his disability

Kemp disputes the district court's holding that he failed to meet the "threshold requirement" of showing that he is disabled under the terms of the ADA. The issue decided was whether he is disabled as defined by the ADA by showing either that he has a physical impairment that substantially limited one or more of his major life activities or that AKAL and USMS regarded him as having such an impairment.

Kemp first challenges the district court's conclusion that, because his hearing impairment is not substantially limiting when it is mitigated through Kemp's use of his electronic hearing aid, he did not raise a genuine issue of material fact regarding whether he had "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(a). In reaching this holding, the district court relied on the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.* and *Murphy v. United Parcel Service, Inc.*, which held that courts must take into account the benefit of any impairment-mitigating devices that the plaintiff uses in determining whether he is disabled within the meaning of the ADA. *See*

Sutton, 527 U.S. 471, 482 (1999) ("[I]f a person is taking measures to correct for, or mitigate, a physical or *mental impairment*, the effects of those measures-both positive and negative-must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the [ADA]."), *superseded by statute*, ADA Amendments Act of 2008, Pub.L. No. 110-325, 122 Stat. 3553; *Murphy*, 527 U.S. 516, 521 (1999) (holding that the "determination of [a person's] disability is made with reference to the mitigating measures he employs."). Kemp contends that the district court's reliance on these cases is misplaced because the ADA Amendments Act of 2008 ("ADAAA") retroactively applies to overrule these decisions and permits ADA-defined disability to be discerned without regard to the mitigating effects of his hearing aids.

The ADA's definition of "disability" permits suits "by plaintiffs who, though not actually disabled are nonetheless 'regarded as having such an impairment.' To meet this standard, a plaintiff must show either that "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489, 119 S.Ct. 2139. However, both of these showings require that the plaintiff demonstrate that the employer actually "entertain[ed] misperceptions about the individual-it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.*

To establish that he was fired as a result of a perceived "substantial limitation," Kemp was required to produce evidence that his employer regarded him as being "[u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195-96 (2002).

The Court found no genuine issue of material fact regarding whether Kemp is substantially limited in the life activity of hearing. His claim that AKAL and USMS regarded him as substantially limited in the major life activity of working also failed because the Supreme Court has held that "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that [Kemp] allege [he is] unable to work in a broad class of jobs." *Sutton*, 527 U.S. at 491. The breadth of the exclusion is significant, as the ADA endeavored to leave employers free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment-such as one's height, build, or singing voice-are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job.

To prevail, Kemp had to prove that he was regarded as "significantly restricted in the ability to perform either a *class of jobs or a broad range of jobs* in various classes as compared to the average person having comparable training skills and abilities." Kemp has failed to submit evidence establishing that either AKAL or USMS believed him to be limited to such a great extent. As mentioned above, the record reflects that AKAL did not even consider him to be substantially limited in his ability to work as a CSO, as it urged USMS to reinstate him even after USMS determined that he could not meet the unaided hearing requirement.

Kemp provided no evidence raising genuine issue of material fact regarding whether AKAL or USMS believed him to be significantly limited in his ability to work a broad class of jobs, not simply in his ability to "perform the tasks associated with [his] specific job," and thus he cannot establish "disability"..

Kemp failed to produce evidence of a physical or mental impairment that substantially limits one or more [of his] major life activities" or that he is "regarded as having such an impairment.

***Allen v. McWane, Inc.*, 593 F.3d 449 (5th Cir. 2010)**

In a collective action under the Fair Labor Standards Act ("FLSA"), hourly employees of McWane, Inc. sought payment for pre- and post-shift time spent donning and doffing protective gear. The employee plaintiffs come from ten different McWane plants that operate under collective bargaining agreements ("CBAs"). Different CBAs govern each of the plants, and three of the plants operate under CBAs that expressly exclude compensation for pre- and post-shift time spent putting on and taking off protective gear, while the other seven CBAs do not address this issue. None of McWane's employees at these plants have ever received compensation for pre- and post-shift changing time.

The district court granted summary judgment on the basis that at each plant there existed a custom or practice of not compensating pre- or post- shift time spent putting on and taking off protective gear under 29 U.S.C.S. §203(o) of the FLSA. The employees had contended that they were not aware that the changing time was potentially compensable under the FLSA. On review, the Fifth Circuit affirmed. The court adopted the reasoning of other circuits and held that negotiation was not necessary in order to find that a custom or practice existed under § 203(o). The facts established that the employer did not pay for changing time over a prolonged period, allowing an inference of knowledge and acquiescence, and that a bona fide CBA existed. The court found that it was not necessary for the parties to explicitly discuss such compensation when negotiating the CBA. Additionally, the court found that § 203(o) was not an affirmative defense and did not have the same status as an exemption under 29 U.S.C.S. § 213. Therefore, the employees had the burden of showing whether or not a custom or practice existed, and they failed to meet that burden on summary judgment.

***Sullivan v. Leor Energy, LLC*, 600 F.3d 542 (5th Cir. 2010)**

Leor Energy and Sullivan tentatively agreed that Sullivan would become the Chief Executive Officer and President of Leor. Attorneys for Leor prepared drafts of an employment agreement, which neither party signed. Sullivan alleges that Leor promised to sign an agreement and that Sullivan therefore began working for the company. Leor also represented to potential investors that Sullivan was its President and CEO, and Sullivan succeeded in securing financing for Leor. Leor then terminated Sullivan's employment without cause. The district court dismissed Sullivan's amended complaint for failure to state a claim, concluding that the statute of frauds bars enforcement of the compensation provisions in the unsigned contract.

The Fifth Circuit found that the district court did not err in finding that plaintiff's breach of contract claim was barred by Tex. Bus. & Com. Code Ann. § 26.01(b)(6) because the alleged agreement was for a stated term of more than a year, and defendant did not sign any document reflecting the parties' agreement. The possibility of a terminating event occurring within one year of the agreement's making, even though considered in the agreement, was insufficient to take the agreement outside of Tex. Bus. & Com. Code Ann. § 26.01(b)(6). Further, even if plaintiff could prove that the partial-performance exception applied, he would have been entitled only to reliance damages, and not the contract damages he sought. Finally, the district court did not err in dismissing plaintiffs quasi-contract claims for quantum meruit and unjust enrichment. Quantum meruit could not be used to enforce the terms of an unsigned draft of a contract, and plaintiff had alleged no facts showing that the salary was not the "reasonable value" for the services he rendered. Plaintiff's unjust enrichment claim was similarly meritless.

IV. SECTION 1983

Zarnow v. City of Wichita Falls, 614 F.3d 161 (5th Cir. 2010)

Zarnow, a Wichita Falls physician, was an avid collector of weapons and licensed firearms dealer. While Zarnow was on vacation, employees at the clinic where he worked discovered a gun, ammunition, blasting caps and fuses in his office, and the police were contacted. The first officer concluded that the found items—while not active explosive devices—were dangerous, and the ATF was called. Police applied for a warrant for Zarnow's home based on suspicion of possession of illegal explosives and devices; while awaiting the warrant police surrounded Zarnow's home and ordered him to exit the house. Zarnow offered to produce paperwork showing his entitlement to possess all of the materials recovered at his office, at which time officers began a consensual search of the home. When officers discovered a box marked "explosives" in plain view, Zarnow withdrew his consent and requested that the officers leave. By that time, however, the warrant had been issued, and the police seized firearms and ammunition (as well as other items not covered by the search warrant, such as currency, bonds and silver) and arrested Zarnow. The following day, the police chief laid out all of the firearms and ammunition for the media to view and photograph. Ultimately, however, a Wichita Falls grand jury declined to indict Zarnow, and no charges were brought against him.

Zarnow sued the City, police chief, and sixteen police officers in their individual and official capacities under § 1983, alleging violations of the Second, Fourth, Fifth, Sixth and Fourteenth Amendments. Several officers were later dismissed and all official capacity claims—except those against the police chief—were dismissed. All defendants moved for summary judgment on qualified immunity grounds, which was granted as to all but Zarnow's Fourth Amendment claims. On appeal, the Fourth Amendment claims against the individual officers were dismissed on qualified immunity grounds, and Zarnow's claims against the City and police chief in his official capacity were remanded.

The issue on remand was whether the City was responsible for the individual officers' misuse of the plain view doctrine during the home searches; the police chief had testified it was his practice to seize more than was necessary during an initial search so as to later "rule things in or out;" the officers testified that they understood "plain view" to allow seizure of any item that may be evidence of nay crime. The district court found the police chief to be a potential policymaker, but that the officers' use of the plain view doctrine was not a custom or policy of the City. Accordingly, summary judgment was granted to the City. Cross-appeals followed.

The Fifth Circuit reviewed the practices of the City and police department, as well as the fact that Wichita Falls is a "home rule" city, and found that the evidence demonstrated that the chief was the sole official responsible for internal police policy, and further that the City had impliedly delegated its policymaking authority to the chief. As there was not an official policy regarding the department's "plain view" practices, the court looked to whether there was a custom or policy demonstrated by either a pattern of unconstitutional conduct or a single unconstitutional action by a final policymaker. In this case, the court did not find a pattern of unconstitutional conduct, but only unintentionally negligent oversight within the department. As Zarnow did not claim a single action by a final policy maker at the district court, the Fifth Circuit refused to consider that element.

As a separate theory of municipal liability, Zarnow made a 'failure to train' claim; however, the court rejected the claim, stating that the officers' unlawful interpretation of the plain view doctrine did not amount to inadequate training. Finally, the Fifth Circuit did not reach the "moving force" element of the municipal liability analysis, as Zarnow was not able to establish a custom or policy of the City. Accordingly, the Fifth Circuit affirmed that the chief was a policy maker, but that Zarnow had

not established a custom or policy sufficient to impose liability.

***Valle v. City of Houston*, 613 F.3d 536 (5th Cir. 2010)**

The Valles called the police when their son, suffering from depression, locked himself in the house. The police tried to get him to open the door and come out but he refused. After failed attempts to negotiate with the son by a member of the Crisis Intervention Team ("CIT"), a Captain, who was not at that scene, authorized entry into the house. When the officers entered, the son allegedly charged at them with a hammer. After they missed with a taser and were unsuccessful stopping the assailant with three blasts of non-lethal soft impact bean bags from a shotgun, a third officer pulled his firearm and shot the son three times, killing him.

The Valles sued the City under Section 1983, alleging that the officers exercised excessive force in entering their home and lethal seizure of their son and that it was done pursuant to a City policymaker's orders (the Captain).

