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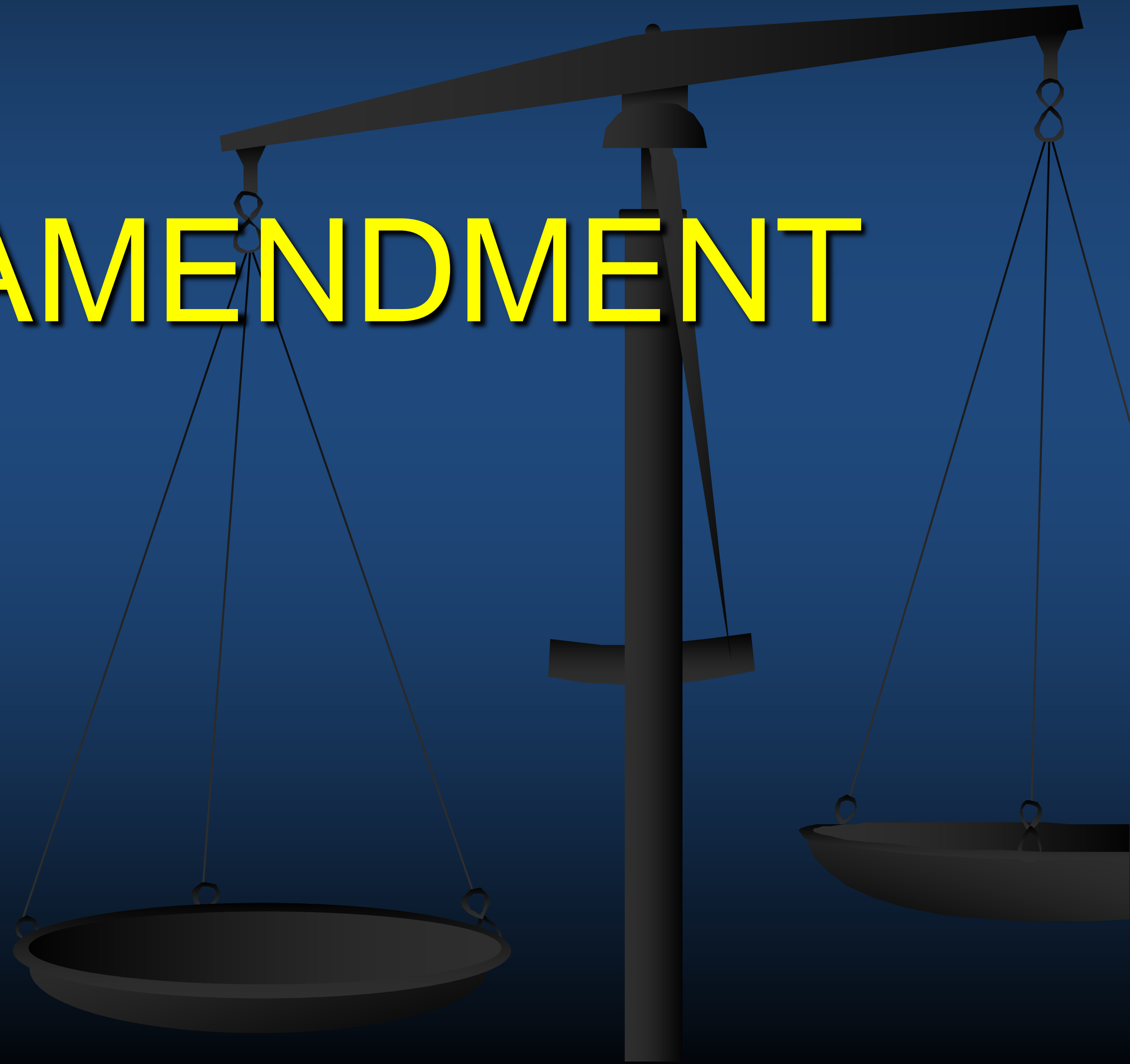
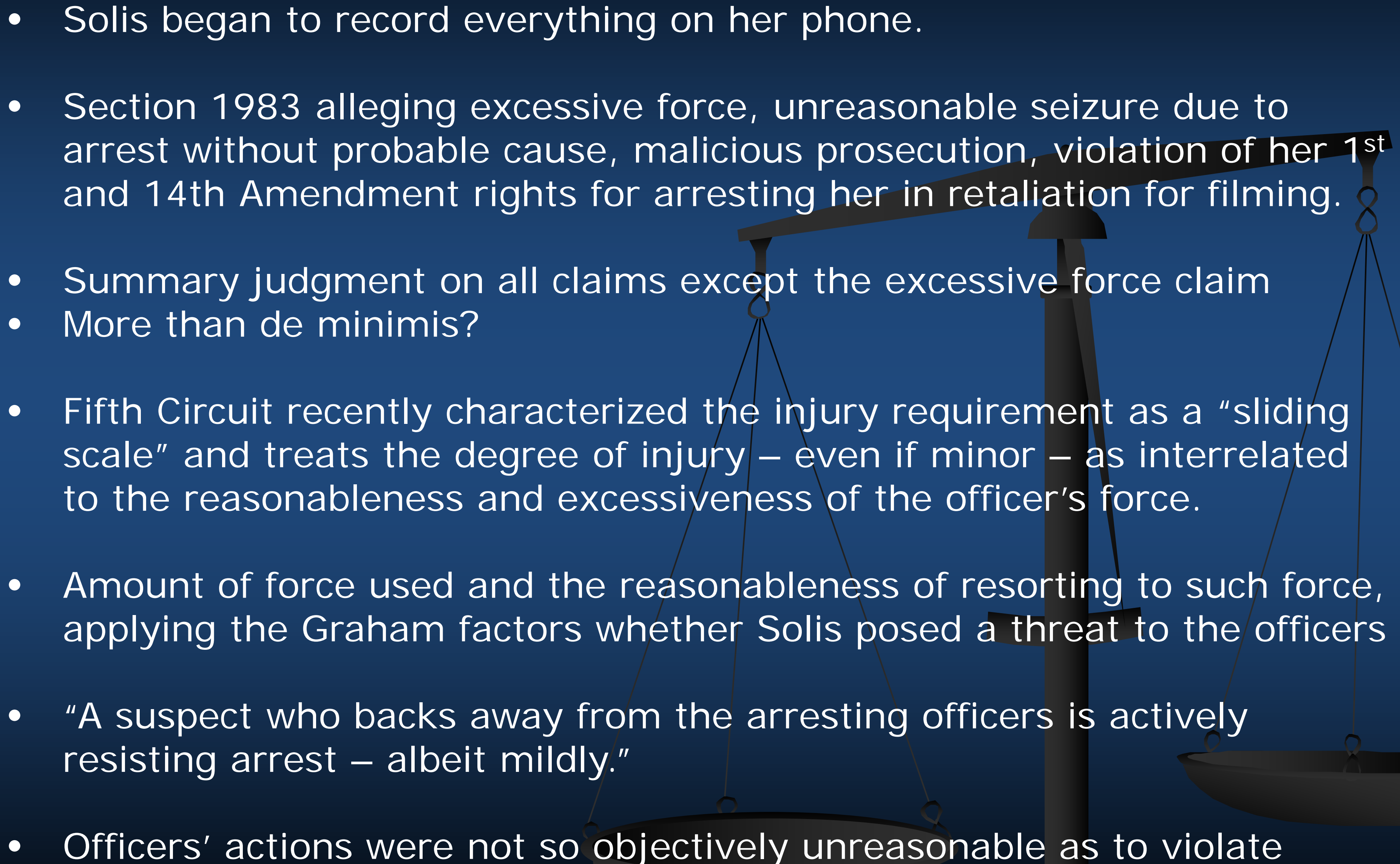
TEXAS CITY ATTORNEYS ASSOCIATION
FALL CONFERENCE
SAN ANTONIO, TEXAS
OCTOBER 6, 2022

FIRST AMENDMENT



Solis v. Serrett



- Solis began to record everything on her phone.

- Section 1983 alleging excessive force, unreasonable seizure due to arrest without probable cause, malicious prosecution, violation of her 1st and 14th Amendment rights for arresting her in retaliation for filming.

- Summary judgment on all claims except the excessive force claim
- More than de minimis?

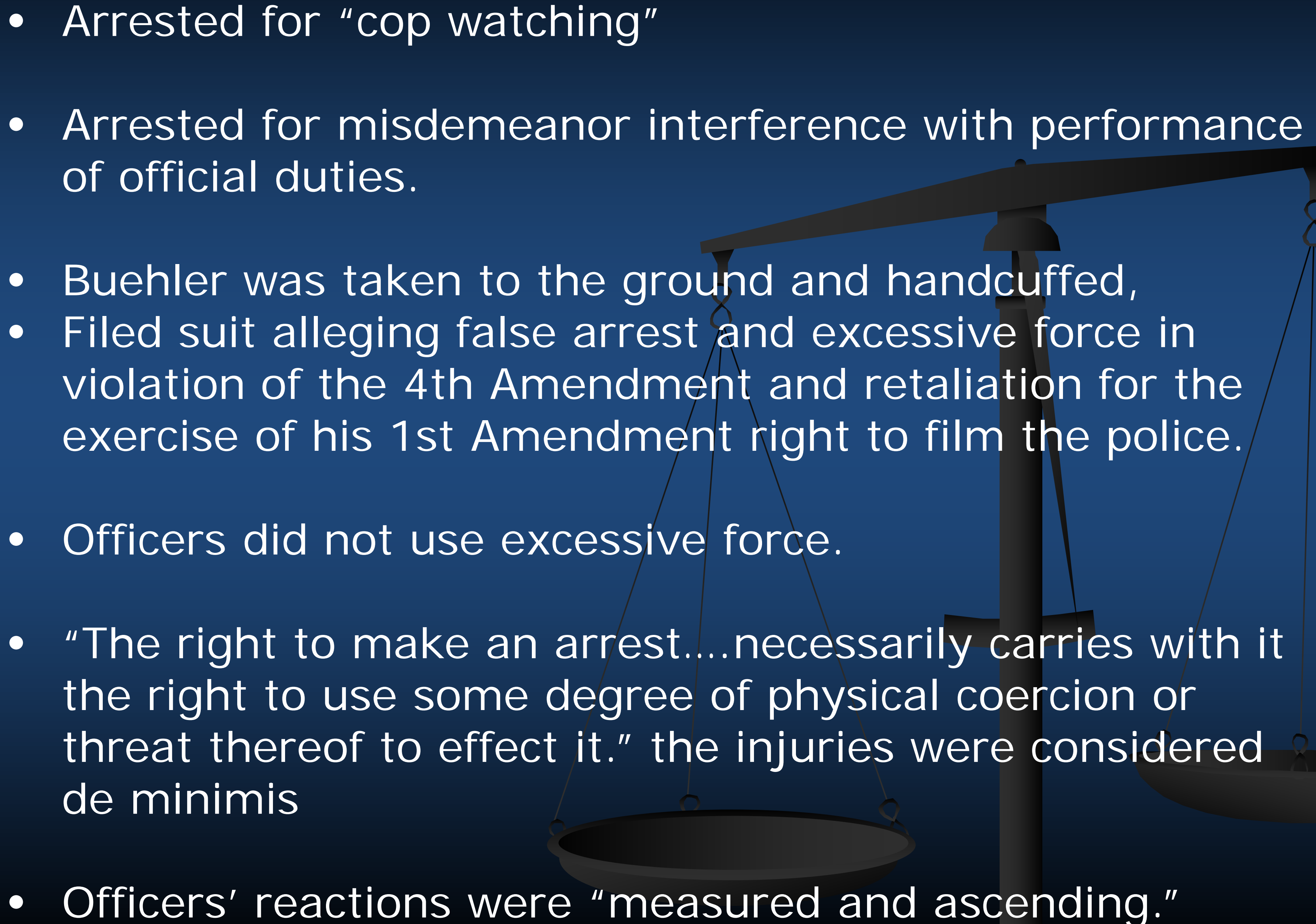
- Fifth Circuit recently characterized the injury requirement as a “sliding scale” and treats the degree of injury – even if minor – as interrelated to the reasonableness and excessiveness of the officer’s force.

- Amount of force used and the reasonableness of resorting to such force, applying the Graham factors whether Solis posed a threat to the officers

- “A suspect who backs away from the arresting officers is actively resisting arrest – albeit mildly.”

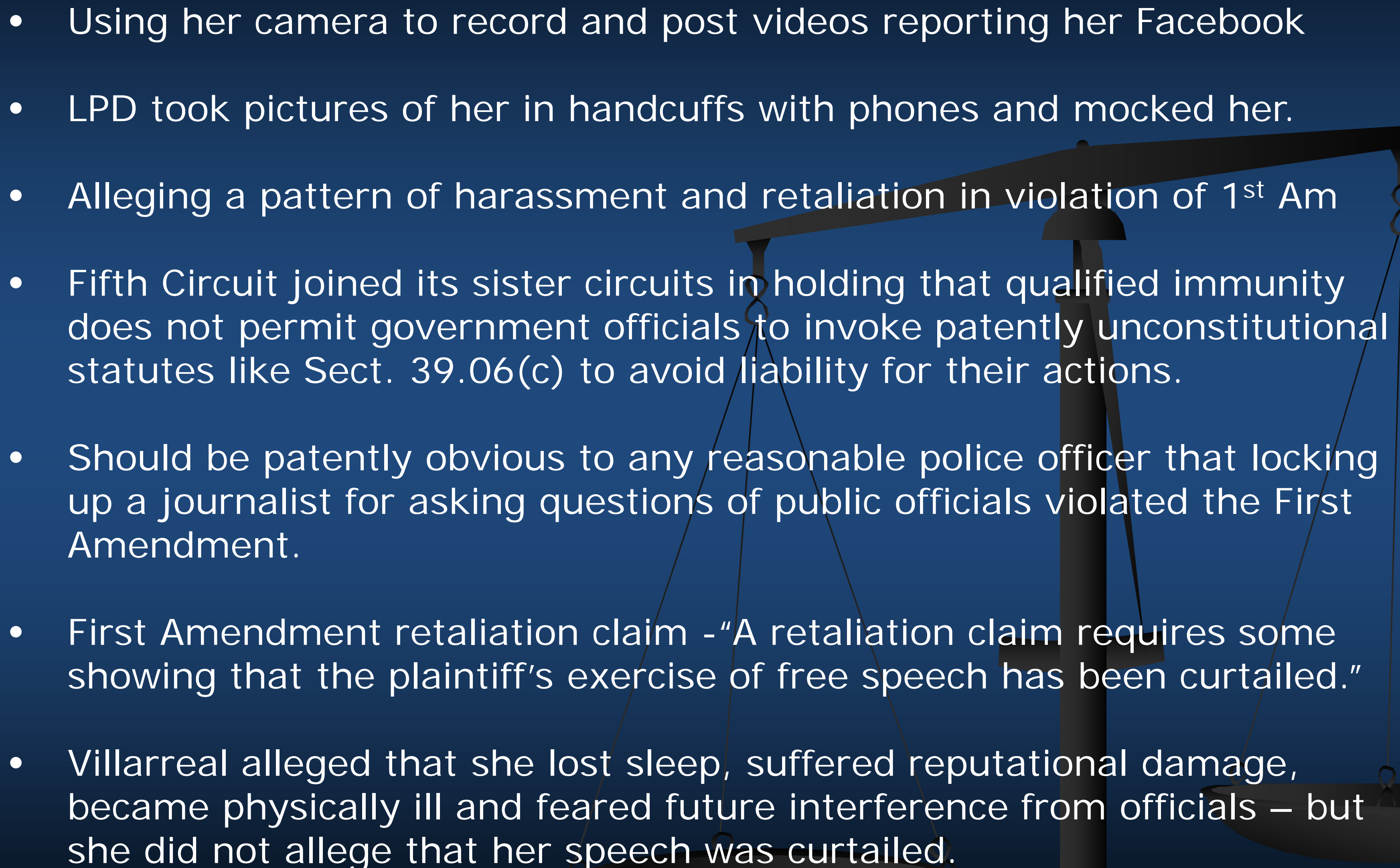
- Officers’ actions were not so objectively unreasonable as to violate

Buehler v. Dear



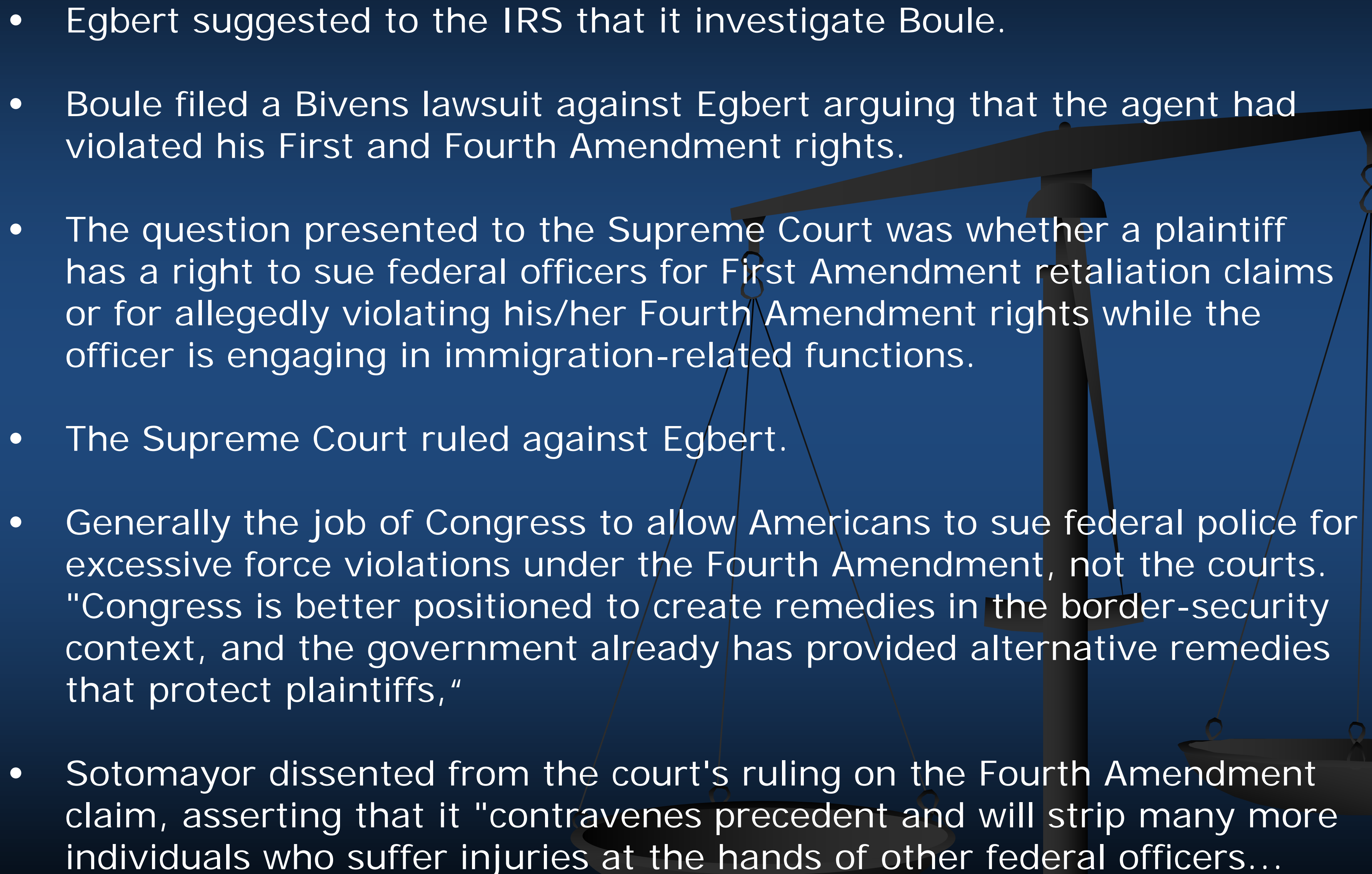
- Arrested for "cop watching"
- Arrested for misdemeanor interference with performance of official duties.
- Buehler was taken to the ground and handcuffed,
- Filed suit alleging false arrest and excessive force in violation of the 4th Amendment and retaliation for the exercise of his 1st Amendment right to film the police.
- Officers did not use excessive force.
- "The right to make an arrest….necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." the injuries were considered de minimis
- Officers' reactions were "measured and ascending."