The Valles did not argue that the City had a formal written policy or custom that caused the unconstitutional seizure of their son. Instead they argued that the City is liable for the Captain's single unconstitutional decision to order entry into the home. In order to succeed under that theory, the Valles had to show that the Captain had final policymaking authority and that his decision was the moving force behind the unconstitutional injury. The Court found that, although the Captain made the final decision in this situation, it did not mean that he was setting City policy regarding the making of arrests. Thus, his decision was not a decision by a final policymaker of the City.

The Valles also argued that the City was liable because it failed to adequately train its patrol supervisors in the use of CIT tactics. In order to succeed on that claim, the Valles had to show that (1) the municipality's training policy or procedure was inadequate; (2) the inadequate training policy was a "moving force" in causing violation of the plaintiff's rights; and (3) the municipality was deliberately indifferent in adopting its training policy. *Sanders-Burns v. City of Plano*, 594 F.3d 366, 381 (5th Cir. 2010). The Fifth Circuit found that the Valles ultimately failed to provide sufficient evidence on the deliberate indifference element. The Valles had to show "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Although the Valles provided some evidence that the City had made a decision to not implement a training proposal that could potentially lead to the deprivation of constitutional rights, the Valles failed to link this potential to a patter of actual violations sufficient to show deliberate indifference.

***Peterson v. City of Fort Worth*, 588 F.3d 838 (5th Cir. 2009)**

This case concerns the municipal liability for the alleged excessive force of two of its police officers. The arrestee, Peterson, and his wife decided to sleep in their truck after leaving a club intoxicated. When Peterson resisted an officer's attempts to wake him, another officer helped drag him out of the truck and delivered a hard knee strike to his thigh allegedly while he was handcuffed. Peterson was released after a background check was completed and it was found that he had no record. Peterson was diagnosed with a ruptured femoral artery as a result of the scuffle with the officers. Peterson filed a § 1983 action against only the City of Fort Worth. The district court concluded that the detention was lawful and that the force was not excessive under the circumstances, and also that even if the officers had violated Peterson's rights, the City was not liable because Peterson did not show that a policy, practice, or custom of the City was moving force behind the officers' conduct. Summary judgment was entered for the City.

The Fifth Circuit determined that the arrestee's unlawful detention claim failed because the officers' actions were reasonable in the light of their articulated concerns for the safety of the arrestee and his wife. Summary judgment was inappropriate as to the arrestee's excessive force claim because the evidence created a genuine issue of material fact as to whether the knee strike was excessive from the perspective of a reasonable officer on the scene. However, summary judgment was nonetheless proper as to the city's liability for the alleged misconduct of its officers because (1) regarding ratification liability, the case did not present an extreme factual situation, (2) regarding failure to train, there was no evidence that the city was aware of any risk of injury from knee strikes, and (3) the 27 complaints on which the arrestee relied were insufficient to establish a pattern of excessive force. In other words, in order to reach a jury trial on that claim, Peterson needed to at least produce enough evidence to raise a question as to whether the Fort Worth Police Department followed a practice, policy, or custom of permitting its officers to engage in excessive force. The panel majority found that he did not meet this burden. Affirmed.

***Reyes v. City of Farmers Branch*, 586 F.3d. 1019 (5th Cir. 2009)**

Under the Farmers Branch city council voting system, candidates run for one of five numbered seats, and all voters can vote for all five positions. The plaintiffs argued that this system dilutes the Hispanic vote in violation of Section 2 of the Voting Rights Act, which generally prohibits discriminatory voting practices or procedures. To prove the violation, the plaintiffs had to show that Farmers Branch's Hispanic minority "is sufficiently large and compact enough to constitute a majority in a single-member district." In November 2008, a federal district judge in Dallas ruled that the plaintiffs had failed to make that showing.

The case hinged partly on an interpretation of a United States Supreme Court case, *Bartlett v. Strickland*, decided the same year. The plaintiffs argued that Strickland indicated that citizenship should no longer be taken into account in calculating a voting-age majority, and therefore that they could prove that Hispanics constituted a majority in a hypothetical single-member district in Farmers Branch.

Writing for a three-member panel of the Fifth Circuit, Judge Patrick Higginbotham, disagreed with that interpretation. Judge Higginbotham pointed out that the question of citizenship's relevance was not an issue in Strickland; that although the language of the Strickland opinion doesn't explicitly refer to citizenship, its discussion of voters and a voting majority implies the legal right to vote, which requires citizenship; that the Supreme Court would not overrule the other circuits that have taken citizenship into account without making such a holding clear; and that because there was only a plurality opinion and not a majority in Strickland, the opinion is not binding in any event.

The plaintiffs had also argued that, even when factoring citizenship into the inquiry, they could prove a Hispanic majority in a hypothetical district. But the circuit court rejected that argument as well, pointing out flawed assumptions or significant inaccuracies in each of the plaintiffs' three methods of indirect proof. As a result, the court said, the plaintiffs could not prove beyond a 50 percent probability that Hispanic citizen voters made up a majority in the hypothetical district.

***Tamez v. Manthey*, 589 F.3d 764 (5th Cir. 2009)**

The decedent, Tamez, was a pretrial detainee when a nurse told detectives that the decedent had dilated pupils and needed to be medically cleared before the county jail would incarcerate him. Tamez was taken back to the city jail and was eventually taken to the hospital to obtain a medical clearance. He died from acute cocaine intoxication when a bag of cocaine that he swallowed before his arrest burst in his intestines. Tamez never advised any of his jailers that he had taken drugs, that he felt ill, that he needed any medical treatment, or that he was injured. The decedent's family asserted that

the defendants violated his Fourteenth Amendment right not to have his serious medical needs met with deliberate indifference. The district court granted summary judgment to the defendants.

The Fifth Circuit determined that the Fourteenth Amendment deliberate indifference claims failed because the facts did not show that the detectives were aware, or should have been aware, of any substantial risk to the decedent's health since the nurse did not tell the detectives to take the decedent to the hospital immediately. The Tamez family tried to argue supervisor liability on the part of the Chief of Police and acting supervisor at the time of the incident, but failed because there was no underlying constitutional violation to impose this type of liability.

***Shepherd v. Dallas County,* 591 F.3d 445 (5th Cir. 2009)**

Plaintiff pretrial detainee alleged he suffered a stroke and permanent disability from defendant county's failure to administer his chronic hypertension medication, as a predictable result of a de facto policy of denying inmates adequate care. At the summary judgment stage, the District Court ruled the claim was a condition of confinement claim. A jury found for the detainee.

The detainee's extensive independent evidence included a comprehensive evaluative report commissioned by the county, a Department of Justice (DOJ) report, and affidavits from jail employees and its medical contractor attesting to the accuracy of the report. A de facto policy of failing properly to treat inmates with chronic illness was reasonably inferred. The detainee showed that serious injury and death were the inevitable results of the jail's gross inattention to the needs of inmates with chronic illness. In the absence of any legitimate penological or administrative goal, it was punishment. An official intent to punish could be presumed since the detainee attacked the general conditions and practices of pretrial confinement. Express intent to punish was not required. The instructions allowed the jury to infer intent to punish only for knowingly subjecting a detainee to inhumane conditions of confinement or abusive practices. The jail's clinical pharmacist testified that administration of medication was so inadequate that his surveys showed half or more of inmates did not receive their prescriptions. The Fifth Circuit affirmed.

***Bustos v. Martini Club, Inc.*, 599 F.3d 458 (5th Cir. 2010)**

Bustos alleged that he was assaulted by several off-duty San Antonio police officers in a late-night altercation at the Martini Club bar. According to the complaint, Bustos claimed he was injured when he fell on a concrete floor after being pushed from behind by the off-duty officers. Bustos asserted a claim under § 1983 against the officers, the City, City Manager, and the Chief of Police for violation of his substantive due process rights. He also brought state law claims against the Officers.

The district court granted the officers' motion to dismiss the state law assault claims based on §101.106 of the Texas Torts Claims Act (TTCA), which forces plaintiffs to choose between suing individual employees or suing their governmental employer. Although *Garcia,* a previous decision of the Fifth Circuit, had exempted claims of intentional injury (such as Bustos' claim) from the TTCA, a later Texas Supreme Court decision, *Meadours*, held that the TTCA did apply to such claims. Following the state court interpretation of its own state's law, the Fifth Circuit applied the TTCA and dismissed Bustos' state law tort claims against the officers.

Separately, the Fifth Circuit also affirmed the dismissal of Bustos' §1983 claims against the police officers for violation of constitutional rights. The court noted that because the police officers were off-duty and did not rely on their official authority or on state power in connection with the alleged assault of Bustos, the officers did not act "under color of state law" as required for liability under §1983. Whether an officer is acting under the "color of state law" does not depend on his on- or off-duty status at the time of the alleged

violation. Rather, the court must consider: (1) whether the officer "misuse[d] or abuse[d] his official power," and (2) if "there is a nexus between the victim, the improper conduct, and [the officer's] performance of official duties." *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991). If an officer pursues personal objectives without using his official power as a means to achieve his private aim, he has not acted under the color of state law. *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002). In this case, the alleged assault was simply an altercation between private individuals at a public club.

***Wilkins v. Gaddy*, 130 S.Ct. 1175 (2010)**

Wilkins, a North Carolina state prisoner, brought a *pro se* § 1983 excessive force claim against a corrections officer, claiming he was "maliciously and sadistically" assaulted without provocation, in violation of the Eighth Amendment prohibition on cruel and unusual punishment. Reiterating its 1992 holding in *Hudson v. McMillan*, 503 U.S. 1, 4, the Court held that "the use of excessive physical force against a prisoner may constitute cruel and unusual punishment [even] when the inmate does not suffer serious injury."

Wilkins claimed that as a result of an assault, he had suffered a bruised heel, lower back pain, increased blood pressure, migraine headaches and various psychological difficulties. Without waiting for Gaddy's response to the complaint, the district court dismissed the action for failure to state a claim, because Wilkins had not alleged that he had suffered more than *de minimis* injury as a result of the alleged attack. The Court of Appeals for the Fourth Circuit affirmed summarily.