Villarreal v. City of Laredo



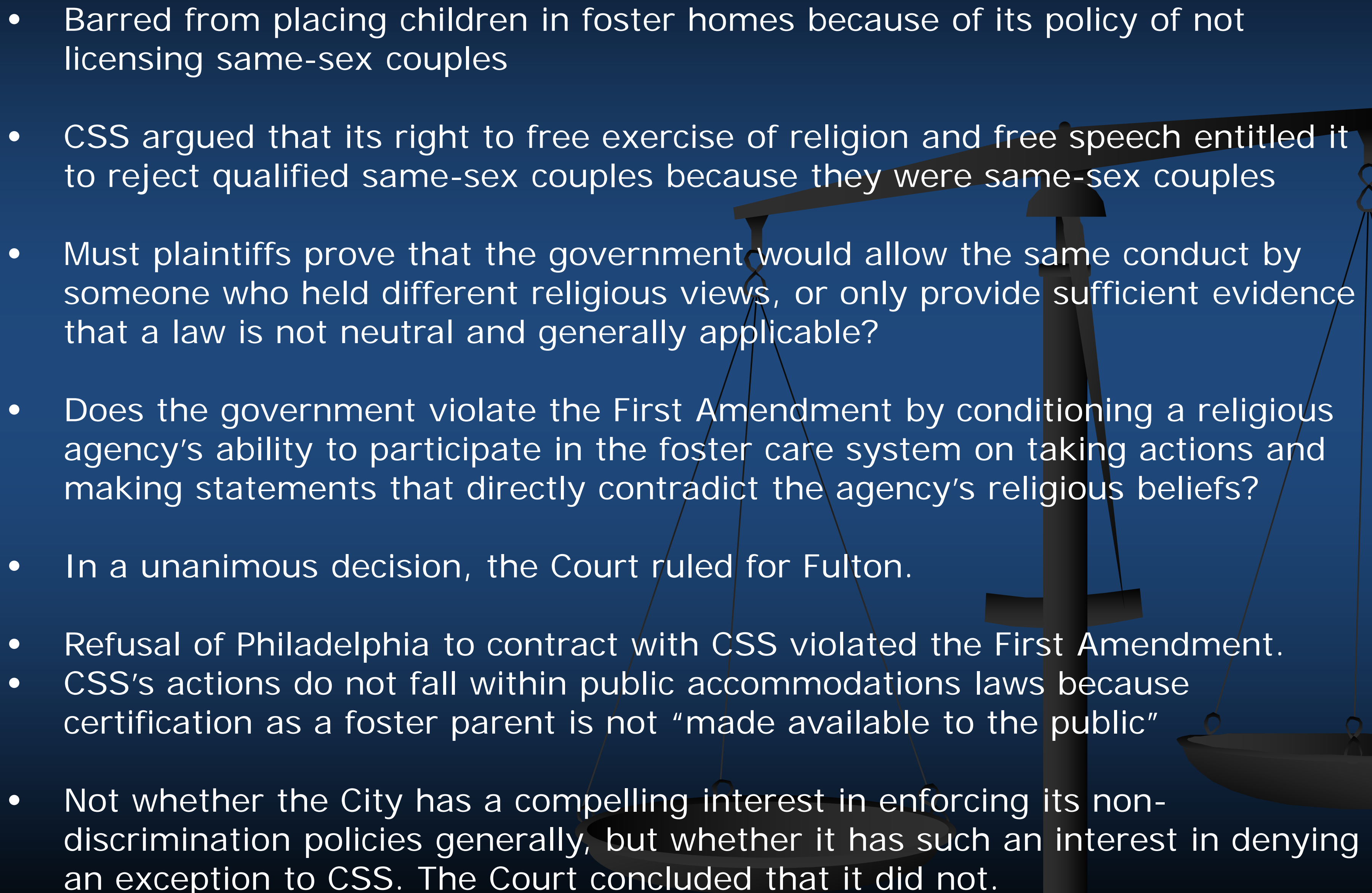
- Using her camera to record and post videos reporting her Facebook
- LPD took pictures of her in handcuffs with phones and mocked her.
- Alleging a pattern of harassment and retaliation in violation of 1st Am
- Fifth Circuit joined its sister circuits in holding that qualified immunity does not permit government officials to invoke patently unconstitutional statutes like Sect. 39.06(c) to avoid liability for their actions.
- Should be patently obvious to any reasonable police officer that locking up a journalist for asking questions of public officials violated the First Amendment.
- First Amendment retaliation claim -"A retaliation claim requires some showing that the plaintiff's exercise of free speech has been curtailed."
- Villarreal alleged that she lost sleep, suffered reputational damage, became physically ill and feared future interference from officials – but she did not allege that her speech was curtailed.

Egbert v. Boule,



- Egbert suggested to the IRS that it investigate Boule.
- Boule filed a Bivens lawsuit against Egbert arguing that the agent had violated his First and Fourth Amendment rights.
- The question presented to the Supreme Court was whether a plaintiff has a right to sue federal officers for First Amendment retaliation claims or for allegedly violating his/her Fourth Amendment rights while the officer is engaging in immigration-related functions.
- The Supreme Court ruled against Egbert.
- Generally the job of Congress to allow Americans to sue federal police for excessive force violations under the Fourth Amendment, not the courts. "Congress is better positioned to create remedies in the border-security context, and the government already has provided alternative remedies that protect plaintiffs,“
- Sotomayor dissented from the court's ruling on the Fourth Amendment claim, asserting that it "contravenes precedent and will strip many more individuals who suffer injuries at the hands of other federal officers…

Fulton v. City of Philadelphia



- Barred from placing children in foster homes because of its policy of not licensing same-sex couples

- CSS argued that its right to free exercise of religion and free speech entitled it to reject qualified same-sex couples because they were same-sex couples

- Must plaintiffs prove that the government would allow the same conduct by someone who held different religious views, or only provide sufficient evidence that a law is not neutral and generally applicable?

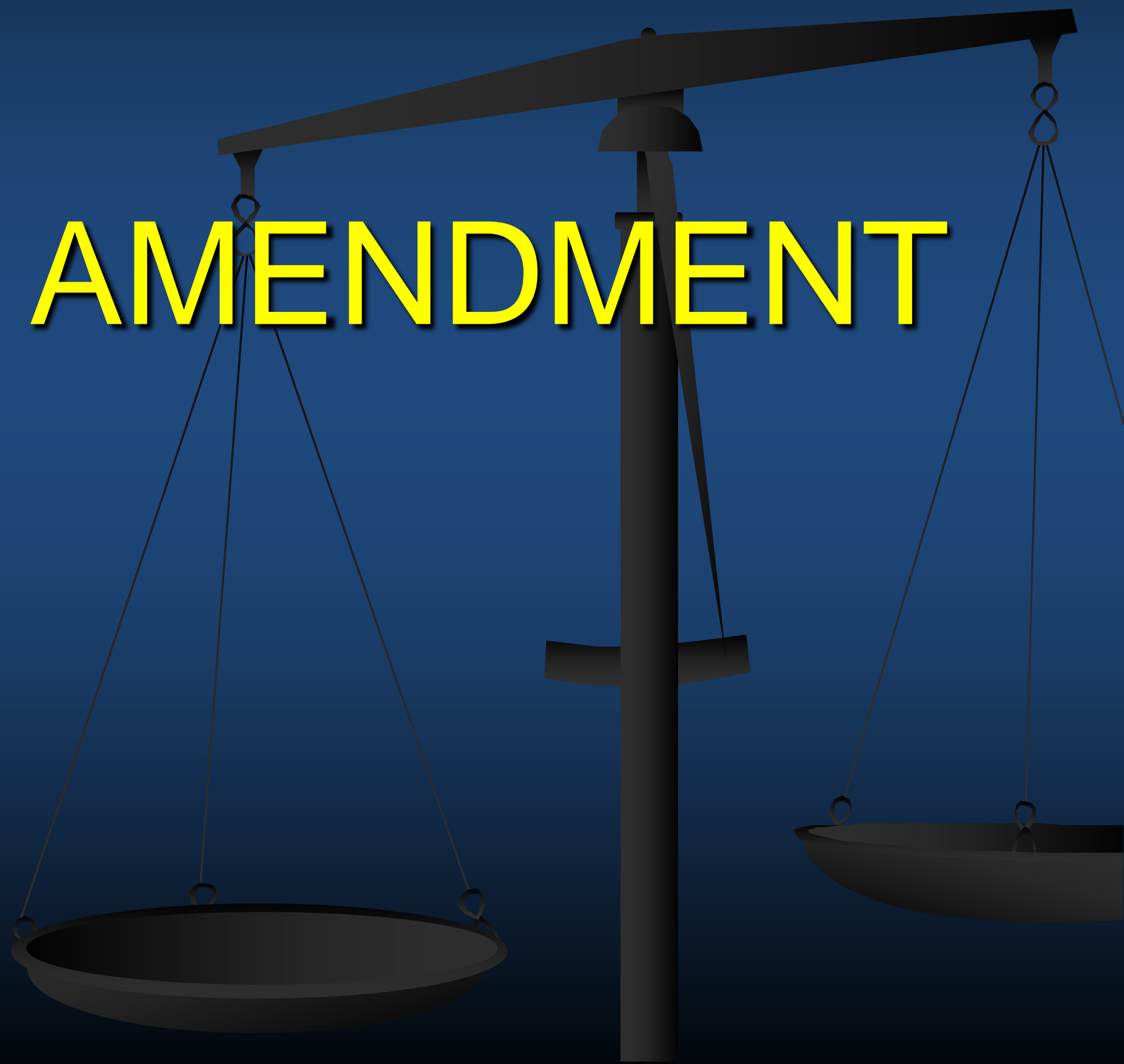
- Does the government violate the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

- In a unanimous decision, the Court ruled for Fulton.

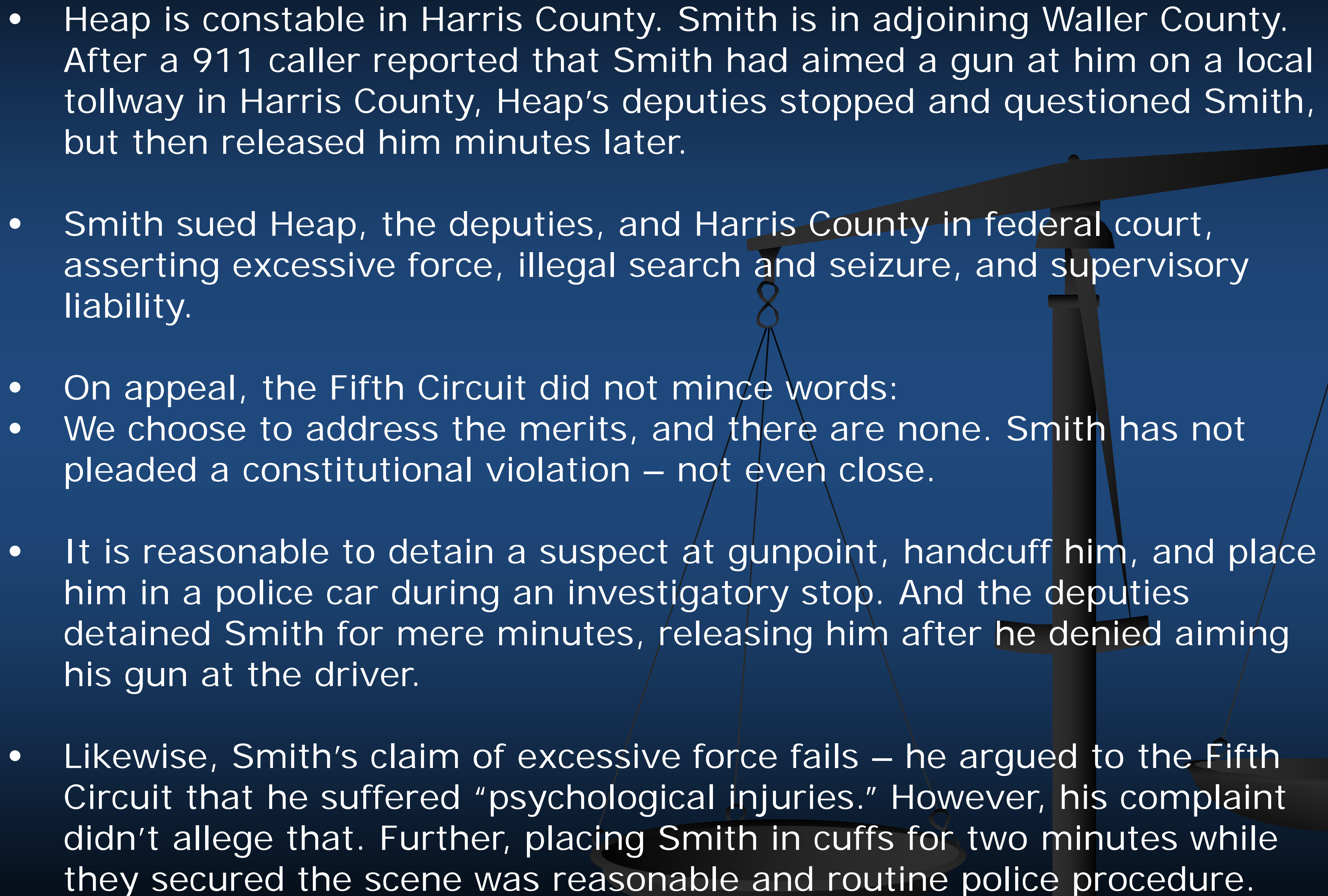
- Refusal of Philadelphia to contract with CSS violated the First Amendment.
- CSS's actions do not fall within public accommodations laws because certification as a foster parent is not "made available to the public"

- Not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS. The Court concluded that it did not.

FOURTH AMENDMENT



Smith v. Heap



- Heap is constable in Harris County. Smith is in adjoining Waller County. After a 911 caller reported that Smith had aimed a gun at him on a local tollway in Harris County, Heap's deputies stopped and questioned Smith, but then released him minutes later.

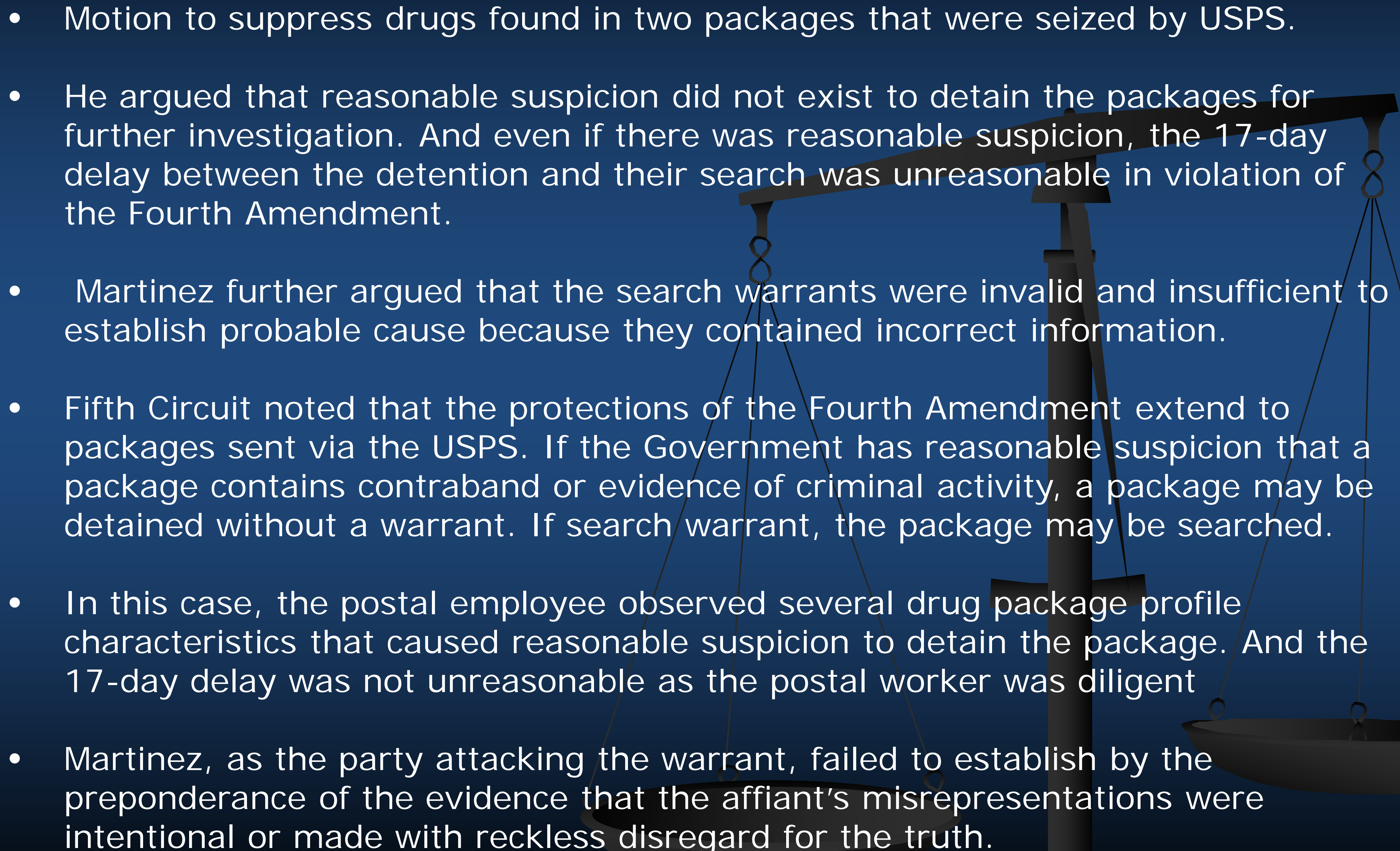
- Smith sued Heap, the deputies, and Harris County in federal court, asserting excessive force, illegal search and seizure, and supervisory liability.

- On appeal, the Fifth Circuit did not mince words:
- We choose to address the merits, and there are none. Smith has not pleaded a constitutional violation – not even close.

- It is reasonable to detain a suspect at gunpoint, handcuff him, and place him in a police car during an investigatory stop. And the deputies detained Smith for mere minutes, releasing him after he denied aiming his gun at the driver.

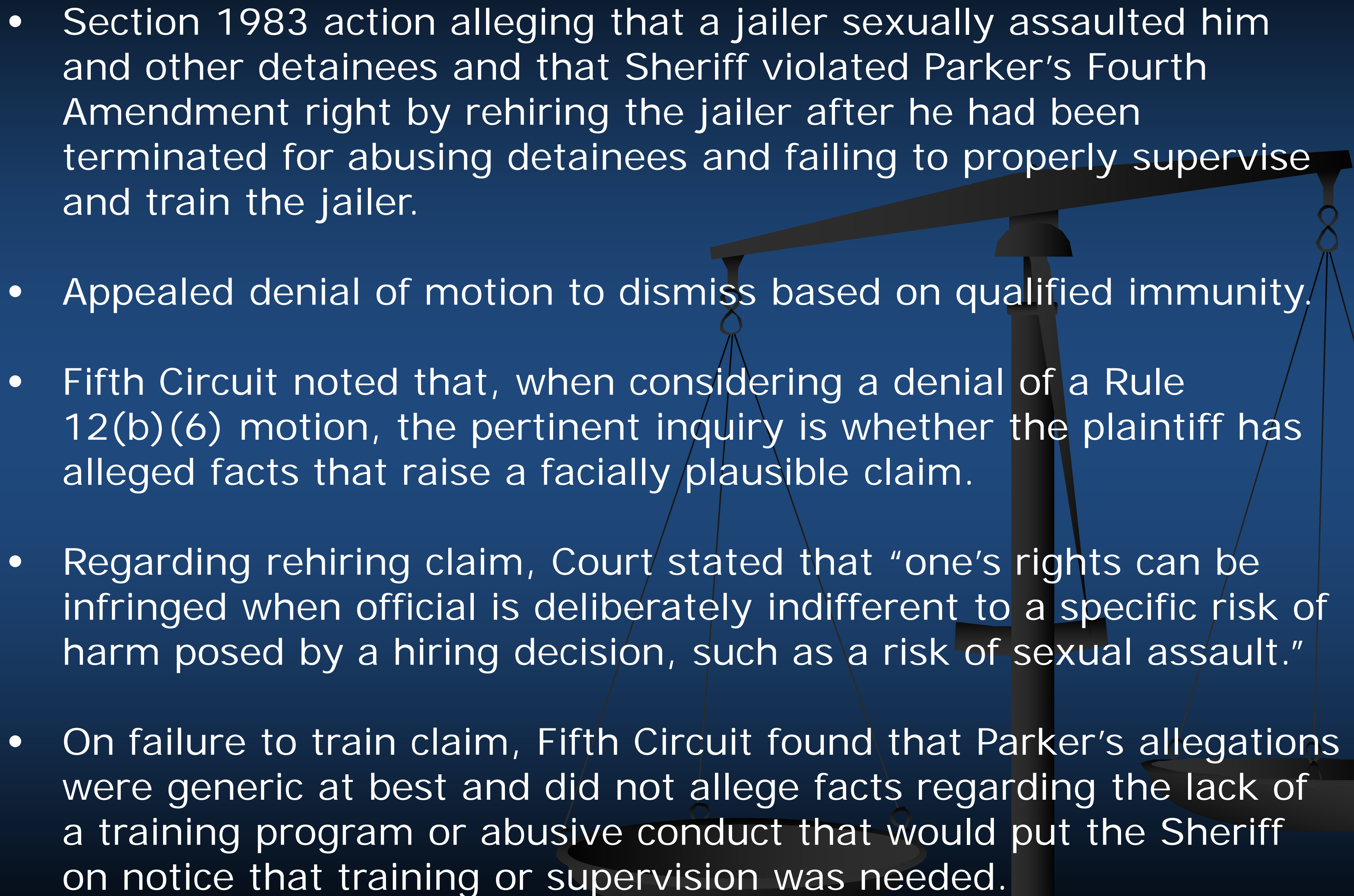
- Likewise, Smith's claim of excessive force fails – he argued to the Fifth Circuit that he suffered "psychological injuries." However, his complaint didn't allege that. Further, placing Smith in cuffs for two minutes while they secured the scene was reasonable and routine police procedure.

United States v. Martinez



- Motion to suppress drugs found in two packages that were seized by USPS.
- He argued that reasonable suspicion did not exist to detain the packages for further investigation. And even if there was reasonable suspicion, the 17-day delay between the detention and their search was unreasonable in violation of the Fourth Amendment.
- Martinez further argued that the search warrants were invalid and insufficient to establish probable cause because they contained incorrect information.
- Fifth Circuit noted that the protections of the Fourth Amendment extend to packages sent via the USPS. If the Government has reasonable suspicion that a package contains contraband or evidence of criminal activity, a package may be detained without a warrant. If search warrant, the package may be searched.
- In this case, the postal employee observed several drug package profile characteristics that caused reasonable suspicion to detain the package. And the 17-day delay was not unreasonable as the postal worker was diligent
- Martinez, as the party attacking the warrant, failed to establish by the preponderance of the evidence that the affiant's misrepresentations were intentional or made with reckless disregard for the truth.

Parker v. Blackwell



- Section 1983 action alleging that a jailer sexually assaulted him and other detainees and that Sheriff violated Parker's Fourth Amendment right by rehiring the jailer after he had been terminated for abusing detainees and failing to properly supervise and train the jailer.

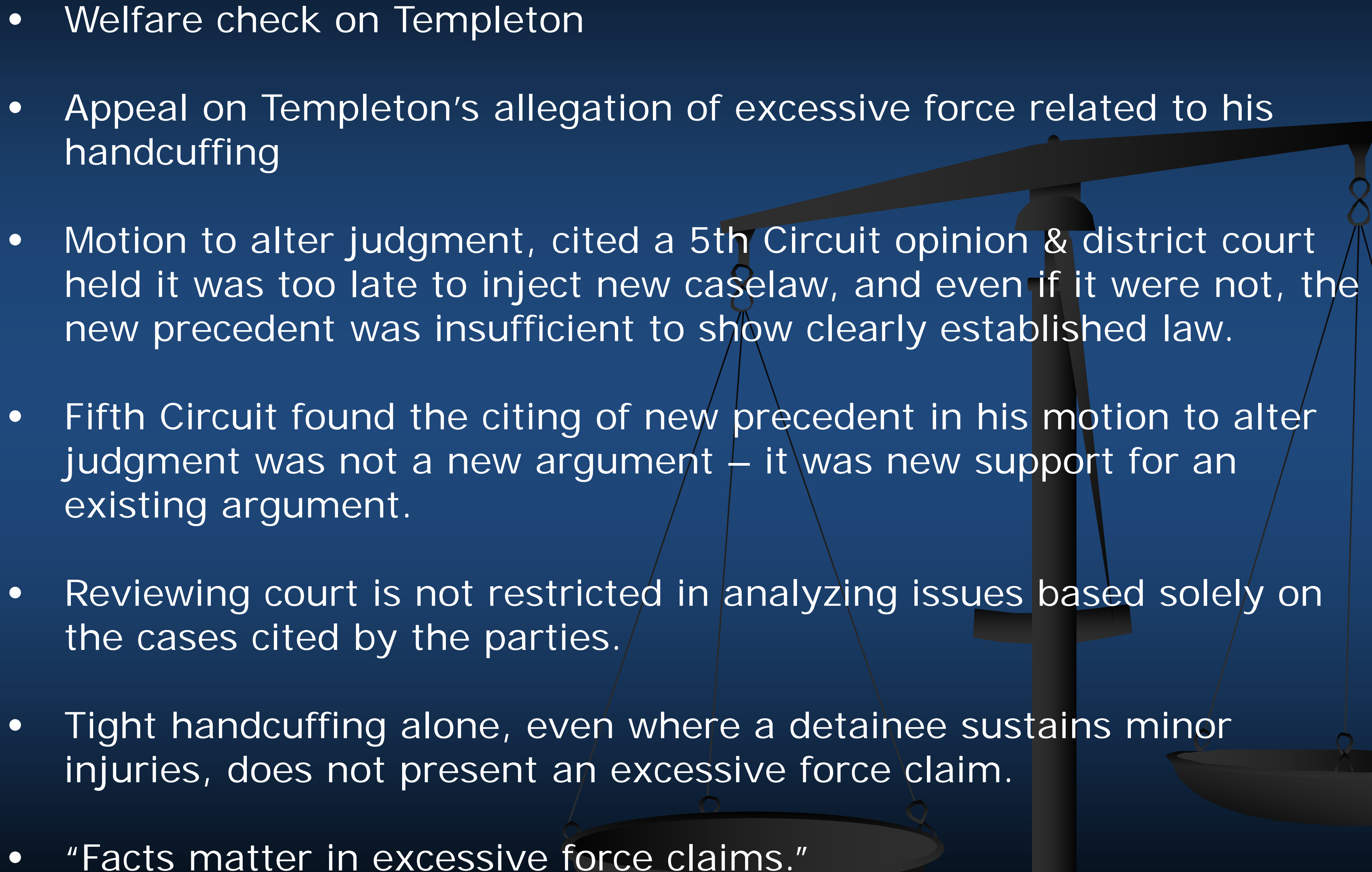
- Appealed denial of motion to dismiss based on qualified immunity.

- Fifth Circuit noted that, when considering a denial of a Rule 12(b)(6) motion, the pertinent inquiry is whether the plaintiff has alleged facts that raise a facially plausible claim.

- Regarding rehiring claim, Court stated that "one's rights can be infringed when official is deliberately indifferent to a specific risk of harm posed by a hiring decision, such as a risk of sexual assault."

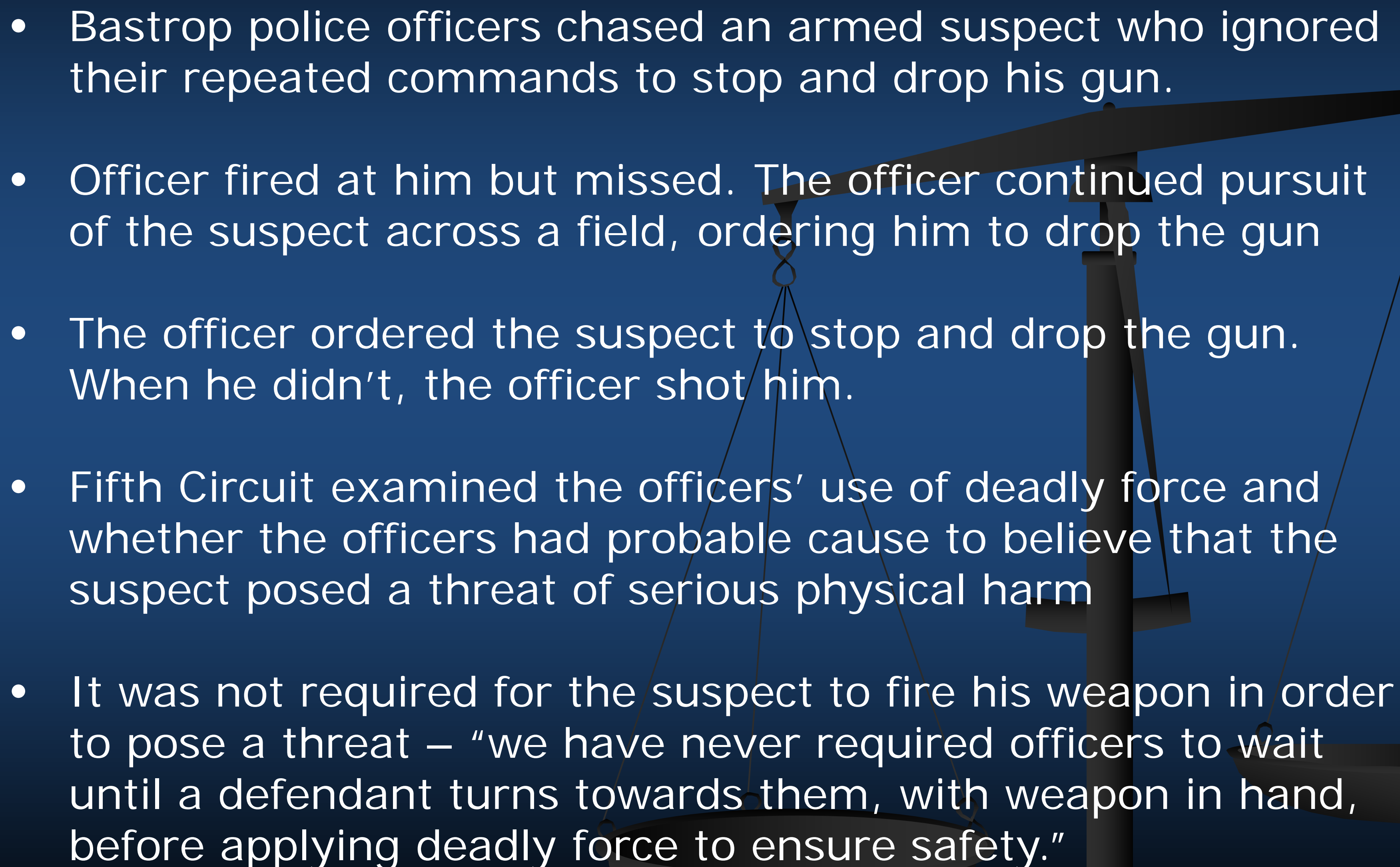
- On failure to train claim, Fifth Circuit found that Parker's allegations were generic at best and did not allege facts regarding the lack of a training program or abusive conduct that would put the Sheriff on notice that training or supervision was needed.