The Supreme Court, in a unanimous per curiam opinion, reversed the Court of Appeals' judgment, holding that the lower courts had "strayed from the clear holding" of *Hudson.* That case, the Court reiterated, rejected the proposition that "significant injury" is a threshold requirement of a claim of excessive force in violation of the "cruel and unusual punishment" clause of the Eighth Amendment. Rather, the relevant question is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously or sadistically to cause harm." The extent of the injury suffered by the prisoner may be relevant in determining whether the use of force could reasonably have been thought to be necessary under the circumstances, and it may be evidence of the amount of force that was applied. However, "an inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury." That is, a claim of excessive force cannot be rejected solely because of the court's perception of the severity of the claimant's injuries.

Although the Court's decision to reverse the judgment in this case was unanimous, Justice Thomas (joined by Scalia) concurred only in the judgment, writing separately to reiterate his belief that *Hudson* had been wrongly decided.

***Lockett v. New Orleans*, 607 F.3d 992 (5th Cir. 2010)**

In July of 2008, Lockett was driving in his vehicle to a class at the Southern University of New Orleans (SUNO). At the same time, two military police officers, Jonathan Bieber and Brandt Arceneaux, were conducting patrol in the area as members of the National Guard Task Force assisting the New Orleans Police Department (NOPD) with law enforcement duties pursuant to an order issued by Governor Jindal after Hurricane Katrina. Bieber and Arceneaux observed Lockett's vehicle and believed it to be traveling over the speed limit. Based on this observation, the defendants effectuated a traffic stop of Lockett.

Lockett provided the documents requested by the officers; however, the insurance card in his possession had expired and he did not have proof of current insurance. Using his cell phone, Lockett called his insurance company in an unsuccessful attempt to prove to Bieber that he currently had the required insurance. Lockett also called the emergency number 911, reported that the military police officers had made racial

slurs, and requested that NOPD officers be dispatched to the scene. He also called his wife Melanie and requested her assistance at the scene. At about this time, Arceneaux frisked Lockett.

In October of 2008, Shawn and Melanie Lockett filed a complaint asserting claims arising out of Lockett's arrest. The complaint alleged claims under as well as numerous supplemental state law claims including assault and battery, false arrest, false imprisonment, malicious abuse of power, intentional infliction of emotional distress.

The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court set forth a two-step inquiry for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201. If the official's conduct violated a clearly established constitutional right, then qualified immunity is not applicable. Additionally, in the recent *Pearson v. Callahan* decision, the Supreme Court had explained that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." 129 S.Ct. 808, 818 (2009).

Lockett concedes that "[a]t the moment of the traffic stop, [the officers] arguably had probable cause to stop [him] for careless driving." Nonetheless, he contends that because the officers have admitted that they did not believe that careless driving was an "arrestable offense," there was no probable cause to arrest him. Lockett relies on the following language in *Resendiz v. Miller*: "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." 203 F.3d 902, 903 (5th Cir. 2000). Lockett misconstrues this precedent. That quoted language is referring to facts within the officer's knowledge-not whether the officer was aware of the legal consequences of the facts.

In his brief, Lockett does not challenge the probable cause the officers had to make the traffic stop based on his speeding. Instead, Lockett asserts that "probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the traffic stop is insufficient for the arrest." Lockett is mistaken. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Because the defendants had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established constitutional right.

In sum, the district court properly found that the defendants were entitled to qualified immunity with respect to the claim of false arrest.

Lockett next contends that he has raised a fact issue with respect to his claim of excessive use of force, and thus, the district court erred in finding that the defendants were entitled to qualified immunity. To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001). Further, the "injury must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." *Id.*

Lockett asserts that he sustained an injury to his wrists when the defendants affixed the handcuffs too tightly, causing him pain. Lockett has admitted that he did not complain to the defendants about the pain while he was handcuffed, and the jail's medical intake screening form does not indicate that Lockett complained of pain. However, after being released from the jail, Lockett and his wife met with Major Douget of the Louisiana National Guard, and he complained that the handcuffs had hurt his wrist. Also, several days later, Lockett visited a physician, complaining of pain in his wrists. However, at his deposition, Lockett testified he was not currently under his physician's care for the wrist injury.

Lockett's claim boils down to an allegation that the handcuffs were too tight. Such a claim, without more, does not constitute excessive force: "This court finds that handcuffing too tightly, without more, does not amount to excessive force." *Glenn,* 242 F.3d at 314; accord *Freeman v. Gore,* 483 F.3d 404, 417 (5th Cir. 2007) (rejecting as *de minimis* plaintiff's claim "that the deputies twisted her arms behind her back while handcuffing her, 'jerked her all over the carport,' and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms").

Lockett also contends that the defendants' multiple searches of his person constitute excessive use of force. Lockett failed to allege an injury resulting from the pat downs. Further, Lockett's deposition testimony completely undermines his claim that the searches constituted excessive use of force. When Lockett was asked "[d]o you think there was anything inappropriate in the way [Bieber] searched you?," he responded: "No. It seemed like a standard search to me."

Lockett has failed to make a claim of excessive use of force with respect to the pat downs. Thus, the defendants were properly accorded qualified immunity with respect to the claim of excessive use of force.

Lockett's final §1983 claim is that the district court erred in granting the defendants qualified immunity because he raised a genuine issue of fact with respect to whether the defendants' conduct was objectively reasonable under the Fourth Amendment. He argues that the defendants' detention of him for approximately an hour and their multiple searches of his person were objectively unreasonable.

Here, the defendants had probable cause to stop Lockett based on their belief that he was speeding. As Lockett concedes, Bieber initially misunderstood Lockett to be stating that he was affiliated with the FBI. Lockett testified that Bieber's statement that Lockett "need[ed] to go to SUNO" disturbed him and that he asked Bieber "why [Bieber] would say such a thing?" Lockett concedes that he could not provide a current proof of insurance card and made a phone call to his insurance company in an attempt to obtain the required proof. Lockett admits that he called "911" and informed the operator that the military police were "making racial slurs" and requested NOPD officers "because the situation looks like it's getting out of hand." Lockett then called his wife and asked her to meet him at the scene. As requested, NOPD officers and Lockett's wife arrived on the scene. In view of the defendants' initial misunderstanding regarding Lockett's FBI affiliation and Lockett's multiple phone calls requesting assistance of his attorney-wife and the presence of law enforcement officers from the NOPD in addition to the Louisiana National Guard at the scene, this was an unusual traffic stop. "The reasonableness of a Fourth Amendment search depends on the circumstances under which the search was conducted." *United States v. Garcia-Garcia,* 319 F.3d 726, 731 (5th Cir. 2003).

The Supreme Court has held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson,* 414 U.S. 218, 235 (1973). We note that, like the instant case, *Robinson* involved an arrest based upon probable cause that a traffic violation had occurred. The Court made no attempt to set forth the state of the law in the Fifth Circuit regarding

the limits on searching an arrestee's person during a traffic stop based on probable cause. The Fifth Circuit said it was not clearly established that the defendants' searches of Lockett's person were objectively unreasonable under the facts surrounding this arrest and affirmed the district court's grant of qualified immunity to the defendants as to this claim.

***Saenz v. Harlingen Medical Center, L.P.*, 613 F.3d 576 (5th Cir. 2010)**

Saenz was hired in 2003 and was diagnosed over two years later with partial complex epileptic seizures, which cause her to lose consciousness and become unable to perform her duties. Saenz requested intermittent FMLA leave for her seizure condition, which was granted with the condition that she contact her employer's TPA within two days after taking each leave.

In the first five months of the grant of intermittent leave, Saenz sought and obtained approval for nine instances of leave. Each time she was reminded of her notice obligations. After her tenth instance of leave (for which she also obtained approval), Saenz' condition worsened and she again missed work one week thereafter. Saenz' mother advised her supervisor, who recommended that she bring Saenz to the emergency room at the medical center. After evaluation, Saenz was transferred to the McAllen Behavioral Center for evaluation and treatment, and she was discharged three days later.

Saenz' mother advised her supervisor that Saenz needed to be taken off the work schedule indefinitely, and the supervisor reminded her of the obligation to contact the TPA. In the following weeks, Saenz continued to miss work and was eventually diagnosed with bipolar disorder and depression. She called the TPA regarding her absences and requested approval for intermittent FMLA leave for her newly diagnosed condition, but she did not stay in communication with her supervisor. A week later, Saenz was terminated for her non-FMLA approved absences (by virtue of failing to timely communicate with the TPA regarding her absences), and Saenz did not follow up with the TPA's request for additional documents.

The Fifth Circuit held that Saenz was not required to comply with her employer's heightened FMLA procedures in this case. Despite the fact that she knew from her prior absences about the procedures, the court found that Saenz and her mother had conveyed enough information to the supervisor to know that Saenz' condition qualified for FMLA leave. Further, the court could not conclude on the record presented that Saenz affirmatively refused to comply with her employer's heightened procedures. Finally, the court determined that Saenz provided satisfactory notice to her employer, noting that the FMLA provides a low threshold of notice "as soon as practicable under the facts and circumstances of the particular case."

V. WARRANT ISSUES

***United States v. Menchaca-Castruita*, 587 F.3d 283 (5th Cir. 2009)**

Defendant appealed from a conviction of one count of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana and one count of possession with intent to distribute the same. Defendant challenged the denial of his motion to suppress evidence recovered from his residence during a warrantless search.

Defendant's landlord forced herself inside his apartment to check the condition of the apartment because Defendant had failed to pay rent since signing the lease, and she had not heard from him in over two months. The landlord noticed several large bundles of marijuana hidden under blankets, and immediately contacted police. Defendant fled in his truck, leaving his front door partially open. When the officer arrived on scene, he could smell the odor of marijuana coming from inside the residence but did not have a visual on the drugs. Without first obtaining a warrant, the officer announced himself, and entered the premises, finding over 700 pounds of marijuana.

The officer later arrested Defendant when he returned to the premises.

Defendant filed a motion to suppress all items found in or seized from his residence on grounds that the officers' warrantless search was unconstitutional under the Fourth Amendment. The district court held that exigent circumstances had justified the officers' warrantless search of Defendant's residence.

The Fifth Circuit held that no exigent circumstances existed to justify the officers' failure to obtain a search warrant, vacated Defendant's conviction and remanded for further proceedings. The mere presence of illegal drugs and weapons does not justify a protective sweep. A finding of exigent circumstances must be based on more than a mere possibility; it must be based on an officer's reasonable belief that the delay necessary to obtain a warrant will facilitate the destruction or removal of evidence or put officers or bystanders in danger.

***Wernecke v. Garcia*, 591 F.3d 386 (5th Cir. 2009)**

An investigator at TDFPS, Garcia sought and was granted a petition to take emergency temporary custody of the daughter of the Werneckes. Garcia, along with another TDFPS worker and two constables, went to the Werneckes' home to execute the temporary custody order but was told by the father that the daughter was not at home. The father eventually consented to the constables entering his home, and the constables invited Garcia into the home without the father's permission. Garcia did not find the daughter in the home, but she did find what she considered "deplorable" conditions. Concerned about the safety of the boys in the home, Garcia contacted her supervisor, Trainer; Trainer consulted with the TDFPS program director who determined that the boys needed to be placed in foster care.

The Werneckes filed suit against various parties, including Garcia and her supervisor, Trainer, under 42 U.S.C. §1983, alleging violations of Fourth and Fourteenth Amendment rights. Garcia and Trainer moved for summary judgment based on qualified immunity, which the district court denied, holding that there were genuine issues of fact regarding the propriety of Garcia's and Trainer's actions.

The Fifth Circuit held that while Garcia indisputably engaged in a search subject to the Fourth Amendment when she entered the Werneckes' home, she did not need a warrant to do so; the properly-issued juvenile court order sufficed to satisfy the warrant requirement. The Court found that in light of TDFPS's duty of care under Texas law, and the real risk that a parent involved in such a situation will flee with the child, it is reasonable and permissible for state workers in possession of a facially valid temporary custody to enter a child's home to look for that child. The Fifth Circuit thus found that summary judgment should have been granted in favor of Garcia and Trainer on the qualified immunity question with regard to the search of the house.

On the question of the seizure of the boys, the Fifth Circuit reversed the District Court and held that the supervisor, Trainer, was entitled to qualified immunity as a matter of law because she was neither the decision-maker nor actively involved in the decision to remove the boys from the home; she did not act with "deliberate indifference" toward the boys' constitutional rights. As to Garcia, however, the Fifth Circuit affirmed the District Court, finding that the circumstances at the Werneckes' home did not create an imminent danger that justified the immediate removal of the boys from the home. Finding further that the law requiring the existence of an imminent danger before a child may be removed from a home without a warrant or court order was "clearly established" at the time of this case, the Fifth Circuit concluded that Garcia was not entitled to qualified immunity on the Werneckes' claim that she unconstitutionally seized the boys, and thus affirmed the District Court's denial of summary judgment on that point.

***Hoog-Watson v. Guadalupe County*, 591 F.3d 431 (5th Cir. 2009)**

Several county officials developed a suspicion that the pet owner could not provide proper care for her animals, and upon hearing that the pet owner had moved to a mental health facility—a rumor that later turned out to be false—the officials suspected that the animals would soon suffer serious injury. Four officials went to the pet owner's home when she was not present, conducted a warrantless search of the premises, perceived an eminent danger to the pet owner's animals' health, and seized 47 dogs and cats. A proceeding was brought against the pet owner, but an agreement was reached by which the charges were dropped and the pet owner agreed to pay some of the county's costs and submit to periodic inspections. The pet owner filed suit, asserting that the search and seizure violated 42 U.S.C. § 1983. The district court granted summary judgment to the defendants on the basis of their collateral estoppel and prosecutorial immunity arguments.

According to defendants, *Heck* applied because the post-seizure proceeding was criminal in nature, while the pet owner said that it was civil. The fact that the proceeding came before a Justice of the Peace and the fact that it followed the civil statute's procedures was evidence of the proceeding's civil nature. An animal control officer swore that she decided not to file any charges against the pet owner. This was enough evidence to raise a genuine question of fact. The Fifth Circuit reversed and remanded.

***United States v. Jackson*, 596 F.3d 236 (5th Cir. 2010)**

Jackson and Midkiff were convicted of charges stemming from a conspiracy to manufacture and distribute methamphetamine. At the time the officers went to Jackson's residence, they had both a state search warrant and a federal arrest warrant. When the officers entered Jackson's home, they observed him place something under the couch on which he was sitting. They quickly arrested Jackson and then conducted a sweep of the home to ensure no one else was present. They found a bag of marijuana under the couch, as well as guns and tablets used to produce methamphetamine in a locked safe, which Jackson provided the combination to. Outside the house the officers found chemicals and equipment used in the manufacturing of methamphetamine. Before trial, Jackson filed a motion to suppress the evidence discovered during the search of the home, which the district court denied.

The Fifth Circuit affirmed the district court's denial of the first defendant's motion to suppress the evidence on the basis of the inevitable discovery doctrine. The inevitable discovery doctrine rule applies if the Government demonstrates by a preponderance of the evidence that (1) there is a reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct and (2) the Government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. The federal arrest warrant gave the officers the authority to enter the first defendant's residence to arrest him, and the officers had the authority to conduct a search of the area immediately surrounding the place where the arrest was made. Once the officers found the marijuana that the first defendant had hidden under the couch when the officers came in, probable cause existed to obtain a search warrant. The equipment and other materials found outside the house could be seized pursuant to the plain view doctrine without a search warrant because these items were located in the area surrounding the residence and the officers had authority to enter this area as they executed the arrest warrant.

Because the police would have inevitably discovered the evidence had the state search warrant never issued, it need not be suppressed. The exclusionary rule is meant to put the police "in the same, not a worse position than they would have been in if no police error or misconduct had occurred. *Nix v. Williams*, 467 U.S. 431, 443 (1984).

***Michigan v. Fisher*, 130 S.Ct. 546 (2009)**

In this 7-2 per curiam opinion, the Supreme Court upheld an officer's warrantless entry into a defendant's residence under the "emergency aid" exception to the Fourth Amendment's warrant requirement.

Fisher was involved in a disturbance at his residence where police officers discovered a chaotic scene: a pickup truck with its front smashed, damaged fenceposts on the property, broken house windows with glass on the ground outside, and blood on the pickup and on a door to the house. Through the window, the officers could see Fisher screaming and throwing things; the doors were either locked or blocked by furniture. Fisher refused to answer the door or answer the officers' questions regarding medical treatment. One officer pushed the front door partway open, whereupon Fisher pointed a long gun at him, and the officer withdrew. Fisher was subsequently arrested for assault and felony possession of a firearm. The trial court suppressed the officer's testimony that Fisher pointed a gun at him on the basis that the entry was conducted without a warrant.

The Supreme Court based its determination on "reasonablness." Acknowledging that warrantless searches are presumptively unreasonable, that presumption can be overcome by the compelling needs of law enforcement—such as the need to assist persons who are seriously injured or threatened with such injury—to as to make the warrantless search objectively reasonable. This is the *Brigham City* emergency aid exception which requires not an analysis of what an officer actually believed, but rather only an objectively reasonable basis for believing that a person within the residence is in need of immediate aid. 547 U.S. 398, 403-06 (2006).

In dissent, Justice Stevens (joined by Justice Sotomayor), after closely analyzing the facts presented, criticized the majority for "micromanaging the day-to-day business of state tribunals making fact-intensive decisions….We ought not usurp the role of the factfinder when faced with a close question of the reasonableness of an officer's actions."

***Alvarez v. Smith*, 130 S.Ct. 576 (2009)**

In December 2009, the Supreme Court held that the question presented by this case is now moot, which perpetuates the uncertainty as to how long local law enforcement may hold seized property without providing administrative review.

Illinois property owners brought a § 1983 claim against the City of Chicago and the State's Attorney challenging the statute authorizing the warrantless seizure of their movable personal property (including cash and cars) by police officers when the officers had "probable cause to believe" the property was used to facilitate a drug crime. The statute required the relevant law enforcement agency to notify the State's Attorney within 52 days of the seizure; the State's Attorney then had 45 days to notify the property owner of an impending forfeiture; and if the owner contested forfeiture, the State's Attorney had another 45 days to begin judicial forfeiture proceedings. During these times, the State could keep possession of the cars or cash.

In a unanimous opinion prepared by Justice Breyer, the Court explained that the case no longer presented an Article III "case or controversy" because each of the underlying property disputes had been resolved, through either the return of the property or the forfeiture of claims for recovery. Though the parties continue to dispute their legal claims, the Court concluded that it would be inappropriate to resolve the dispute because it "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." The Court acknowledged that the settlement in this case did not resolve the due process questions before the Court but rendered them moot by "the vagaries of circumstance"—here unrelated state court proceedings that addressed only the status of the property itself. The Court concluded that such unrelated and uncoordinated dispositions do not constitute the sort of "voluntary forfeit[ure]" that "tilted against vacatur." It thus vacated the

judgment of the Seventh Circuit and remanded the case with instructions to dismiss.

Justice Stevens, though agreeing that the case was moot, dissented from the Court's decision to vacate the judgment below. Rather than vacate, Justice Stevens would have dismissed the writ of certiorari as improvidently granted and thus preserve the decision below.

VI. MISCELLANEOUS CASES

Hertz Corporation v. Friend, 130 S. Ct. 1181 (2010)

California citizens sued Hertz in a California state court. Hertz tried to remove the case to federal court based on diversity jurisdiction. Respondents argued that Hertz was a California citizen, not a New Jersey citizen. The District Court held that California was Hertz's principal place of business because a plurality of its relevant business activity takes place there. After the Ninth Circuit affirmed, the Supreme Court granted cert in order to give clarity to the jurisdictional question: Where is a corporation's principal place of business?

In reversing the Ninth Circuit, the Supreme Court unequivocally stated that the focus for determining federal diversity jurisdiction with respect to a corporation is the "nerve center." That is, a corporation's principal place of business is where its "high level officers direct, control, and coordinate the corporation's activities." In explaining its decision, Justice Breyer stated that although the nerve center is normally where corporate headquarters is located, the true test is where the "actual center of direction, control and coordination" lies. Thus, empty headquarter buildings will not suffice if the opposing party can show that decisions are made elsewhere.

Carr v. United States, 130 S.Ct. 2229 (2010)

The Sex Offender Registration and Notification Act ("SORNA") includes one provision, 18 U.S.C. § 2250, subjecting sex offenders to up to 10 years in prison if three criteria are met: (1) registration is required under SORNA, (2) the offender travels in interstate or foreign commerce, and (3) knowingly fails to register or update a registration. In a 6-3 decision, the Supreme Court held that the second element applies only to travel that occurs after the 2006 enactment of SORNA.