Templeton v. Jarmillo



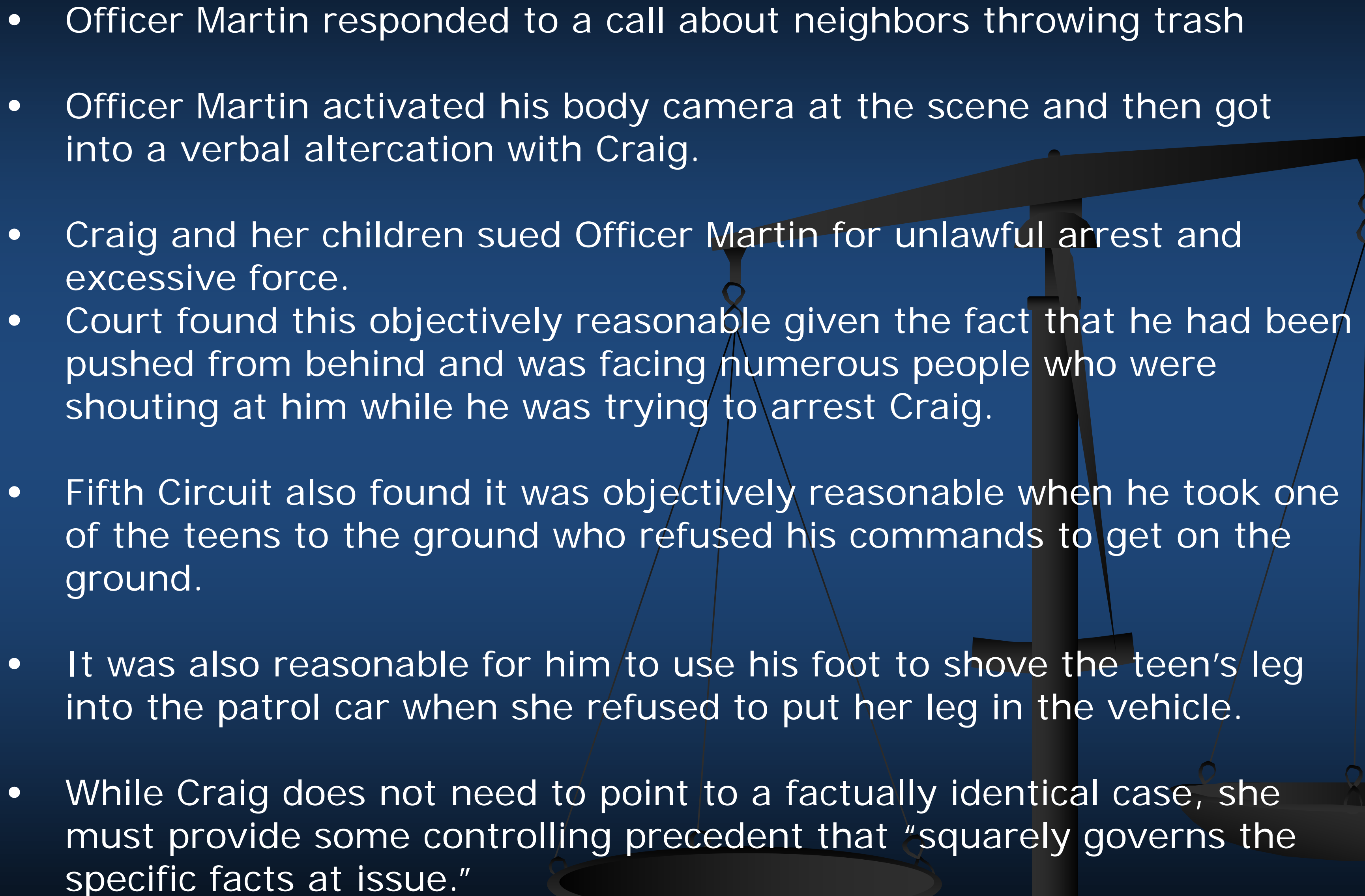
- Welfare check on Templeton
- Appeal on Templeton's allegation of excessive force related to his handcuffing
- Motion to alter judgment, cited a 5th Circuit opinion & district court held it was too late to inject new caselaw, and even if it were not, the new precedent was insufficient to show clearly established law.
- Fifth Circuit found the citing of new precedent in his motion to alter judgment was not a new argument – it was new support for an existing argument.
- Reviewing court is not restricted in analyzing issues based solely on the cases cited by the parties.
- Tight handcuffing alone, even where a detainee sustains minor injuries, does not present an excessive force claim.
- "Facts matter in excessive force claims."

Wilson v. City of Bastrop



- Bastrop police officers chased an armed suspect who ignored their repeated commands to stop and drop his gun.
- Officer fired at him but missed. The officer continued pursuit of the suspect across a field, ordering him to drop the gun
- The officer ordered the suspect to stop and drop the gun. When he didn't, the officer shot him.
- Fifth Circuit examined the officers' use of deadly force and whether the officers had probable cause to believe that the suspect posed a threat of serious physical harm
- It was not required for the suspect to fire his weapon in order to pose a threat – "we have never required officers to wait until a defendant turns towards them, with weapon in hand, before applying deadly force to ensure safety."

Craig v. Martin

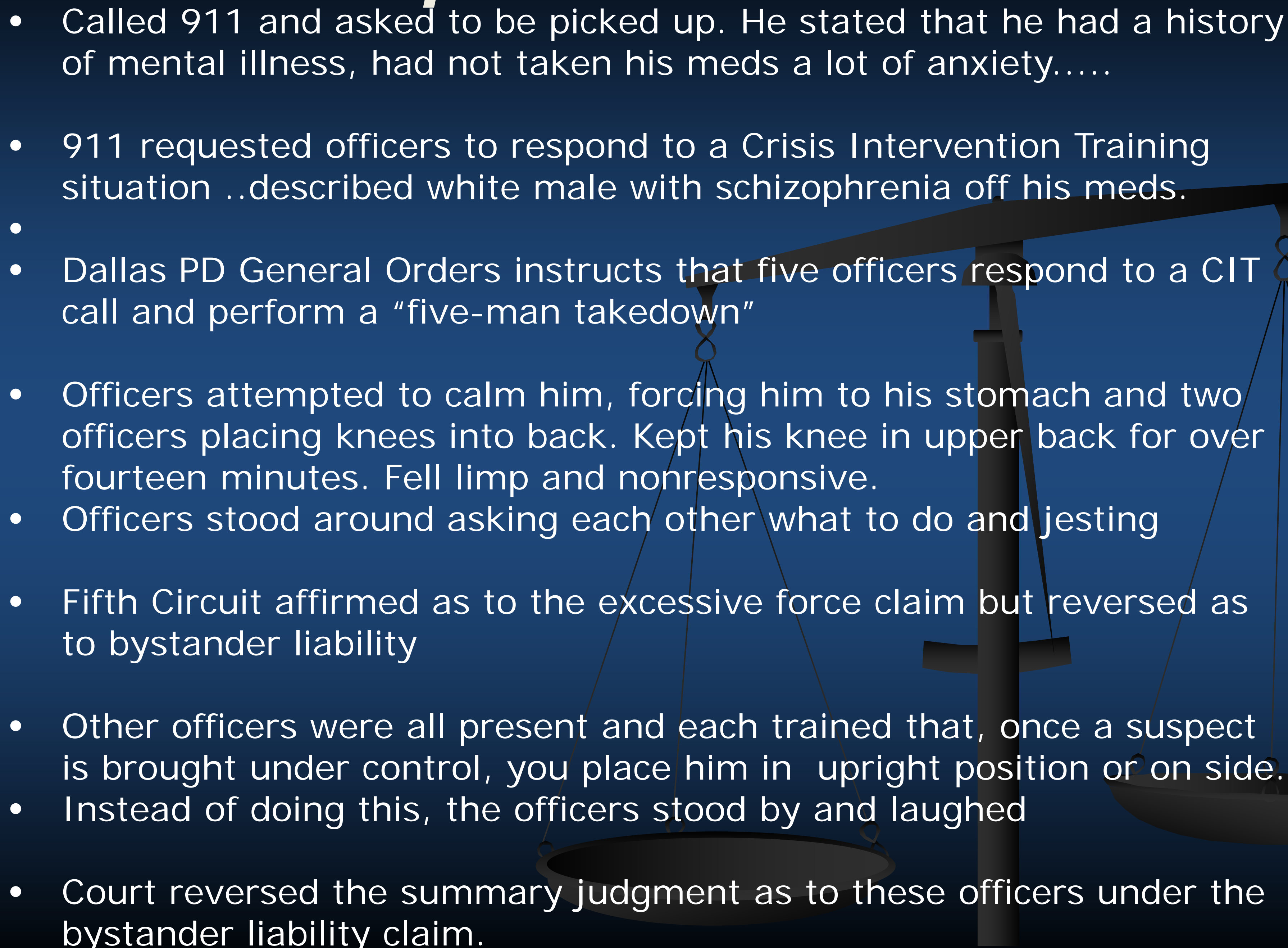


- Officer Martin responded to a call about neighbors throwing trash
- Officer Martin activated his body camera at the scene and then got into a verbal altercation with Craig.
- Craig and her children sued Officer Martin for unlawful arrest and excessive force.
- Court found this objectively reasonable given the fact that he had been pushed from behind and was facing numerous people who were shouting at him while he was trying to arrest Craig.
- Fifth Circuit also found it was objectively reasonable when he took one of the teens to the ground who refused his commands to get on the ground.
- It was also reasonable for him to use his foot to shove the teen's leg into the patrol car when she refused to put her leg in the vehicle.
- While Craig does not need to point to a factually identical case, she must provide some controlling precedent that "squarely governs the specific facts at issue."

Betts v. Brennan

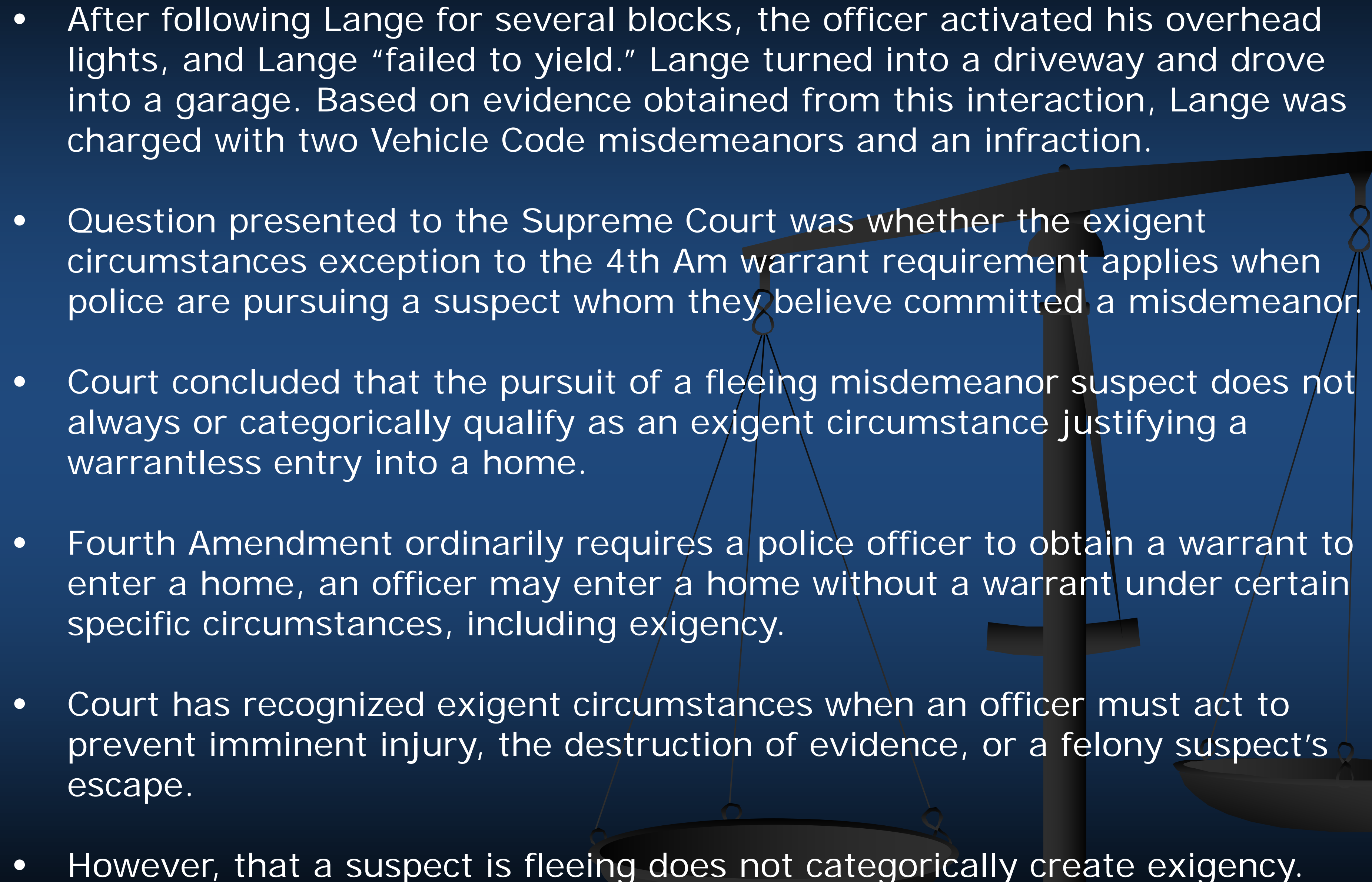
- Challenged Officer's reasons for stopping him, refused to comply with his orders, batted his hand away...dared him to use his taser.
-
- Brennan tased Betts once and arrested him. Betts plead guilty to resisting arrest but then sued Brennan for excessive force.
- D Ct. denied motion for summary judgment on qualified immunity.
- Fifth Circuit applied the Graham factors to determine whether the use of force was reasonable, finding that the extent of Betts' resistance was the most important.
- Betts' persistent confrontational manner created some threat to the officer's safety. Further, Betts' resistance was not "passive."
- Use of the taser was found to be reasonable, as not the officer's first resort and used measured and ascending actions that corresponded with escalating verbal and physical resistance

Timpa v. Dillard



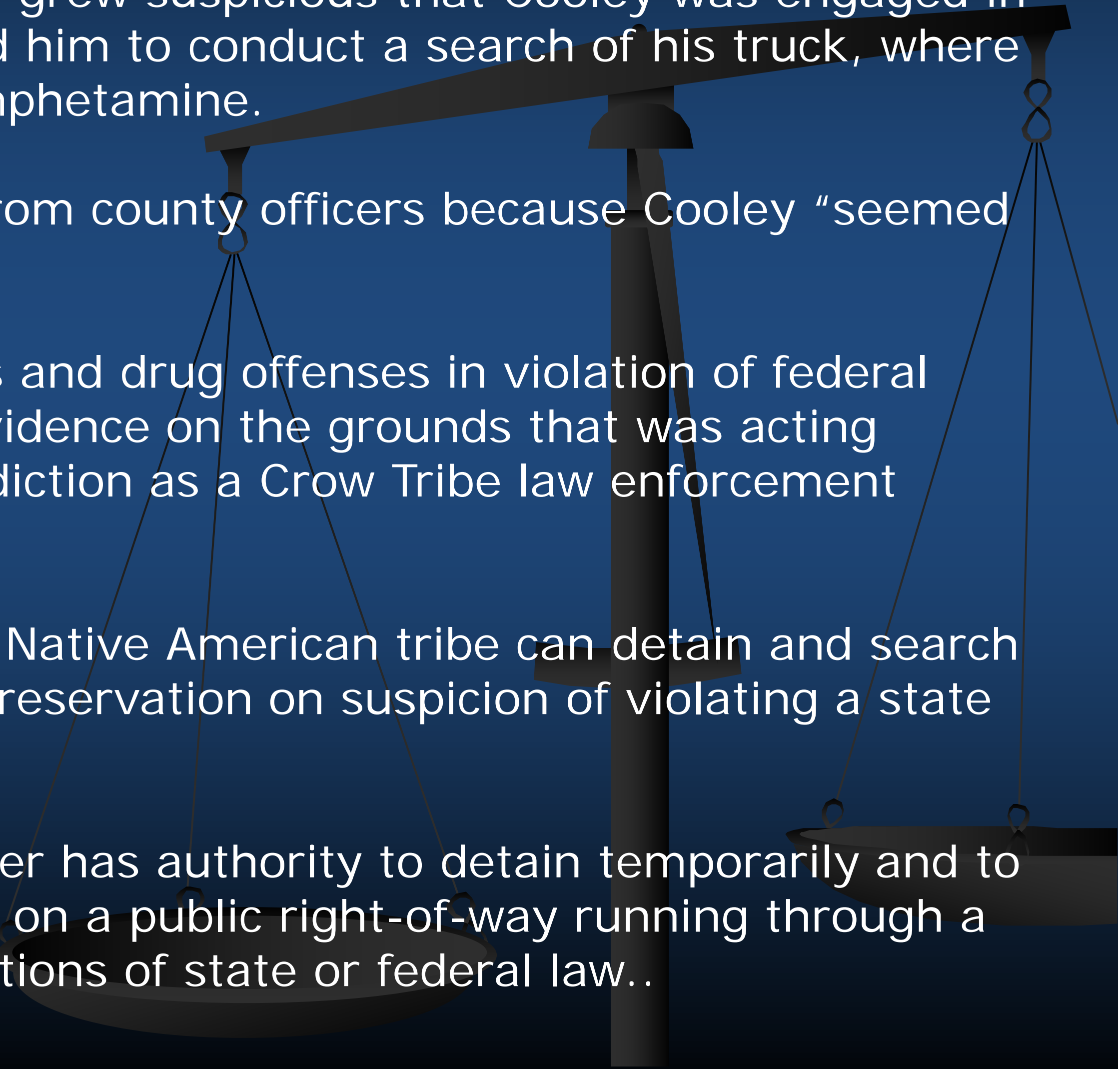
- Called 911 and asked to be picked up. He stated that he had a history of mental illness, had not taken his meds a lot of anxiety.....
- 911 requested officers to respond to a Crisis Intervention Training situation ..described white male with schizophrenia off his meds.
-
- Dallas PD General Orders instructs that five officers respond to a CIT call and perform a "five-man takedown"
- Officers attempted to calm him, forcing him to his stomach and two officers placing knees into back. Kept his knee in upper back for over fourteen minutes. Fell limp and nonresponsive.
- Officers stood around asking each other what to do and jesting
- Fifth Circuit affirmed as to the excessive force claim but reversed as to bystander liability
- Other officers were all present and each trained that, once a suspect is brought under control, you place him in upright position or on side.
- Instead of doing this, the officers stood by and laughed
- Court reversed the summary judgment as to these officers under the bystander liability claim.