All of the parties agreed that the three elements must occur in sequence: conviction, travel, and failure to register. Carr challenged the government's position that § 2250 is violated as long as the failure to register post-dates SORNA's enactment. In rejecting the government's suggestion, the Supreme Court emphasized that the first element can only be satisfied when a person is required to register under SORNA—that is, after conviction. As there is no requirement to register under SORNA before it was passed, pre-enactment travel cannot satisfy the second element of the provision.

Justice Scalia concurred in the judgment but disavowed the portion of the opinion discussing the legislative history of the statute. Justice Alito wrote a dissent—joined by Justices Ginsburg and Thomas—contending that there was no reason for Congress to treat two sex offenders who failed to register differently based on whether they moved in interstate commerce before or after the enactment of SORNA.

Hui v. Castaneda, 130 S.Ct. 1845 (2010)

While he was detained by U.S. Immigration and Customs Enforcement, Castaneda complained to Public Health Service employees about a penile lesion. Several physicians recommended a biopsy; however, PHS repeatedly denied the requests, even as Castaneda's condition worsened, deeming a biopsy "elective." After his release, a biopsy confirmed the existence of penile cancer which later metastasized. Castaneda died a year after his release, after undergoing an amputation and chemotherapy.

Castaneda's estate brought *Bivens* and Federal Tort Claims Act ("FTCA") claims

against his PHS physician and the supervising PHS official, alleging that his rights were violated under the Fifth, Eighth and Fourteenth Amendments by their deliberate indifference to his serious medical needs. PHS filed a motion to dismiss, arguing that 42 USC § 233(a) provided its employees with absolute immunity from Bivens actions by making a FTCA suit against the United States Castaneda's exclusive remedy.

The Supreme Court, in a unanimous decision authored by Justice Sotomayor, found that Section 233(a) does, in fact, provide PHS officers with immunity from Bivens actions for constitutional harms committed in the line of duty, thus making the FTCA the sole remedy for Castaneda and other similarly situated. It should be noted that by contrast to Bivens actions, the FTCA does not permit a jury trial and strictly caps damages.

***Montoya v. FedEx Ground Package System, Inc.*, 614 F.3d 145 (5th Cir. 2010)**

Montoya was an independent contractor providing pick-up and delivery services for FedEx Ground from 1994 to 2006. Under his contract, he provided his own vehicles and employees, and served an area designated by FedEx Ground. He was compensated on the basis on the number of pick-ups and deliveries he made in his primary service area.

In 2002, Montoya was advised that part of his primary service area was being reassigned. Montoya complained and won reinstatement of part of his area. In 2004, Montoya filed suit in arising out of the reassignment. During the course of discovery, certain FedEx Ground managers learned of the litigation and allegedly developed a hostile animus toward Montoya, including withholding approval of employees, advising other contractors from helping Montoya, reducing and reassigning routes to other contractors, and similar actions to make Montoya's performance appear poor. One manager advised Montoya that he would receive no new routes during the pendency of the litigation. Eventually, Montoya's contract with FedEx Ground was terminated.

Montoya filed suit based on 42 U.S.C. § 1985(2), claiming that the actions of FedEx Ground and various managers constituted a conspiracy to intimidate a party to a federal lawsuit. Montoya alleged that the termination of the contract, as well as the other actions, were based in whole or in part on Montoya's maintenance of the litigation. Montoya eventually dismissed the individual managers from the suit but preserved his claims against FedEx Ground. The district court dismissed the suit on statute of limitations grounds. The Fifth Circuit did not reach the limitations issue, but in a *de novo* review found that the actions of FedEx and its managers did not constitute injury to Montoya in order to deter him from attending or testifying in federal court; as FedEx had removed the original case to federal court and obtained Montoya's deposition testimony, there was not (as required by the statute) any deterrence of Montoya's attendance or testimony in the underlying litigation. That is, the Fifth Circuit upheld the dismissal of the case, concluding that Montoya had not demonstrated that the alleged conspiracy had the unlawful effect proscribed by § 1985(2).

***Stop the Beach Renourishment, Inc. v. Florida Dept. of Environ. Protection*, 130 S.Ct. 2592 (2010)**

In an 8-0 vote, the Supreme Court upheld a Florida Supreme Court decision that the state's ownership of newly created land at the shoreline was not an unconstitutional taking. Florida law decrees that beachfront property seaward of the median high-water line belongs to the state, and the owners of beachfront property own the land between that line and their homes. Two cities looked to add new sand along the shoreline of their beaches, extending the beaches seaward by 75 feet. The newly created land (and any subsequently added by gradual natural change) would belong to the state and the owners of adjacent property would be deprived of their exclusive access to the water.

Property owners claimed that the actions violated the Takings Cause of the Constitution, an argument rejected by the Supreme Court. Under Florida law, the property owners had no right to the filled-in land, as the state had the right to fill its own seabed. Any previously submerged land exposed by a sudden event belongs to the state, even if the state causes the exposure, and that event disrupts the contact with the water. With no rights to future accretions of land, and no rights to contact with the water superior to the state's right to fill its own seabed, there was no taking.

***A.A. by and through Betenbaugh v. Needville ISD*, 611 F.3d 248 (5th Cir. 2010)**

Needville ISD's grooming policy provides that boys' hair "shall not cover any part of the ear or touch the top of the standard collar in the back." The stated purposes for the policy are hygiene, discipline, safety, and "to assert authority." In accordance with his Native American (Lipan Apache) religious beliefs, A.A. has never cut his hair, which is sometimes braided and sometimes not. In preparation for their move to Needville, A.A.'s parents contacted the District about his hair and the grooming policy. In response, the District requested proof of the family's religious beliefs. The District denied A.A.'s exemption request, and the family appealed. The family rejected a compromise offer by the District to allow A.A. to wear his hair in a bun on the top of his head, and the District ultimately granted an exemption which would require A.A. to tuck a single tightly woven braid in the collar of his shirt.

When A.A. enrolled in school, he was placed in in-school suspension and not permitted to socialize with other children. The family filed suit and sought injunctive relief, claiming that the District's policy violated A.A.'s rights to free exercise of religion under the First and Fourteenth Amendments and similar rights under the Texas Religious Freedom Restoration Act ("TRFRA"), A.A.'s rights to free expression under the First and Fourteenth Amendments, and the family's due process right to raise A.A. according to their Native American heritage and religion. The district court found for the family and issued a permanent injunction against the District, preventing application of the grooming policy to A.A.

Avoiding the Constitutional questions presented, the Fifth Circuit addressed the case on TRFRA grounds. The TRFRA prevents any Texas government agency from substantially burdening a person's free exercise of religion unless it can demonstrate that the application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The Fifth Circuit engaged in a lengthy review of RLUIPA and its predecessor, RFRA, as well as Texas cases interpreting those statutes and the TRFRA. After a very fact-specific analysis of the family's claims and beliefs, and a strict scrutiny of the grooming policy, the Fifth Circuit found there was no compelling interest in the context of this case to permit the District's enforcement of this regulation: "A.A.'s long hair is conceded to be an exercise, not of rebellion, but of adherence to religious belief....it is an acknowledgment of piety to religion and fealty to an authority superior to individual whim." As the District could not sufficiently justify the stated reasons for its grooming policy, and as A.A. and his family had demonstrated a sincere religious belief in wearing his hair uncut and in plain view which would be burdened by the policy, the permanent injunction was affirmed.

***United States v. Long*, 597 F.3d 720 (5th Cir. 2010)**

Defendant was convicted on four counts of willfully failing to file income tax returns. In his initial appearance, defendant purported to fire anyone that thought they represented him. At the next hearing, he again fired the public defender. Multiple times he stated he was the attorney in fact that he wanted to replace the public defender. Thus, the magistrate believed a *Faretta* hearing was warranted and made multiple attempts to have a *Faretta* hearing, but defendant thwarted each attempt until the day of trial when he expressly denied that he wanted to represent himself. A *Faretta* hearing is warranted if the right to counsel is to be waived,

and it is used to caution the defendant about the dangers of self-representation and establishing, on the record, that the defendant makes a knowing and voluntary choice. Given his uncooperative and non-responsive nature, defendant's prior comments were unclear and equivocal. Right before sentencing, he once again wished to fire his attorney. His conduct suggested disruptive and obstructionist behavior. Each time a *Faretta* hearing was attempted, defendant was extremely uncooperative, which tended to suggest his behavior of itself could have resulted in the waiver of his right to self-representation.

Faretta recognized that the judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. The Fifth Circuit found that Long's conduct suggested disruptive and obstructionist behavior. A defendant can waive his *Faretta* rights, either by expressly requesting standby counsel's participation on a matter or by acquiescing in certain types of participation by counsel, even if the defendant insists that he is not waiving his *Faretta* rights. The Fifth Circuit held that Long was not denied his constitutional right to represent himself because he did not timely, clearly, and unequivocally assert it. Any attempts to assert that right were waived by his own obstructionist behavior combined with his negative answer to the district court's inquiry whether he desired to represent himself.

***Peacock v. United States*, 597 F.3d 654 (5th Cir. 2010)**

A cardiologist at the Veterans Administration (VA) medical center performed an angioplasty procedure on Peacock, which allegedly caused him to have a heart attack and severe congestive heart failure. Peacock filed suit against the United States under the FTCA alleging that Dr. Warner breached the standard of care and caused his injuries. The Government initially conceded the cardiologist was a government employee. Less than one week before trial, it asserted that he was an independent contractor. The Government filed a motion to dismiss the claims against Dr. Warner for lack of subject matter jurisdiction, which the district court denied with prejudice and ordered sixty days of discovery regarding the issue of Dr. Warner's status. Peacock then filed a motion for sanctions, arguing that due to his reliance on the Government's misrepresentations regarding Dr. Warner's employment status, he lost significant time and money in pursuing his claim. After the sixty days of discovery, the district court granted both the Government's motion to dismiss the claims against Dr. Warner for lack of subject matter jurisdiction as well as Peacock's motion for sanctions.