Lange v. California



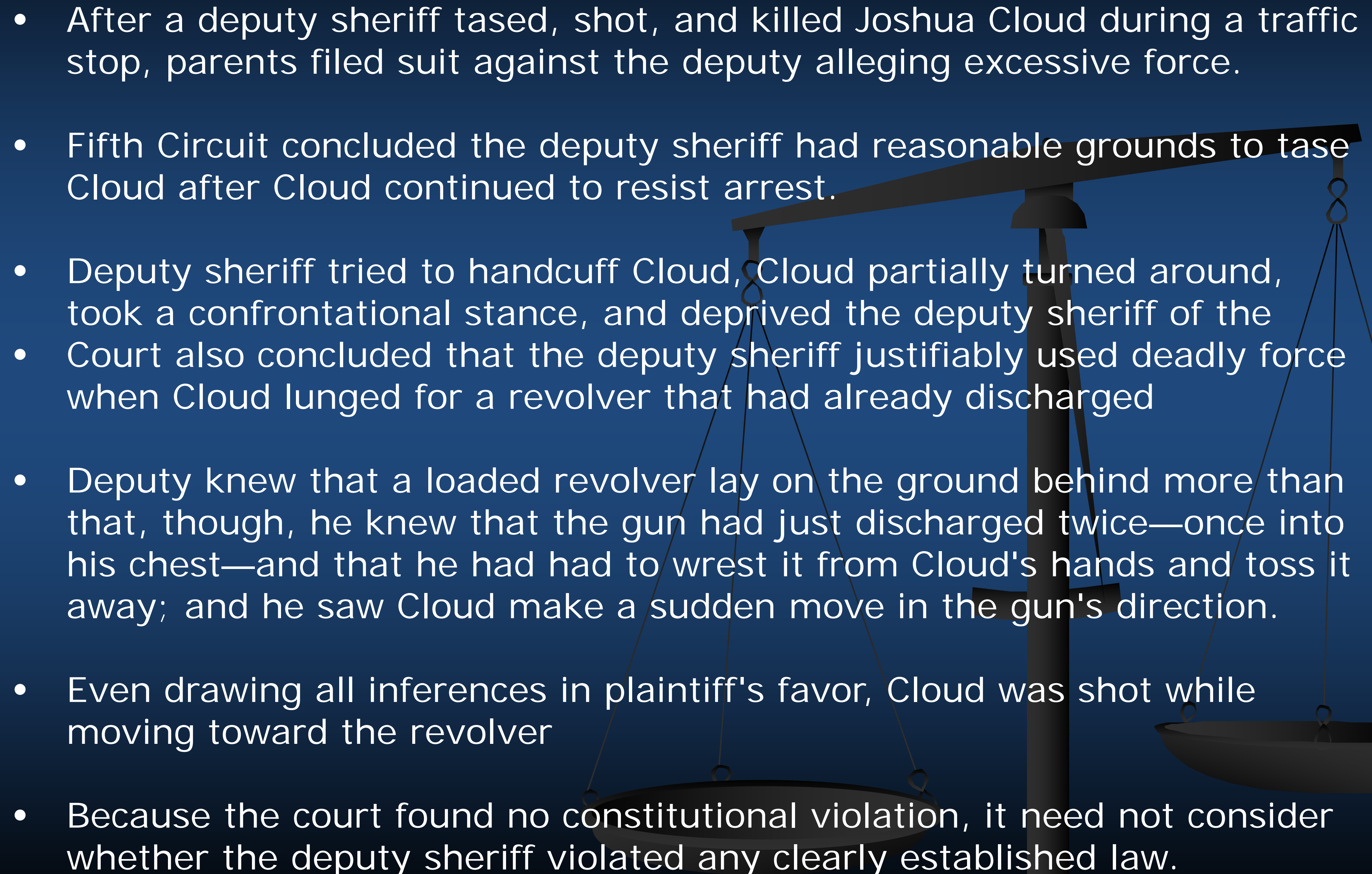
- After following Lange for several blocks, the officer activated his overhead lights, and Lange “failed to yield.” Lange turned into a driveway and drove into a garage. Based on evidence obtained from this interaction, Lange was charged with two Vehicle Code misdemeanors and an infraction.
- Question presented to the Supreme Court was whether the exigent circumstances exception to the 4th Am warrant requirement applies when police are pursuing a suspect whom they believe committed a misdemeanor.
- Court concluded that the pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home.
- Fourth Amendment ordinarily requires a police officer to obtain a warrant to enter a home, an officer may enter a home without a warrant under certain specific circumstances, including exigency.
- Court has recognized exigent circumstances when an officer must act to prevent imminent injury, the destruction of evidence, or a felony suspect’s escape.
- However, that a suspect is fleeing does not categorically create exigency.

United States v. Cooley



- Joshua James Cooley was parked in his pickup truck on the side of a road
- During their exchange, the officer assumed, Cooley did not belong to a Native American tribe. Officer grew suspicious that Cooley was engaged in unlawful activity and detained him to conduct a search of his truck, where he found evidence of methamphetamine.
- Officer called for assistance from county officers because Cooley "seemed to be non-Native."
- Cooley charged with weapons and drug offenses in violation of federal law.Moved to suppress the evidence on the grounds that was acting outside the scope of his jurisdiction as a Crow Tribe law enforcement officer
- Whether a police officer for a Native American tribe can detain and search a non-tribe member within a reservation on suspicion of violating a state or federal law.
-
- Court held a tribal police officer has authority to detain temporarily and to search a non-Indian traveling on a public right-of-way running through a reservation for potential violations of state or federal law..

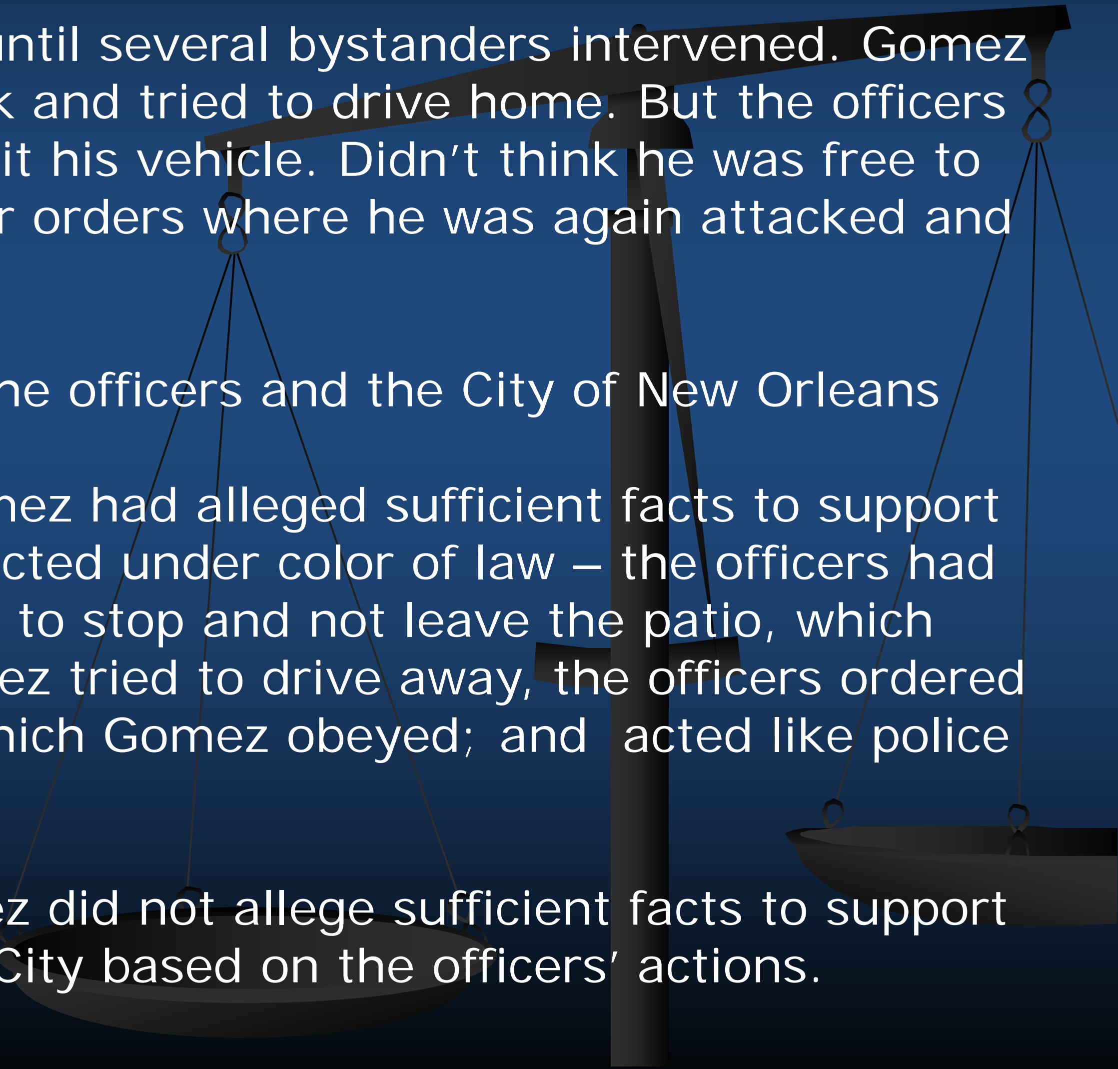
Cloud v. Stone



- After a deputy sheriff tased, shot, and killed Joshua Cloud during a traffic stop, parents filed suit against the deputy alleging excessive force.
- Fifth Circuit concluded the deputy sheriff had reasonable grounds to tase Cloud after Cloud continued to resist arrest.
- Deputy sheriff tried to handcuff Cloud, Cloud partially turned around, took a confrontational stance, and deprived the deputy sheriff of the
- Court also concluded that the deputy sheriff justifiably used deadly force when Cloud lunged for a revolver that had already discharged
- Deputy knew that a loaded revolver lay on the ground behind more than that, though, he knew that the gun had just discharged twice—once into his chest—and that he had had to wrest it from Cloud's hands and toss it away; and he saw Cloud make a sudden move in the gun's direction.
- Even drawing all inferences in plaintiff's favor, Cloud was shot while moving toward the revolver
- Because the court found no constitutional violation, it need not consider whether the deputy sheriff violated any clearly established law.

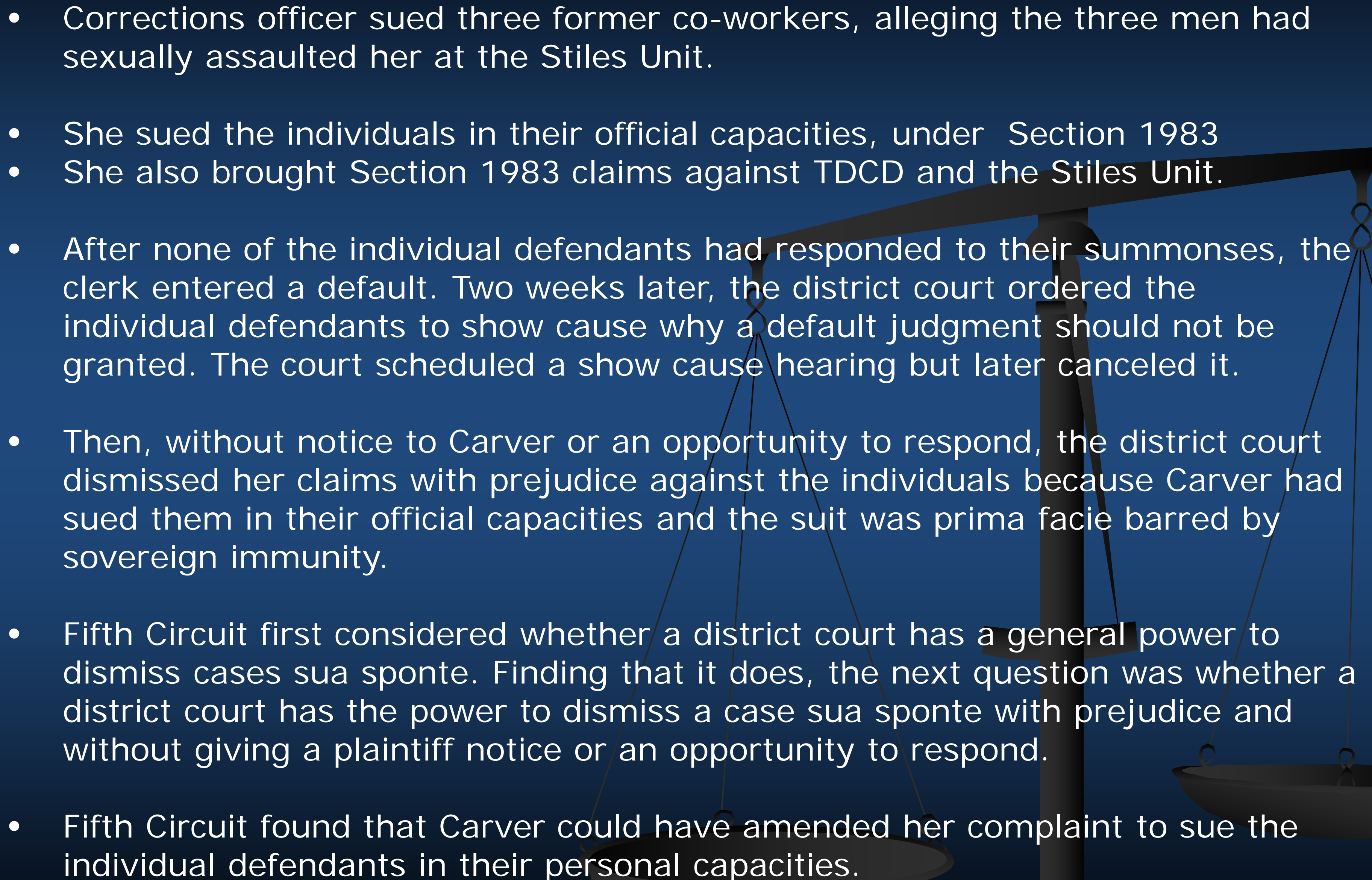
SECTION 1983

Gomez v. Galman



- Off-duty officers, not in uniform, came in and began harassing him. After they stole beret off his head, Gomez followed the pair outside, where one officer ordered Gomez to stop and not leave the patio.
- Officers then beat Gomez until several bystanders intervened. Gomez managed to get to his truck and tried to drive home. But the officers ordered him to stop and exit his vehicle. Didn't think he was free to leave. Gomez followed their orders where he was again attacked and beaten
- Section 1983 suit against the officers and the City of New Orleans
- Fifth Circuit found that Gomez had alleged sufficient facts to support his claim that the officers acted under color of law – the officers had given Gomez a direct order to stop and not leave the patio, which Gomez obeyed; when Gomez tried to drive away, the officers ordered him to stop and get out, which Gomez obeyed; and acted like police officers
- Court concluded that Gomez did not allege sufficient facts to support a Monell claim against the City based on the officers' actions.

Carver v. Atwood



- Corrections officer sued three former co-workers, alleging the three men had sexually assaulted her at the Stiles Unit.

- She sued the individuals in their official capacities, under Section 1983
- She also brought Section 1983 claims against TDCD and the Stiles Unit.

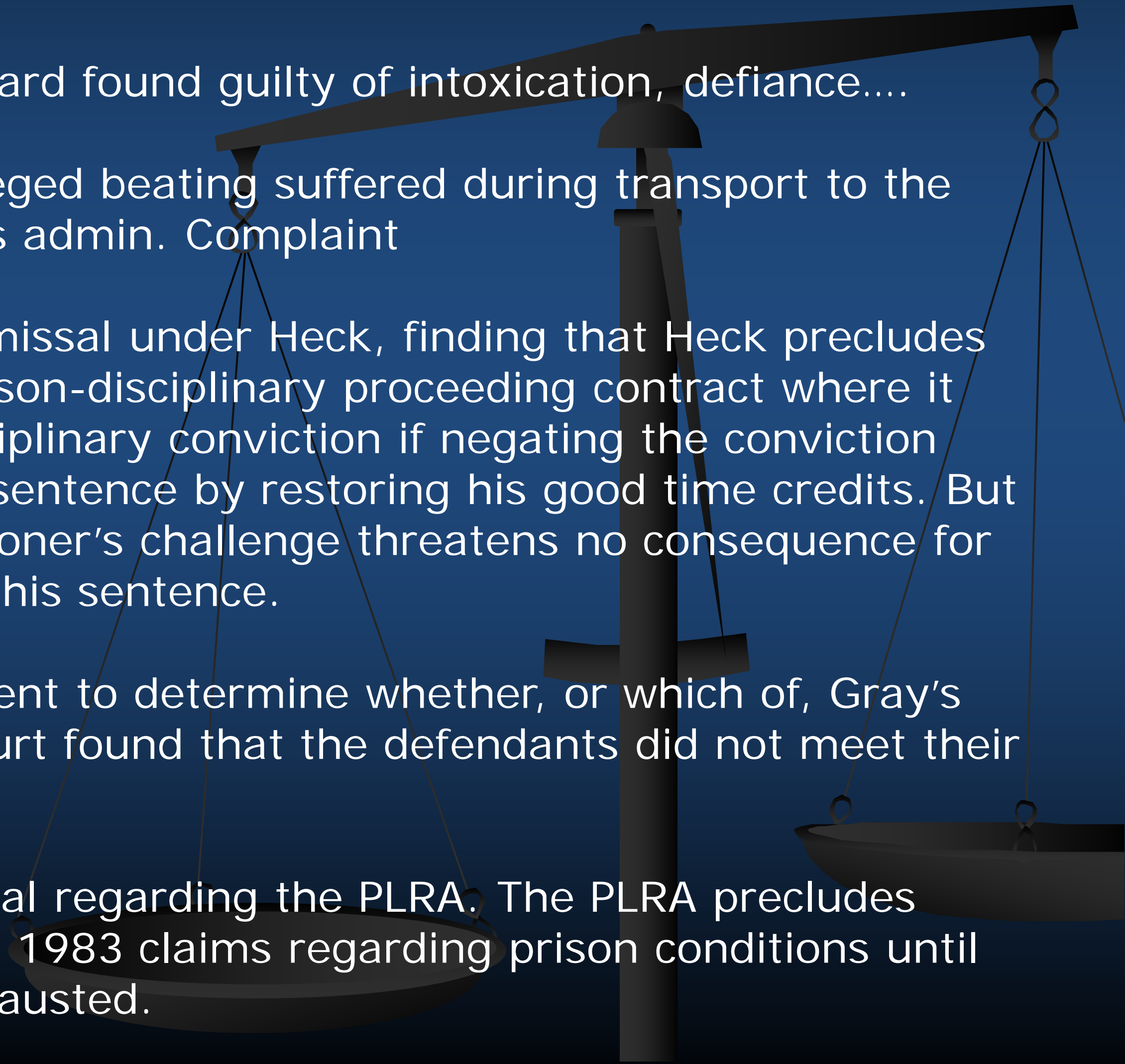
- After none of the individual defendants had responded to their summonses, the clerk entered a default. Two weeks later, the district court ordered the individual defendants to show cause why a default judgment should not be granted. The court scheduled a show cause hearing but later canceled it.