Under the FTCA, Congress has waived sovereign immunity and has granted consent for the Government to be sued for acts committed by any employee of the Government while acting within the scope of his office or employment, which does not extend to acts of independent contractors working for the Government. *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998). The power of the federal government to control the detailed physical performance of the individual is the key in determining whether an individual is an employee of the government or an independent contractor. The *Linkous* factors, drawn from the Restatement (Second) of Agency § 220, are prominent in the Fifth Circuit's analysis. These factors include extent of control which the government exercises over the agreement, whether or not the one employed is engaged in a distinct occupation or business, the kind of occupation, the skill required in the particular occupation, who supplies the instrument and the place of work, length of time of employment, method of payment, whether or not the work is a part of the regular business of the employer, whether or not the parties believe they are creating the relation of master and servant, and whether the principal is or is not in business. Applying these factors, the Fifth Circuit held that the government's power to control the cardiologist's performance was not sufficient to create an employment relationship. The patient's claim that the government should have been judicially estopped from denying the cardiologist was an employee was properly rejected because he did not allege any affirmative misconduct by the government.

***Hollingsworth v. Perry* (on application for stay), 130 S.Ct. 705 (2010)**

The Supreme Court granted a stay of the order issued by the United States District Court for the Northern District of California for a broadcast of the California lawsuit challenging Proposition 8, which amended the state constitution to define a valid marriage as only between a man and woman. The District Court issued this order following an amendment to a local rule of the District Court that had forbidden broadcasting of trials outside of the courthouse. The court had planned to stream the trial live in federal courts in several other cities and to post it on YouTube as part of a pilot program to test broadcasting of court proceedings. Chief Judge Alex Kozinski of the Court of Appeals for the Ninth Circuit issued an order allowing for real-time broadcasting to five federal courthouses, but did not address broadcasting the trial online due to technical difficulties encountered by the District Court staff. In a per curiam decision, the Supreme Court held that the revision of the local district rule did not follow procedures designated by federal law, found that applicants would suffer irreparable harm if the live broadcast occurred, and granted a stay of the order.

In determining the appropriateness of issuing a stay, the Supreme Court analyzed the process by which the District Court amended the rule, the potential harm to the parties, and the Court's interest in overseeing the judicial system. The Supreme Court held that the five business days the District Court allowed for the public notice and comment period for its revision of the rule was likely insufficient, and found that the modification of the rule did not qualify for the "immediate need" exception to the usual notice and comment requirement. The Supreme Court held that irreparable harm would likely result from denial of a stay, noting that witness testimony may be chilled if broadcast, and acknowledging that some of the applicant's witnesses will not testify if the trial is broadcast due to past incidents of harassment. The Supreme Court also emphasized its significant interest in supervising the administration of the judicial system, and criticized the District Court for its attempt to change the rules "at the eleventh hour" to treat "this high-profile trial" differently contrary to federal statutes and policy. The Supreme Court emphasized repeatedly that it was not making a judgment on whether trials in general should be broadcasted. This decision is limited to the particular circumstances of this high-profile trial, and the more general question of trial broadcasting remains to be addressed.

Justice Breyer dissented and was joined by Justices Stevens, Ginsburg, and Sotomayor. Justice Breyer would have held that the District Court provided an appropriate notice and comment period for the rule revision because the trial judge discussed the possibility of live broadcast as early as September 25, 2009, both sides made written submissions to the court as to their views on other transmissions, and the court had received 138,574 comments by January 8, 2010, all but 32 of which favored the broadcast. Justice Breyer said that the Supreme Court would normally not grant certiorari to this kind of a legal question, as questions regarding local judicial administration have traditionally been left to Circuit Judicial Councils, and Supreme Court lacks their institutional experience. He noted that he was unable to find a single previous instance of the Supreme Court intervening in procedural aspects of local judicial administration in this manner. The dissent also questioned the applicants' claim that denying a stay would lead to irreparable harm, since none of the witnesses had asked the Supreme Court to stop the broadcast, and many of them are already well-known participants in the debate surrounding Proposition 8. Justice Breyer would have found that the respondents' interest in broadcasting the trial and keeping the public informed outweighed the respondents' concerns that the broadcast would harm the parties.

***Thaler v. Haynes*, 130 S.Ct. 1171 (2010)**

Following his capital murder conviction for murder of a police officer and imposition of a death sentence, Haynes brought a *habeas* challenge to his conviction based on *voir dire*,

which the Supreme Court rejected in a *per curiam* opinion.

Two different judges presided at different stages of *voir dire* in Haynes' murder trial. The first judge presided when the attorneys were questioning the panel members individually, but a second judge took over when peremptory challenges were exercised. The prosecutor struck an African-American juror, which resulted in a *Batson* challenge, to which the prosecutor offered a race-neutral explanation based on the prospective juror's demeanor and body language during individual questioning. Haynes' counsel did not dispute the characterization of the demeanor or body language but asserted that her questionnaire showed she was leaning toward the State's case. The second judge, after hearing the explanation and argument, denied the *Batson* challenge without further explanation. Haynes was convicted and sentenced to death, whereupon he brought two challenges to the proceedings.

Haynes argued that a judge who did not witness the *voir dire* proceedings could not fairly evaluate a *Batson* challenge. *Batson* requires that a judge ruling on an objection to a peremptory challenge "tak[e] into account all possible explanatory factors in the particular case." However, in reversing the Fifth Circuit, the Supreme Court rejected the notion that the same judge was required to observe the jury interviews as well as the prosecutor's explanation of the challenge. "*Batson* plainly did not…hold that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the juror's demeanor."

***Florida v. Powell*, 130 S.Ct. 1195 (2010)**

In this case, the Supreme Court held that Tampa police officers adequately warned a criminal suspect (felon in possession of a handgun) of his *Miranda* rights when they advised him that he had "the right to talk to a lawyer before answering [any] questions" and that he could invoke that right "at any time." The Court, in a 7-2 decision, overturned the decision of the Florida Supreme Court, which had found those warnings to be constitutionally insufficient.

Justice Ginsburg first dismissed Powell's argument that the Court lacked jurisdiction to hear the case because the Florida court's decision rested on adequate and independent state grounds. Rather, the Court concluded, there was no clear statement that the Florida decision was grounded in any state doctrine separate from the federal constitutional precedent of *Miranda v. Arizona*.

As to the merits of the case, the Court emphasized that *Miranda* requires only that law enforcement officers "clearly inform" suspects of their legal rights, including the right to consult with counsel and to have counsel present during interrogations. The Tampa Police Department's warnings satisfied that standard because "[i]n combination, the two warnings reasonably conveyed the right to have an attorney present."

The Court acknowledged that more precise formulations of the warning are possible, and perhaps even preferable in some circumstances. In fact, the Court's opinion specifically lauded the standard FBI warnings as "exemplary" because they explicitly inform suspects of their right to an attorney's presence during questioning. But while such explicit warnings are "admirably informative," the Court ultimately concluded that they are not constitutionally required. Law enforcement officers thus enjoy some latitude to communicate *Miranda* rights to suspects using different language, so long as the essential message of the warnings remains intact.

Justice Stevens filed a dissenting opinion, which Justice Breyer joined in part. Stevens argued that under the adequate and independent state ground doctrine, the Court did not have the power to review the Florida state court's decision. Moreover, in the portion of the opinion joined by Justice Breyer, Justice Stevens concluded that the Tampa warnings were inadequate because they entirely failed to inform Powell of his right to an attorney's presence during interrogation, instead misleadingly

suggesting that he could only consult with a lawyer before questioning began.

***Maryland v. Shatzer*, 130 S.Ct. 1213 (2010)**

In *Shatzer*, the Supreme Court again revisited *Miranda*, addressing the question of whether a detained criminal suspect who has asked to speak with a lawyer can ever be questioned again without a lawyer present. Justice Scalia, writing for the majority, announced a "fourteen day rule" to address the situation posed in this case, which was whether police have to honor a previous request for a lawyer once a suspect has been released from custody and is later rearrested.

Shatzer was incarcerated pursuant to a prior conviction when a police detective tried to question him in 2003 regarding separate allegations. Shatzer invoked *Miranda* and asked for counsel, whereupon he was returned to the general prison population and the interview was terminated. Another detective reopened the investigation in 2006 and interviewed Shatzer, who was still incarcerated; Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court found that *Edwards v. Arizona*, 451 U.S. 477 (1981) did not apply as there was a break in custody prior to the 2006 interrogation, thus refusing to suppress the inculpatory statements. The appellate court reversed, holding that the mere passage of time does not end *Edwards'* protections, and if it did, the release back into the prison population did not constitute such a break.

Justice Scalia reiterated that there is no basis in the Constitution for *Miranda* and *Edwards*, but rather that it is "judicially prescribed prophylaxis." As this protection was created by the Supreme Court, it was incumbent on the Court to clarify when renewed interrogation is lawful. Justice Scalia wrote: "We think it appropriate to specify a period of time [at which time the clock is reset]. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." Accordingly, the passage of more than two years between interviews satisfied the break in custody requirement.

Furthermore, the Court found that "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*," and thus incarceration is distinguished from interrogative custody to which *Miranda* applies. Accordingly, the return of Shatzer to the general prison population constituted the break in custody required by this line of cases, and his inculpatory statements should not be suppressed.

VII. CRIMINAL LAW

***United States v. Pack*, 612 F.3d 341 (5th Cir. 2010)**

Pack moved to suppress evidence of his possession of marijuana and a pistol discovered during a traffic stop and subsequent search of the vehicle in which he was a passenger. The district court denied the motion, finding he lacked standing to challenge the evidence. On appeal, Pack argued he had standing to challenge discovery of the evidence because he has standing to contest the seizure of his person, and further that the motion to suppress should have been granted because the search took place during an unconstitutional detention that violated his Fourth Amendment rights. The Fifth Circuit affirmed the district court.

Pack was a passenger in a speeding vehicle on I-30 in Hopkins County. The veteran DPS trooper making the stop became suspicious on noting Pack's nervous behavior and in uncovering inconsistent and conflicting responses to his inquiries about their travel plans. The driver refused consent to search the vehicle, so the trooper requested a canine search, which alerted the trooper to search the trunk, revealing nearly eighteen pounds of marijuana and a pistol. Pack was indicted in federal court for possession with intent to distribute, as well as possession of the pistol in furtherance of a drug trafficking crime.

On appeal, the government conceded that Pack had standing to challenge the evidence; however, the Fifth Circuit analyzed the standing issue at length as an issue of the merits of Pack's claim. In sum, the Fifth Circuit agreed with the magistrate judge who determined that there was "no factual nexus" between any alleged Fourth Amendment violation consisting of the continued detention of Pack and the discovery of the drugs and firearm, because the discovery was inevitable given the continued detention of the driver. Further, as Fourth Amendment rights are personal in nature, Pack could not assert the driver's Fourth Amendment rights.