- Then, without notice to Carver or an opportunity to respond, the district court dismissed her claims with prejudice against the individuals because Carver had sued them in their official capacities and the suit was prima facie barred by sovereign immunity.

- Fifth Circuit first considered whether a district court has a general power to dismiss cases sua sponte. Finding that it does, the next question was whether a district court has the power to dismiss a case sua sponte with prejudice and without giving a plaintiff notice or an opportunity to respond.

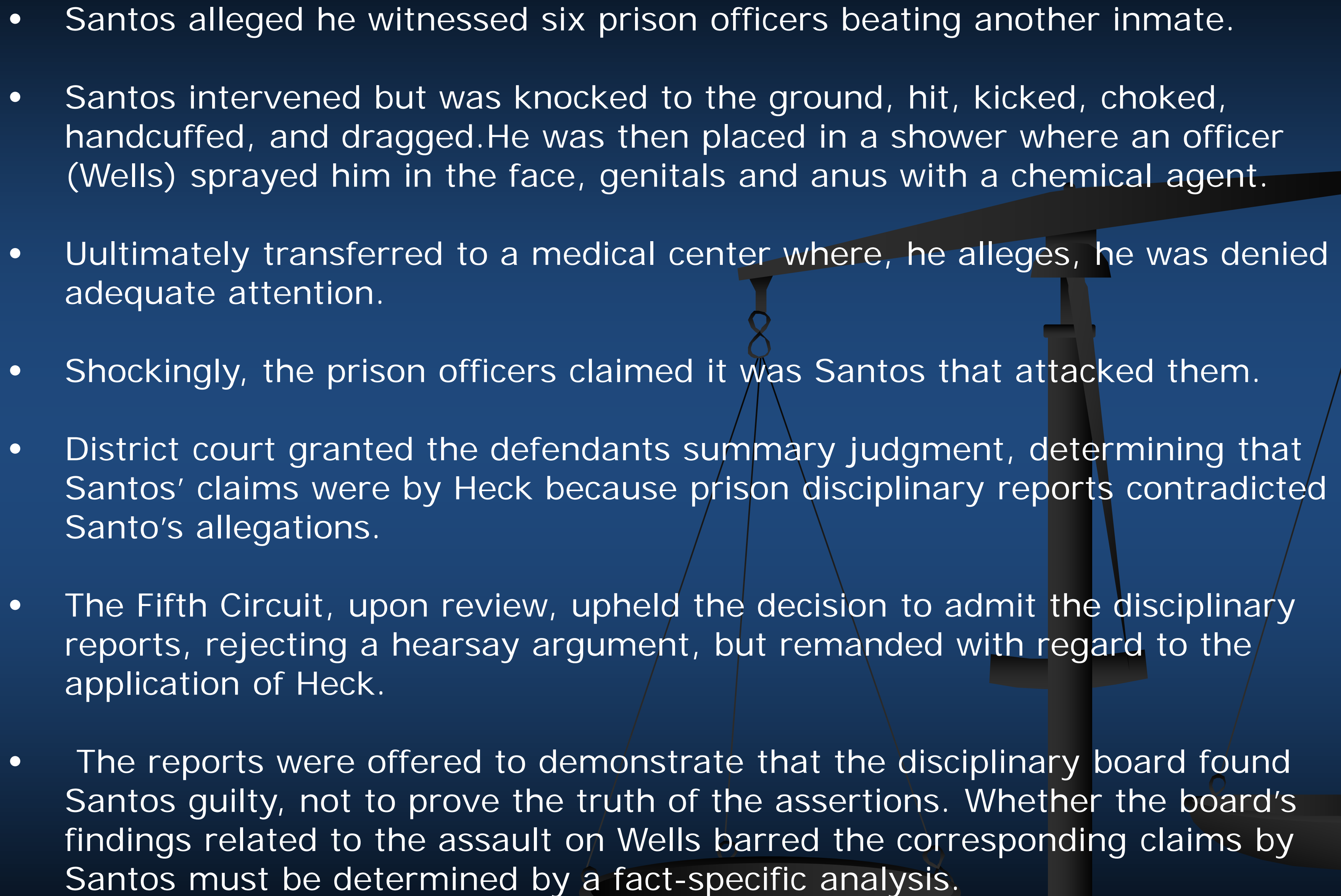
- Fifth Circuit found that Carver could have amended her complaint to sue the individual defendants in their personal capacities.

Gray v. White



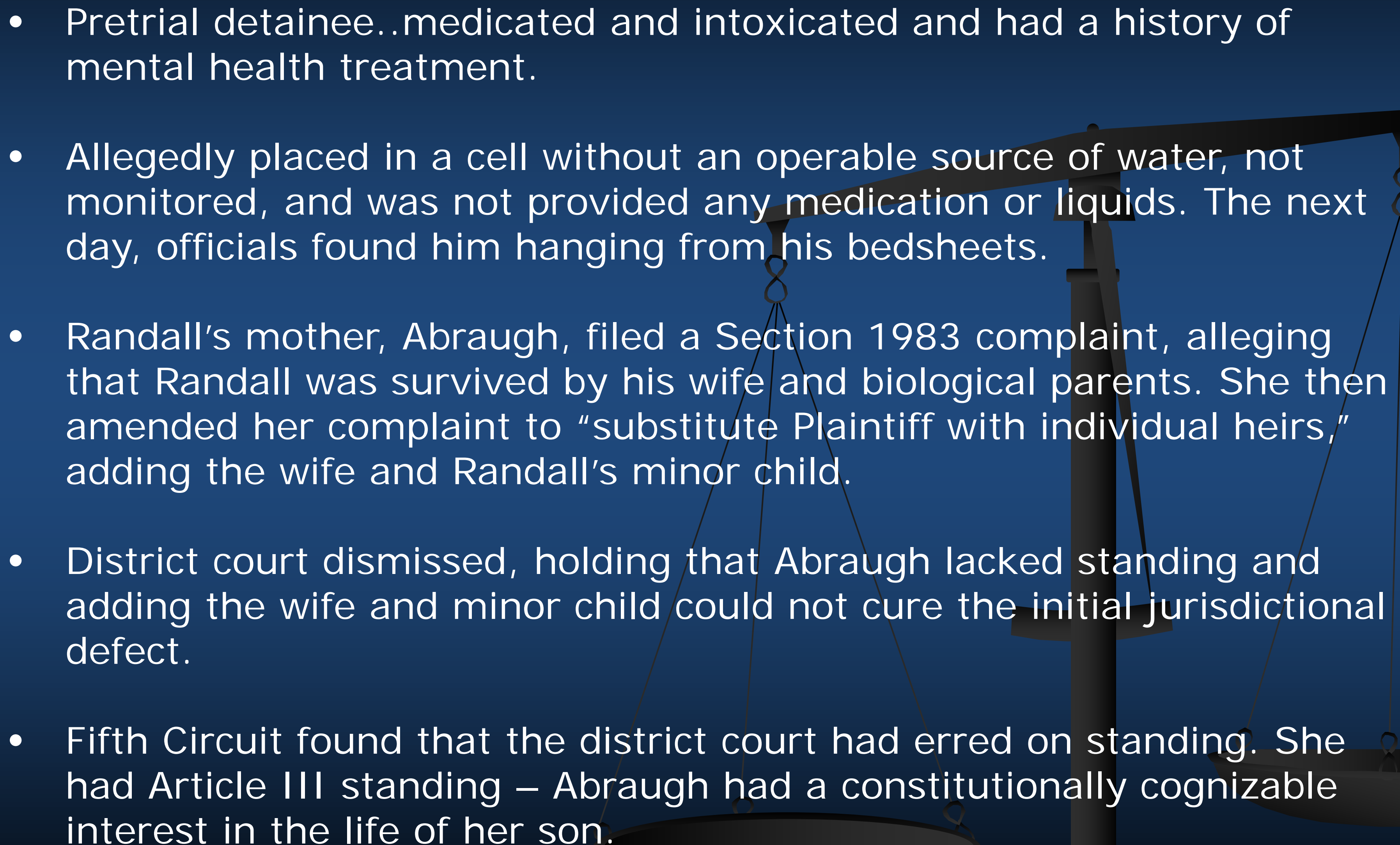
- Gray claims that officers came to his cell and attacked him without provocation
- Allegations were contradicted by the disciplinary reports prepared by the jail officers
- Before the prison disciplinary board found guilty of intoxication, defiance….
- District court found that the alleged beating suffered during transport to the showers was not raised in Gray's admin. Complaint
- Fifth Circuit reversed on the dismissal under Heck, finding that Heck precludes Section 1983 litigation in the prison-disciplinary proceeding contract where it would negate the prisoner's disciplinary conviction if negating the conviction would affect the duration of his sentence by restoring his good time credits. But Heck is not implicated if the prisoner's challenge threatens no consequence for his conviction or the duration of his sentence.
- Because the record was insufficient to determine whether, or which of, Gray's claims were barred by Heck, Court found that the defendants did not meet their burden
- Fifth Circuit affirmed the dismissal regarding the PLRA. The PLRA precludes prisoners from asserting Section 1983 claims regarding prison conditions until administrative remedies are exhausted.

Santos v. White



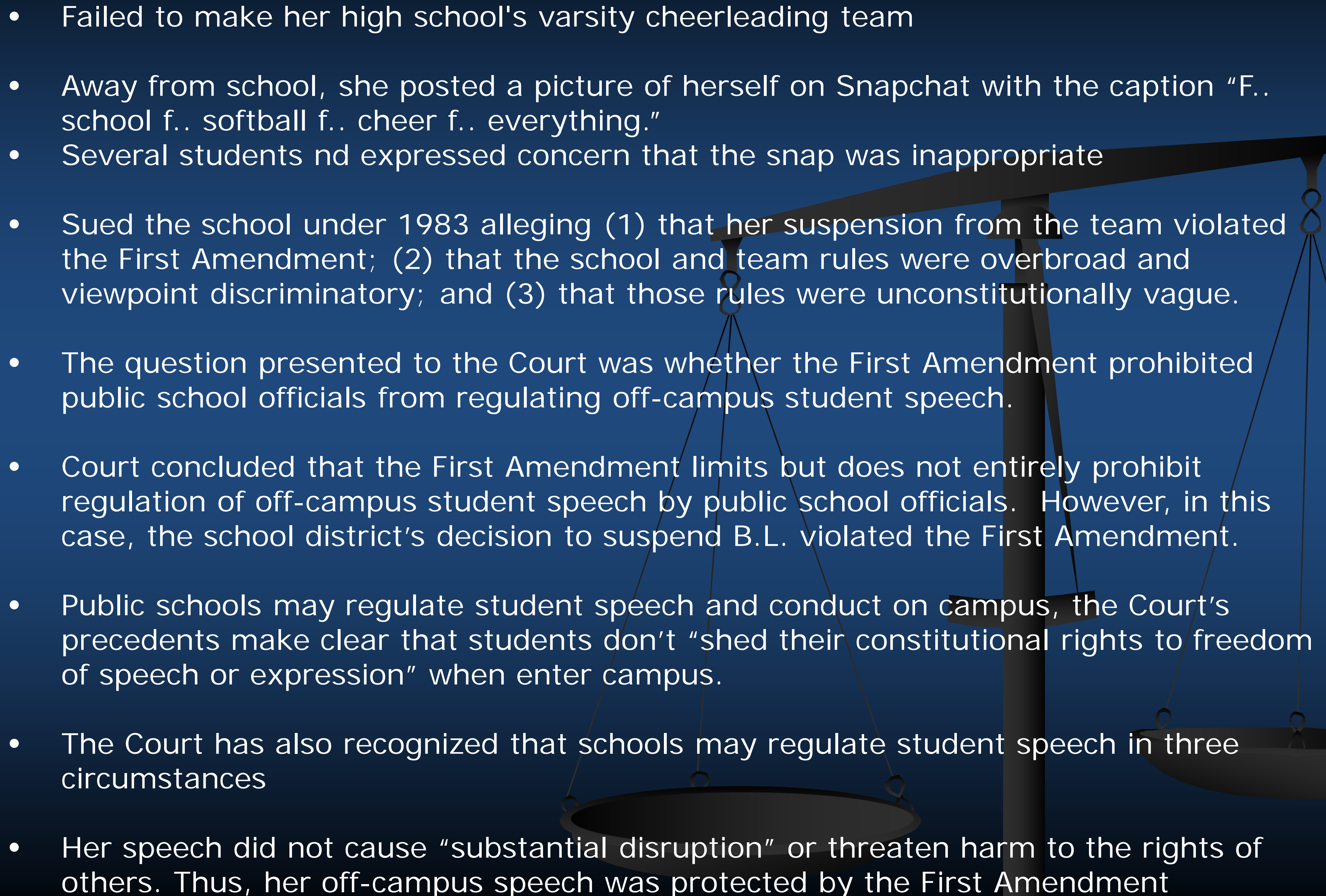
- Santos alleged he witnessed six prison officers beating another inmate.
- Santos intervened but was knocked to the ground, hit, kicked, choked, handcuffed, and dragged.He was then placed in a shower where an officer (Wells) sprayed him in the face, genitals and anus with a chemical agent.
- Uultimately transferred to a medical center where, he alleges, he was denied adequate attention.
- Shockingly, the prison officers claimed it was Santos that attacked them.
- District court granted the defendants summary judgment, determining that Santos' claims were by Heck because prison disciplinary reports contradicted Santo's allegations.
- The Fifth Circuit, upon review, upheld the decision to admit the disciplinary reports, rejecting a hearsay argument, but remanded with regard to the application of Heck.
- The reports were offered to demonstrate that the disciplinary board found Santos guilty, not to prove the truth of the assertions. Whether the board's findings related to the assault on Wells barred the corresponding claims by Santos must be determined by a fact-specific analysis.

Abraugh v. Altimus



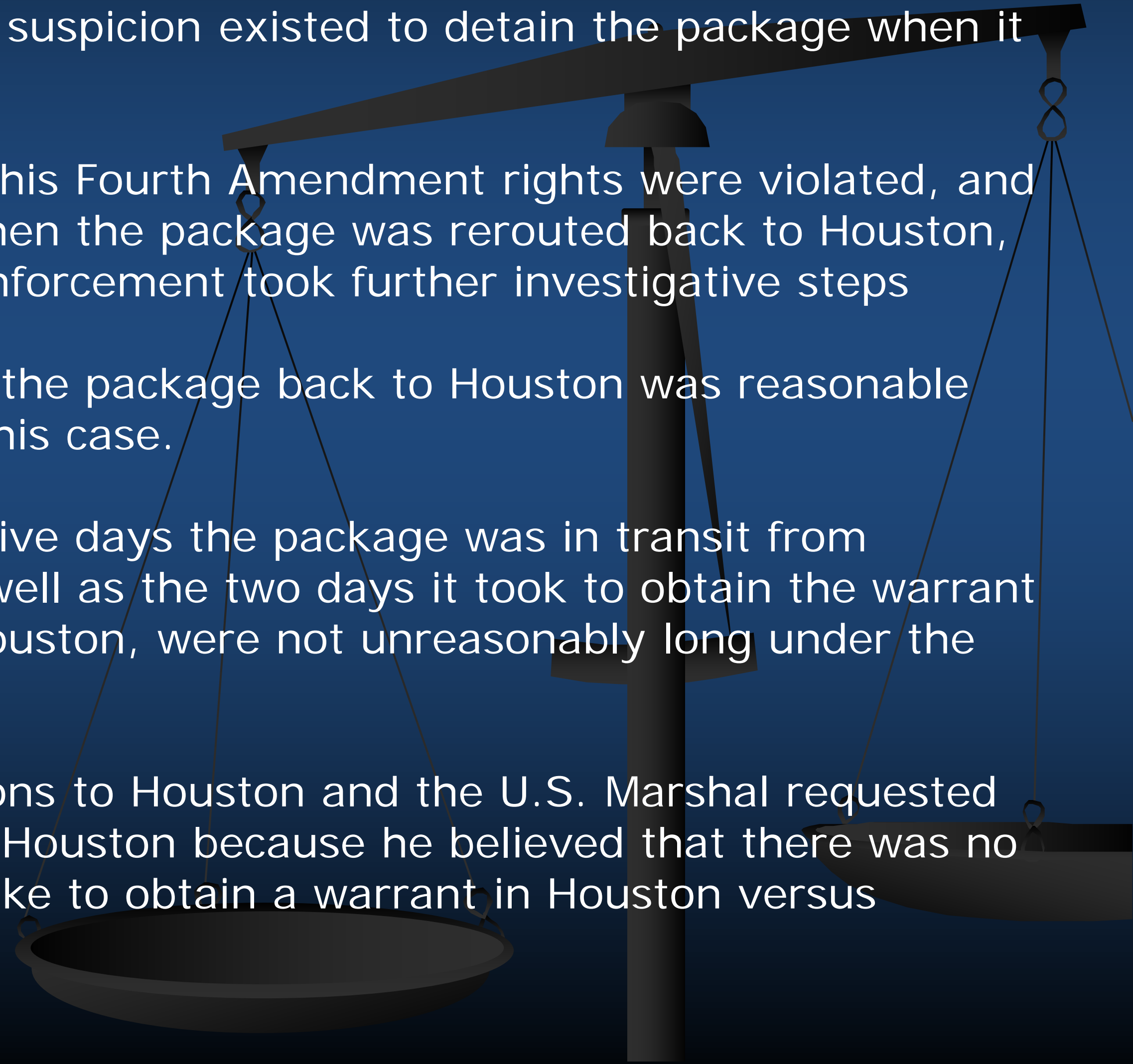
- Pretrial detainee..medicated and intoxicated and had a history of mental health treatment.
- Allegedly placed in a cell without an operable source of water, not monitored, and was not provided any medication or liquids. The next day, officials found him hanging from his bedsheets.
- Randall's mother, Abraugh, filed a Section 1983 complaint, alleging that Randall was survived by his wife and biological parents. She then amended her complaint to "substitute Plaintiff with individual heirs," adding the wife and Randall's minor child.
- District court dismissed, holding that Abraugh lacked standing and adding the wife and minor child could not cure the initial jurisdictional defect.
- Fifth Circuit found that the district court had erred on standing. She had Article III standing – Abraugh had a constitutionally cognizable interest in the life of her son.