As to the merits of the Fourth Amendment claim, the Fifth Circuit reiterated the *Terry v. Ohio* rubric: whether the stop was justified at its inception, and whether the officer's subsequent actions were reasonably related in scope to the circumstances causing him to stop the vehicle in the first place. The subsequent actions are not reasonably related in scope if the officer detains the vehicle's occupants beyond the time needed to investigate the circumstances giving rise to the initial stop, unless the officer develops reasonable suspicion of additional criminal activity in the meantime, which permits further detention for a reasonable time to attempt to dispel this reasonable suspicion. Here, in light of the suspicious facts observed by the officer—including conflicting stories and extreme nervousness—the court found that the short delay caused by the investigation did not render the length of the entire detention unreasonable. Pack's Fourth Amendment rights were not violated by the trooper's decision to detain him beyond the brief time required to investigate the driver's speeding violation, in light of the facts observed.

***Magwood v. Patterson,* 130 S.Ct. 2788 (2010)**

Magwood was sentenced to death for murder in Alabama state court. After exhausting his state appeals, he sought federal *habeas* relief and was granted a new trial as to his sentence. The trial court sentenced him to death a second time. Magwood again sought *habeas* relief, challenging his sentence on the ground that he did not have fair warning at the time of his offense that he conduct would permit a death sentence under Alabama law. 42 U.S.C. § 2244(b) prohibits state prisoners seeking federal *habeas* relief from filing "second or successive" applications for relief, even if the claims in the subsequent applications are meritorious. The Supreme Court held in this case that when a state prisoner obtains federal *habeas* relief and is resentenced, a *habeas* application challenging the new judgment is not "second or successive," even if the petitioner could have challenged the original sentence on the same ground. Justice Thomas, writing for the majority, explained that the holding in this case was limited and declined to address whether Magwood's claim was procedurally defaulted.

***Berghuis v. Thompkins,* 130 S.Ct. 2250 (2010)**

Thompkins was convicted of murder arising out of a drive-by shooting and sentenced to life in prison without parole. He brought this *Miranda* challenge to his arrest and interrogation, on which the Supreme Court sharply divided 5-4.

Thompkins was arrested in Ohio about a year after a drive-by shooting in Michigan that left one man dead. Two Michigan officers traveled to Ohio to interrogate Thompkins while he was awaiting transfer to Michigan. During the three hour interrogation, after being provided with his *Miranda* rights Thompkins remained largely silent for the first two hours and forty-five minutes but acknowledged he understood his rights. At no time did he express that he wanted to remain silent, that he did not want to talk to police, or that he wanted an attorney. Occasionally he gave limited verbal responses or nodded his head in response to questions. Near the end of the interrogation, one detective asked Thompkins whether he believed in God and whether he prayed for forgiveness for the murder. Thompkins responded "Yes" to both questions but refused to make a written confession.

At trial, Thompkins moved to suppress his statements, arguing he had invoked his Fifth Amendment right to remain silent, requiring the police to end the interrogation, and that any inculpatory statements were involuntary. The trial court denied his motion, and Thompkins was found guilty.

Justice Kennedy wrote for the majority, joined by the most conservative elements of the Court: Roberts, Alito, Scalia and Thomas. The opinion reiterated a long established rule that a suspect must make clear without ambiguity when he wants to claim the right to counsel after receiving *Miranda* warnings and extended that to a suspect's intent to claim the right to silence. Here, the Court found it to be decisive that Thompkins never said that he wanted to remain silent of that he did not wish to speak to the police. Further, the majority concluded that the police need only give the *Miranda* warnings and satisfy themselves that the suspect understands his rights; the police are not required at any point to obtain an explicit waiver from the suspect. An interrogation can then go on unless the suspect explicitly and without ambiguity invokes his right to silence.

***United States v. Chavira*, 614 F.3d 127 (5th Cir. 2010)**

Chavira, a US citizen, attempted to enter the US through a Port of Entry located in El Paso. Chavira was accompanied by a teenage girl. Customs officers took the pair into a passport control secondary processing area, handcuffed Chavira to a chair, and questioned her for 30-45 minutes. During the questioning, Chavira stated that the minor was her daughter and a US citizen when the minor was neither. Chavira was convicted under 18 USC 1001(a) for knowingly and willfully making false statements to a Customs and Border Protection officer. Chavira appealed arguing that the district court erred in denying her motion to suppress statements made during secondary processing because she was not Mirandized.

The Fifth Circuit was presented with the issue whether Chavira's Fifth Amendment rights were violated when customs officers questioned her at secondary processing without giving her the warnings required under *Miranda*. *Miranda* warnings must be given before custodial interrogation which generally occurs when a person is taken into custody or otherwise deprived of his freedom in any significant way. The court examines how a reasonable man in the suspect's position would have understood the situation.

When Chavira was moved into secondary processing, the questioning turned from routine immigration questioning to custodial interrogation. The officers testified that, by this point, they already knew the minor was not Chavira's and was not a citizen. One of the officers further testified that they accused Chavira of not being truthful but did not advise of her rights because they wanted her to make a confession to the crime and make incriminating statements. The Fifth Circuit concluded that a reasonable person would have realized that the officers were asking something more than routine immigration questions. Moreover, Chavira was not free to leave: she was handcuffed to a chair in a small, windowless trailer, surrounded by officers. A reasonable person would associate this with an arrest. Thus, the Fifth Circuit found that Chavira should have been given her *Miranda* warnings and reversed Chavira's motion to suppress statements elicited without *Miranda* warnings.

***United States v. Watkins*, 591 F.3d 780 (5th Cir. 2009)**

Defendant Watkins was convicted of conspiracy to distribute and possession with intent to distribute five kilograms or more of cocaine, and possession with intent to distribute five kilograms or more of cocaine. The Fifth Circuit affirmed.

Watkins was a passenger in a tractor-trailer that was pulled over by a Deputy Sheriff on a routine traffic stop. The driver of the tractor-trailer was acting suspicious, so the trailer was searched, and six kilograms of cocaine were found in a duffle bag that was inside of an SUV in trailer. Both the driver and Watkins were Mirandized and placed under

arrest. Special Agent Cummings of U.S. Immigrations and Customs Enforcement conducted two interviews with Watkins, and during the second interview Watkins admitted placing the bag in the back of the SUV and knowing it contained drugs. Watkins also admitted to Agent Cummings that he had been on two previous drug runs involving marijuana.

Given the similarities between the crime of conviction and two previous drug runs, the determination that the evidence of the previous runs was relevant to establish how the conspiracy was structured and operated, and thus intrinsic and not subject to Fed. R. Evid. 404(b), was affirmed. A single conspiracy finding was warranted as the conduct was aimed at a common goal and involved the same techniques and participants. Because all of the runs were part of a single conspiracy, admitting evidence of prior drug runs involving marijuana as intrinsic evidence was not error even though the charged conduct involved cocaine. An agent's testimony about what others at the arrest had said about defendant was not hearsay under Fed. R. Evid. 801 as it was offered to rehabilitate a police officer's assertion that defendant appeared deceptive during interrogation. A rental application was properly admitted under Fed. R. Evid. 613 as it was offered only to show that defendant had made a prior inconsistent statement. Finally, the evidence was sufficient to sustain the conviction, especially since defendant was found with the cocaine and admitted to participating in the conspiracy.

***United States v. Santos*, 589 F.3d 759 (5th Cir. 2009)**

Santos and another prisoner beat and stabbed Cazeau, a fellow inmate, at the federal penitentiary in Pollock, Louisiana. Santos claims that the Government violated his Sixth Amendment right to confront witnesses by failing to call Cazeau as a witness at trial, but admitted statements Cazeau made to a prison nurse about the amount of pain he was in. During trial, the district court overruled Santos's hearsay and 6th Amendment objection to Cazeau's statements.

The Fifth Circuit affirmed, finding that the Government did not violate defendant's Sixth Amendment right to confront witnesses by failing to call the victim as a witness at trial but admitting statements the victim made to a prison nurse about the amount of pain he was in, as the statement was made during an ongoing emergency, for the purpose of seeking a resolution to that emergency, and were not testimonial under *Crawford v. Washington*, 541 U.S. 36, 52. Also, because the victim's statement to the prison nurse regarding his pain was "reasonably pertinent" to treatment for that pain, the district court did not abuse its discretion by finding that the victim's statements fit the hearsay exception. Finally, defendant had not shown that the trial court abused its discretion by instructing the jury that it should draw no inferences from any party's failure to call a witness equally available to all parties.

***El Paso Independent School District v. Richard*, 591 F.3d 417 (5th Cir. 2009)**

R.R., a student in the El Paso Independent School District, requested a state due process hearing to determine his eligibility for special education services under the Individuals with Disabilities Education Act (IDEA). At the required pre-hearing resolution meeting, the District stated that it was willing to provide all of the relief requested by R.R., including the payment of attorney's fees. The District faxed a formal written settlement offer to R.R. with a suggested attorney's fee award and also a request to know the amount of attorney's fees that would be necessary to finalize the settlement. R.R. refused the settlement offer and proceeded to the due process hearing. After the hearing, the hearing officer entered judgment in favor of R.R. Both the District and R.R. filed suit in District Court seeking attorney's fees. The District Court found that R.R. was the prevailing party and was entitled to attorney's fees.

The crucial fact in this case was that the judgment rendered in R.R.'s favor after the formal hearing contained the exact same relief requested by R.R. and offered by the District in its earlier settlement offer. Concerned with

IDEA policy in favor of cooperative and early resolution of issues, and relying on various provisions of the IDEA allowing and requiring reduction in fee awards, the Fifth Circuit eliminated the entire attorney fee award.

As a threshold matter, the IDEA requires that a party be the "prevailing party" to be entitled to attorney's fees. The District argued that R.R. was not the prevailing party in the litigation because the District had offered R.R. all requested relief before the litigation and thus the judgment in the case did not alter the legal relationship between the parties. Though the Fifth Circuit seemed sympathetic to the District's argument that R.R. should not be considered a prevailing party, it ultimately left the resolution of that issue for another day and assumed that R.R. was a prevailing party "simply because he achieved a judicial order of relief."

The Fifth Circuit held that the District Court had abused its discretion in awarding attorney's fees to R.R. for work performed subsequent to the District's written settlement offer. R.R. had argued, and the District Court had held, that the District's settlement offer would not have been enforceable in state or federal court and thus that R.R. was justified in rejecting the offer and proceeding to hearing. However, the Circuit Court held that a settlement agreement reached at the resolution meeting is enforceable in federal court and thus that R.R. did not have a good reason to reject the District's settlement offer.