Mahoney Area School District v. B.L.



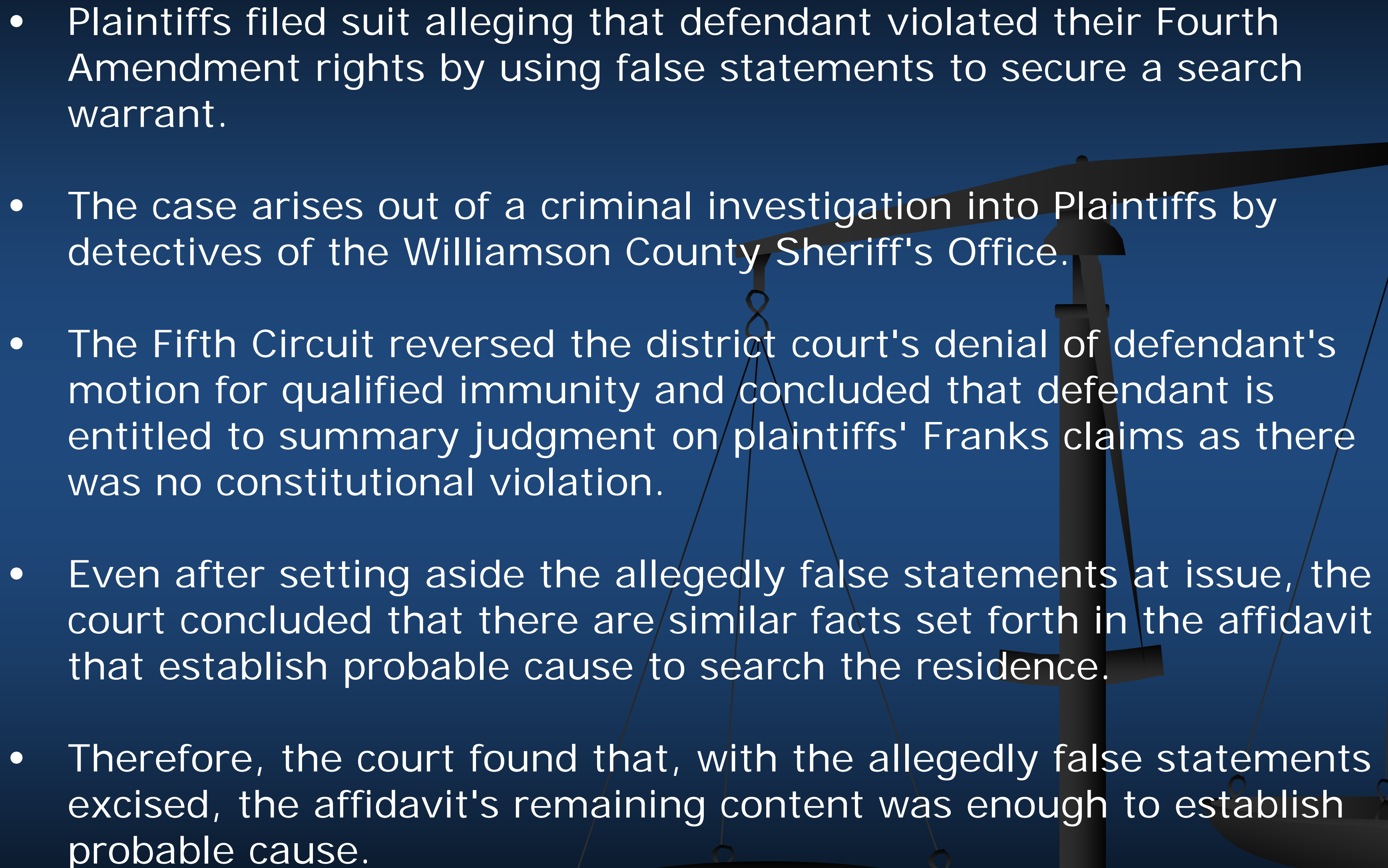
- Failed to make her high school's varsity cheerleading team
- Away from school, she posted a picture of herself on Snapchat with the caption "F.. school f.. softball f.. cheer f.. everything."
- Several students nd expressed concern that the snap was inappropriate
- Sued the school under 1983 alleging (1) that her suspension from the team violated the First Amendment; (2) that the school and team rules were overbroad and viewpoint discriminatory; and (3) that those rules were unconstitutionally vague.
- The question presented to the Court was whether the First Amendment prohibited public school officials from regulating off-campus student speech.
- Court concluded that the First Amendment limits but does not entirely prohibit regulation of off-campus student speech by public school officials. However, in this case, the school district's decision to suspend B.L. violated the First Amendment.
- Public schools may regulate student speech and conduct on campus, the Court's precedents make clear that students don't "shed their constitutional rights to freedom of speech or expression" when enter campus.
- The Court has also recognized that schools may regulate student speech in three circumstances
- Her speech did not cause "substantial disruption" or threaten harm to the rights of others. Thus, her off-campus speech was protected by the First Amendment

United States v. Beard



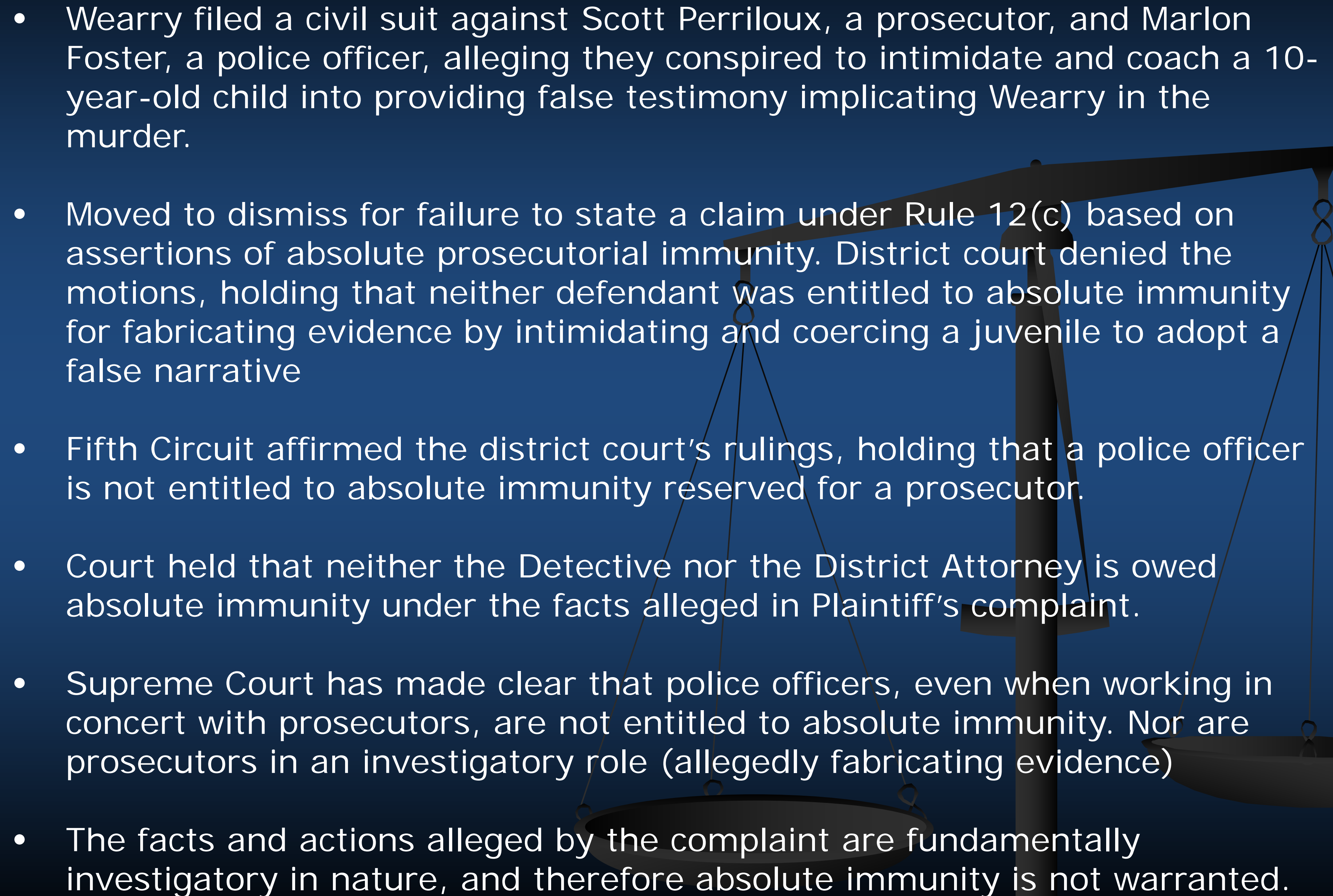
- Denial of defendant's motion to suppress drugs found in a package he mailed via the United States Postal Service from Texas to Louisiana.
- Did not dispute that reasonable suspicion existed to detain the package when it arrived in Hammond, Louisiana.
- Defendant argued, though, that his Fourth Amendment rights were violated, and an unlawful seizure occurred, when the package was rerouted back to Houston, which took 5 days, before law enforcement took further investigative steps
- U.S. Marshal's choice to reroute the package back to Houston was reasonable and prudent under the facts of this case.
- The court also agreed that the five days the package was in transit from Hammond back to Houston, as well as the two days it took to obtain the warrant after the package returned to Houston, were not unreasonably long under the circumstances
- Package had extensive connections to Houston and the U.S. Marshal requested that the package be rerouted to Houston because he believed that there was no difference in the time it would take to obtain a warrant in Houston versus Louisiana.

Davis v. Hodgkiss



- Plaintiffs filed suit alleging that defendant violated their Fourth Amendment rights by using false statements to secure a search warrant.
- The case arises out of a criminal investigation into Plaintiffs by detectives of the Williamson County Sheriff's Office.
- The Fifth Circuit reversed the district court's denial of defendant's motion for qualified immunity and concluded that defendant is entitled to summary judgment on plaintiffs' Franks claims as there was no constitutional violation.
- Even after setting aside the allegedly false statements at issue, the court concluded that there are similar facts set forth in the affidavit that establish probable cause to search the residence.
- Therefore, the court found that, with the allegedly false statements excised, the affidavit's remaining content was enough to establish probable cause.

Wearry v. Foster



- Wearry filed a civil suit against Scott Perriloux, a prosecutor, and Marlon Foster, a police officer, alleging they conspired to intimidate and coach a 10-year-old child into providing false testimony implicating Wearry in the murder.

- Moved to dismiss for failure to state a claim under Rule 12(c) based on assertions of absolute prosecutorial immunity. District court denied the motions, holding that neither defendant was entitled to absolute immunity for fabricating evidence by intimidating and coercing a juvenile to adopt a false narrative

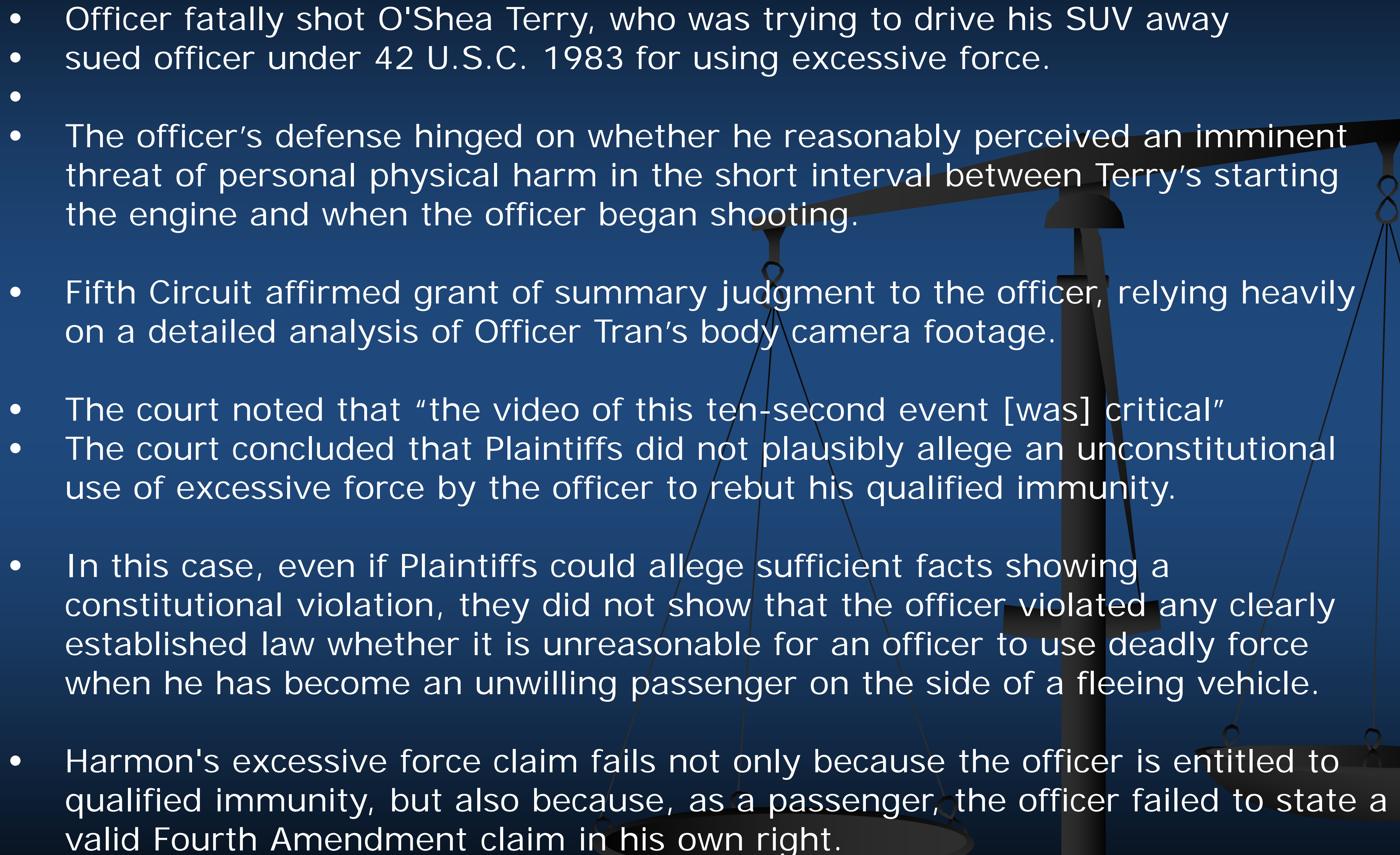
- Fifth Circuit affirmed the district court's rulings, holding that a police officer is not entitled to absolute immunity reserved for a prosecutor.

- Court held that neither the Detective nor the District Attorney is owed absolute immunity under the facts alleged in Plaintiff's complaint.

- Supreme Court has made clear that police officers, even when working in concert with prosecutors, are not entitled to absolute immunity. Nor are prosecutors in an investigatory role (allegedly fabricating evidence)

- The facts and actions alleged by the complaint are fundamentally investigatory in nature, and therefore absolute immunity is not warranted.

Harmon v. City of Arlington



- Officer fatally shot O'Shea Terry, who was trying to drive his SUV away
- sued officer under 42 U.S.C. 1983 for using excessive force.
-
- The officer's defense hinged on whether he reasonably perceived an imminent threat of personal physical harm in the short interval between Terry's starting the engine and when the officer began shooting.