The Circuit Court also ruled that R.R. was not entitled to attorney's fees for work performed prior to the resolution meeting. The Court relied on the IDEA provision that requires a court to reduce fees when a party has "unreasonably protracted the final resolution of the controversy." Because R.R. was offered all requested educational relief and reasonable attorney's fees in the District's original settlement offer and instead decided to continue litigating, the Court held that he had unreasonably protracted the resolution of the dispute for over three years. Quoting a Seventh Circuit case, the Court concluded: "[T]he IDEA only guarantees the right to a free education; it does not guarantee the right to attorney's fees incurred in pursuit of that education." The Fifth Circuit vacated the award of attorney's fees to R.R., and affirmed the dismissal of EPISD's claim for attorney's fees.

***Bloate v. United States,* 130 S. Ct. 1345 (2010)**

In a 7-2 opinion written by Justice Thomas, the Supreme Court held that a delay resulting from time spent preparing pretrial motions cannot be automatically excluded under the Speedy Trial Act, which requires that a criminal defendant be brought to trial within seventy days of the later of being arraigned or indicted. This opinion rejected the interpretations of eight federal courts of appeals, finding instead that such time can only be excluded from the speedy trial calculation if the district court finds, on the record, that granting the extra time serves the end of justice.

In this case, Bloate was arrested after a traffic stop led to the discovery of cocaine, drug paraphernalia weapons and cash. After his indictment, Bloate sought an extension of the deadline to prepare and file pretrial motions, which was granted. Bloate then waived his right to file pretrial motions, trial was later delayed and ultimately rescheduled for four months later. Bloate moved to dismiss the indictment under the Speedy Trial Act, which was denied as the district court disregarded most of the time between the indictment and the trial date. At issue, however, was the delay caused by Bloate's request to extend the time for preparing pretrial motions. The Eighth Circuit found that time to be automatically excluded as "other proceedings concerning the defendant."

Reversing, the Supreme Court refused to read the exclusions in the Speedy Trial Act broadly, requiring instead—based on language in the Act—that a trial court make a finding on the record that delay from trial resulting from continuances serve "the ends of justice" in order to be automatically excluded from calculation under the Speedy Trial Act. In essence, the Court sent a message to Congress through this

case to write more clearly when drafting federal statutes.

***Presley v. Georgia*, 130 S.Ct.721 (2010)**

In this *per curiam*, 7-2 opinion, the Supreme Court held that a criminal defendant's Sixth Amendment right to a public trial was violated when the trial court excluded the defendant's uncle from the *voir dire* of prospective jurors.

Presley's uncle was a lone courtroom observer immediately before *voir dire* in Presley's cocaine trafficking trial. The trial court instructed the uncle to leave the courtroom, to which Presley's counsel objected. The trial judge explained that there was insufficient room for the observer, and that he could not be permitted to "intermingle" with the prospective jurors. Presley was convicted and unsuccessfully moved for a new trial based on the exclusion of the public from the jury selection proceedings.

The Supreme Court held that the Sixth Amendment protects a defendant's right to insist that *voir dire* remain public, with some very limited exceptions. Even if the trial court has an overriding interest in closing the proceedings, "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." That is, trial courts "are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including *voir dire*. If the trial court does not consider all reasonable alternatives to closure, the proceedings are constitutionally infirm.

In dissent, Justices Thomas and Scalia contend that the majority did not meaningfully consider the important question of whether voir dire is a part of the "public trial" guaranteed by the Sixth Amendment. The dissenters further take issue with the majority's directive that a trial court must *sua sponte* consider reasonable alternatives to closure, as the issue presented by the parties was rather whether the opponent of closure must suggest alternatives to closure, or whether the proponent of closure must show that there is no available less intrusive alternative.

***Berghuis v. Smith*, 130 S.Ct. 1382 (2010)**

In 1993, Diapolis Smith was convicted of second-degree murder in Michigan by a jury composed of all white jurors. Smith and the thirty-six other witnesses to the shooting were African American. The venire panel from which the jury was drawn included no more than three African-Americans in its sixty to one hundred members. Smith appealed his conviction on the ground that he had been denied his Sixth Amendment right to a jury drawn from a fair cross-section of the community, in violation of *Taylor v. Lousiana* (U.S. 1975) and in *Duren v. Missouri* (U.S. 1979).

The Supreme Court, in a unanimous decision, held that Smith had failed to establish that the decision of the Michigan Supreme Court (in rejecting his claim that the jury was not drawn from a fair cross section of the community) "involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States" — the standard of review for *habeas* petitions after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. Writing for the majority, Justice Ginsburg merely observed that each of the available tests for underrepresentation of a distinctive group "is imperfect." Instead, she based her opinion on the "systematic exclusion" element of the *Duren* test.

Smith had argued that African-American jurors were systematically excluded by the county's practice of first assigning jurors to local district courts, and only then filling the jury pools of the county-wide courts where Smith and other alleged felons were tried. (A large majority of the African-American residents of Kent County live in Grand Rapids, home to a single local court.) As Justice Ginsburg wrote, "Evidence that African-Americans were underrepresented on the [county-wide] Circuit Court's venires in significantly higher percentages than on the Grand Rapids District

Court's could have indicated that the assignment order made a critical difference. But…Smith adduced no evidence to that effect." Justice Ginsburg indicated that "Smith's best evidence of systematic exclusion was…a decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed the assignment order," filling the county-wide jury pools first. But even Smith's lawyer had conceded that this was not "a big change."

Smith had also argued that Kent County's practice of excusing potential jurors who alleged hardship or failed to report for jury service, its reliance on notices of jury duty mailed to addresses at least fifteen months old and its decision not to follow up on non-responses, along with the refusal of Kent County police to enforce court orders for the appearance of prospective jurors, collectively amounted to systematic exclusion because each practice was likely to have a disproportionately large impact on African-American potential jurors. Justice Ginsburg rejected these arguments, explaining that "[n]o 'clearly established' precedent of this Court supports Smith's claim that he can make out a *prima facie* case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation." She went on to note that "furthermore, [the Court] has never 'clearly established' that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim." Quite the opposite: "in *Duren*, the Court understood that hardship exemptions resembling those that Smith assails might well 'survive a fair cross-section challenge.'"

Justice Clarence Thomas concurred. Agreeing that Smith had not shown any violation of clearly established law, Justice Thomas stated that he would be willing in a future case to reconsider the "fair cross-section" precedents, on the grounds that because "[h]istorically, juries did not include a sampling of persons from all levels of society or even from both sexes," the requirement therefore "seems difficult to square with the Sixth Amendment's text and history."

***United States v. Sylvester*, 582 F.3d 285 (5th Cir. 2009)**

The government obtained a warrant for the arrest of Sylvester for the murder of a federal informant arising out of a drug conspiracy investigation. Sylvester voluntarily surrendered and met with prosecutors, accompanied by his attorney, at which time he was advised of his *Miranda* rights and informed of the charges against him. Faced with evidence presented him by the prosecutor and a proposed plea agreement in which the government would not seek the death penalty, and after consulting with his attorney, Sylvester waived his objection to the admission of incriminating statements at trial in the event that plea negotiations failed. Shortly after the meeting, Sylvester changed his mind, decided to go to trial and obtained new counsel, who then sought to suppress the statements Sylvester made during the plea negotiations. The trial court denied the motion (holding the waiver was enforceable), admitted the statements, and Sylvester was convicted of multiple felony counsel with concurrent life sentences.

The issue of whether the government could use a defendant's statements made in the course of plea negotiations in its case-in-chief, when the defendant had knowingly and voluntarily waived his rights to object to such use, was one of first impression in the Fifth Circuit. Observing that the Supreme Court had previously permitted the use of statements in plea negotiations to impeach the defendant if he testified at trial, the Fifth Circuit could not find a reason for not extending that rationale to permit a case-in-chief use, absent specific evidence that the agreement was entered into unknowingly or involuntarily. Accordingly, the court affirmed Sylvester's convictions.

***United States v. Young*, 585 F.3d 199 (5th Cir. 2009)**

Young appealed his conviction under 18 U.S.C. § 2250(a) "for traveling in interstate commerce and knowingly failing to update his registration information as required by the Sex Offender Registration and Notification Act

(SORNA)." SORNA, which requires sex offenders to register where they reside or work, criminalizes the act of traveling in interstate commerce and knowingly failing to register. Young argued that SORNA permits *ex post facto* punishment in violation of the Constitution, which prohibits any law that imposes a punishment of an act not punishable at the time it was committed or imposes additional punishment for a prior crime.

In this case of first impression for the Fifth Circuit, the court first considered Young's argument that sanctioning the act of interstate travel and knowingly failing to register constituted a retroactive punishment. While the sanctioning provision related to Young's prior conviction, the act that provision sought to punish was the current conduct (interstate travel and knowing failure to register). The Fifth Circuit determined that in order to constitute e*x post facto* punishment, a law must seek to punish events occurring before its enactment; accordingly, the sanctioning provision of SORNA did not violate Young's rights.

Young also contended that SORNA's requirement that he register as a sex offender increased the punishment for his prior crime by causing "inconvenience and embarrassment." The Fifth Circuit adopted the reasoning of the Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003), stating that a provision requiring sex offender registration could be considered additional punishment only if the legislature intended to impose punishment, rather than merely to "establish civil proceedings," or if the statute was so punitive either in purpose or effect as to negate" the intent to establish civil proceedings. The Fifth Circuit determined that Congress lacked intent to punish because Congress designed the registration requirement to protect the public (a civil remedy) and not to further punish sex offenders. The court then looked at the punitive purpose and effect of SORNA and determined that the differences in SORNA from that of the statute in the Supreme Court case were not sufficient to constitute a punitive purpose. The sanctions provision of SORNA punishes only new crimes (*i.e.* failing to register) that occur after the law was enacted, and the registration provision of SORNA is not an actual punishment to the defendant, but rather a method of attempting to protect the public. Suffering embarrassment or inconvenience due to the registration provision is not comparable to other traditionally accepted forms of punishment to the defendant, such as incarceration and probation. Further, labeling "mere embarrassment" and inconvenience as "punishment" could lead to a slippery slope for future claims.

Readers of this paper should note that this case was decided prior to the *Carr v. United States* case reported on elsewhere in the paper.