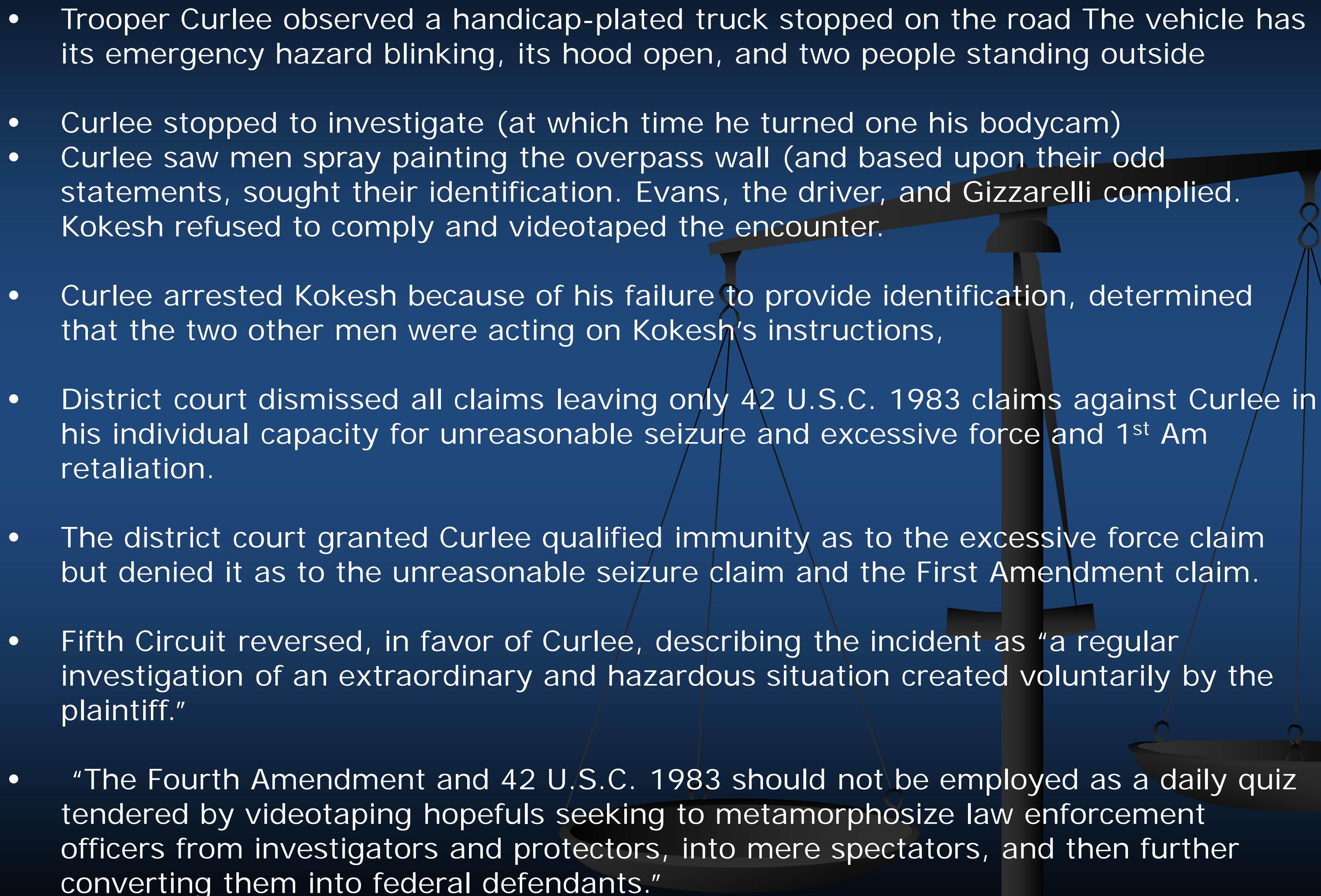
- Fifth Circuit affirmed grant of summary judgment to the officer, relying heavily on a detailed analysis of Officer Tran's body camera footage.

- The court noted that "the video of this ten-second event [was] critical"
- The court concluded that Plaintiffs did not plausibly allege an unconstitutional use of excessive force by the officer to rebut his qualified immunity.

- In this case, even if Plaintiffs could allege sufficient facts showing a constitutional violation, they did not show that the officer violated any clearly established law whether it is unreasonable for an officer to use deadly force when he has become an unwilling passenger on the side of a fleeing vehicle.

- Harmon's excessive force claim fails not only because the officer is entitled to qualified immunity, but also because, as a passenger, the officer failed to state a valid Fourth Amendment claim in his own right.

Kokesh v. Curlee



- Trooper Curlee observed a handicap-plated truck stopped on the road The vehicle has its emergency hazard blinking, its hood open, and two people standing outside

- Curlee stopped to investigate (at which time he turned one his bodycam)
- Curlee saw men spray painting the overpass wall (and based upon their odd statements, sought their identification. Evans, the driver, and Gizzarelli complied. Kokesh refused to comply and videotaped the encounter.

- Curlee arrested Kokesh because of his failure to provide identification, determined that the two other men were acting on Kokesh's instructions,

- District court dismissed all claims leaving only 42 U.S.C. 1983 claims against Curlee in his individual capacity for unreasonable seizure and excessive force and 1st Am retaliation.

- The district court granted Curlee qualified immunity as to the excessive force claim but denied it as to the unreasonable seizure claim and the First Amendment claim.

- Fifth Circuit reversed, in favor of Curlee, describing the incident as "a regular investigation of an extraordinary and hazardous situation created voluntarily by the plaintiff."

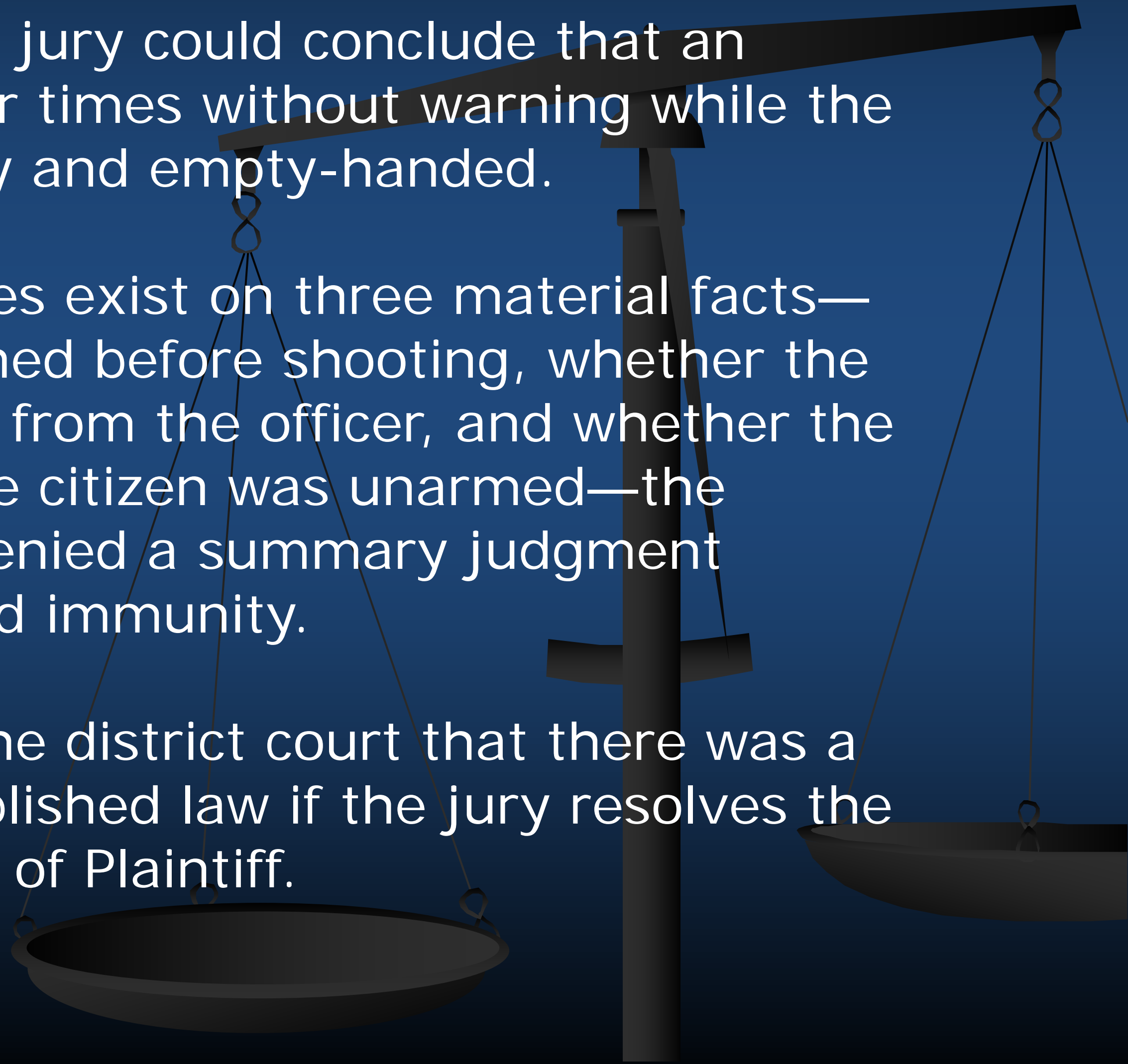
- "The Fourth Amendment and 42 U.S.C. 1983 should not be employed as a daily quiz tendered by videotaping hopefuls seeking to metamorphosize law enforcement officers from investigators and protectors, into mere spectators, and then further converting them into federal defendants."

Poole v. City of Shreveport

- Fifth Circuit affirmed the district court's denial of summary judgment in an excessive force case where the district court held that a jury could conclude that an officer shot a citizen four times without warning while the citizen was turning away and empty-handed.

- Because genuine disputes exist on three material facts—whether the officer warned before shooting, whether the citizen had turned away from the officer, and whether the officer could see that the citizen was unarmed—the district court properly denied a summary judgment motion invoking qualified immunity.

- The court agreed with the district court that there was a violation of clearly established law if the jury resolves the factual disputes in favor of Plaintiff.



Spikes v. McVea

- Former inmate, filed suit against nurses and his Dr. under 42 U.S.C. 1983, alleging they were deliberately indifferent to his medical needs in violation of the Eighth Amendment.

- Fifth Circuit concluded that Plaintiff had introduced evidence showing that officials knowingly furnished treatment unresponsive to his need.

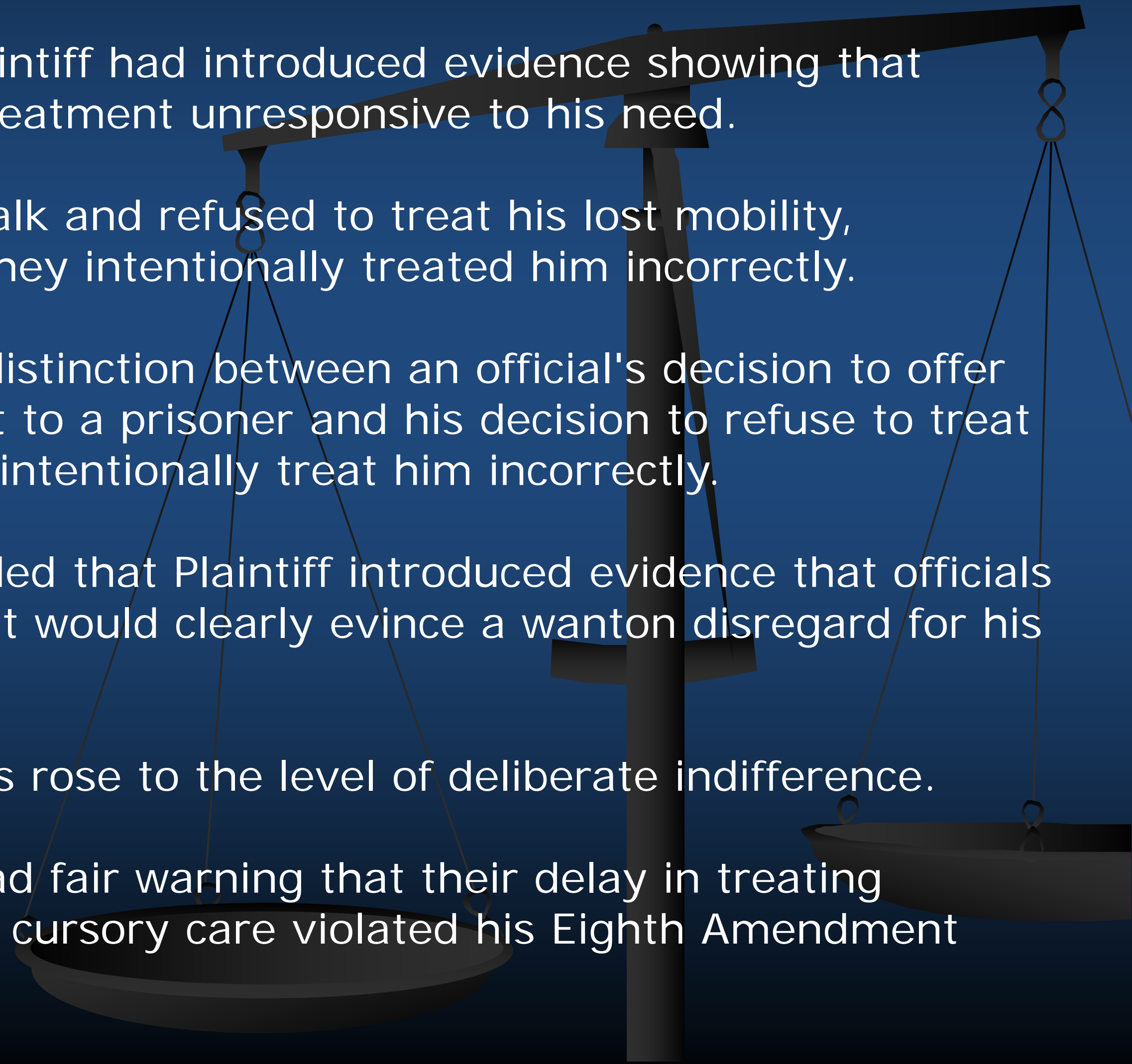
- They ignored his inability to walk and refused to treat his lost mobility, permitting the inference that they intentionally treated him incorrectly.

- The court saw no meaningful distinction between an official's decision to offer plainly unresponsive treatment to a prisoner and his decision to refuse to treat him, ignore his complaints, or intentionally treat him incorrectly.

- At minimum, the court concluded that Plaintiff introduced evidence that officials engaged in similar conduct that would clearly evince a wanton disregard for his serious medical need.

- Court determined these actions rose to the level of deliberate indifference.

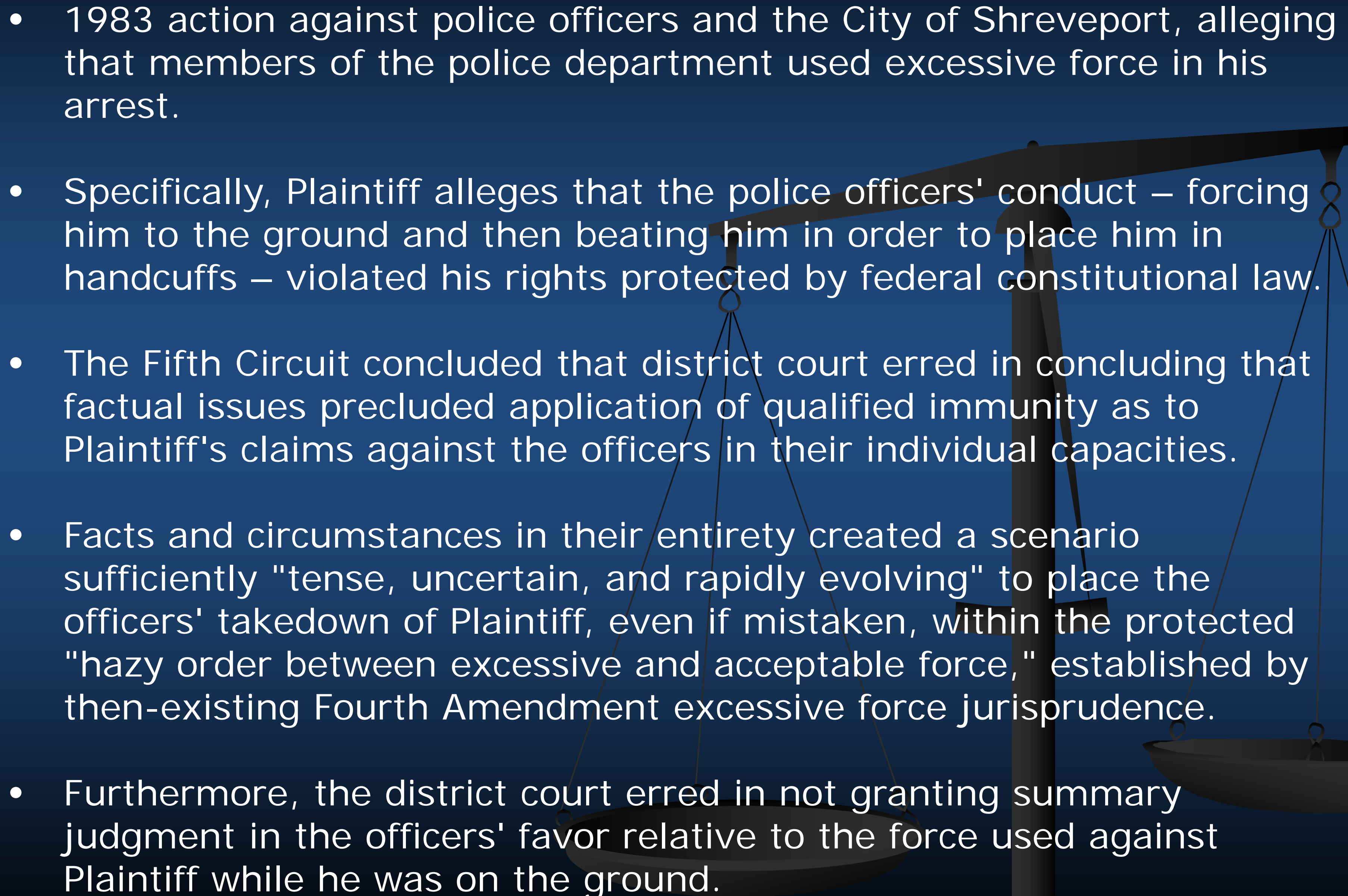
- Court concluded defendants had fair warning that their delay in treating Plaintiff's fractured hip beyond cursory care violated his Eighth Amendment



Prim v. Deputy Stein

- Attended a concert at the Pavilion after consuming wine during the concert
- After the concert, Janet, who suffers from MS, was "stumbling" and unstable.
- Noticed that Eric had difficulty standing and had slurred speech. Eric admitted that he had been drinking. Eric twice failed a horizontal gaze nystagmus test.
- The Prims insisted on walking home, but they would have had to cross two busy intersections in the dark. Stein arrested them for public intoxication.
- Alleged violated their rights under the ADA and Rehabilitation Act. Also asserted false imprisonment, assault, negligence, gross negligence, and intentional infliction of emotional distress claims
-
- Janet claimed that she was assaulted when forced into a wheelchair
- Eric -employee assaulted him by grabbing his arm while walked to security office.
- Fifth Circuit reversed with respect to Eric's assault claim but affirmed as to Janet's assault claim and both false imprisonment claims.
- Officers were entitled to qualified immunity on the section 1983 claims.
- Given their apparent intoxication and their route home, the officers reasonably concluded that the Prims posed a danger to themselves or others.
- ADA and Rehabilitation Act, the court noted Pavilion is a private entity
- Janet was not discriminated against based on her disability

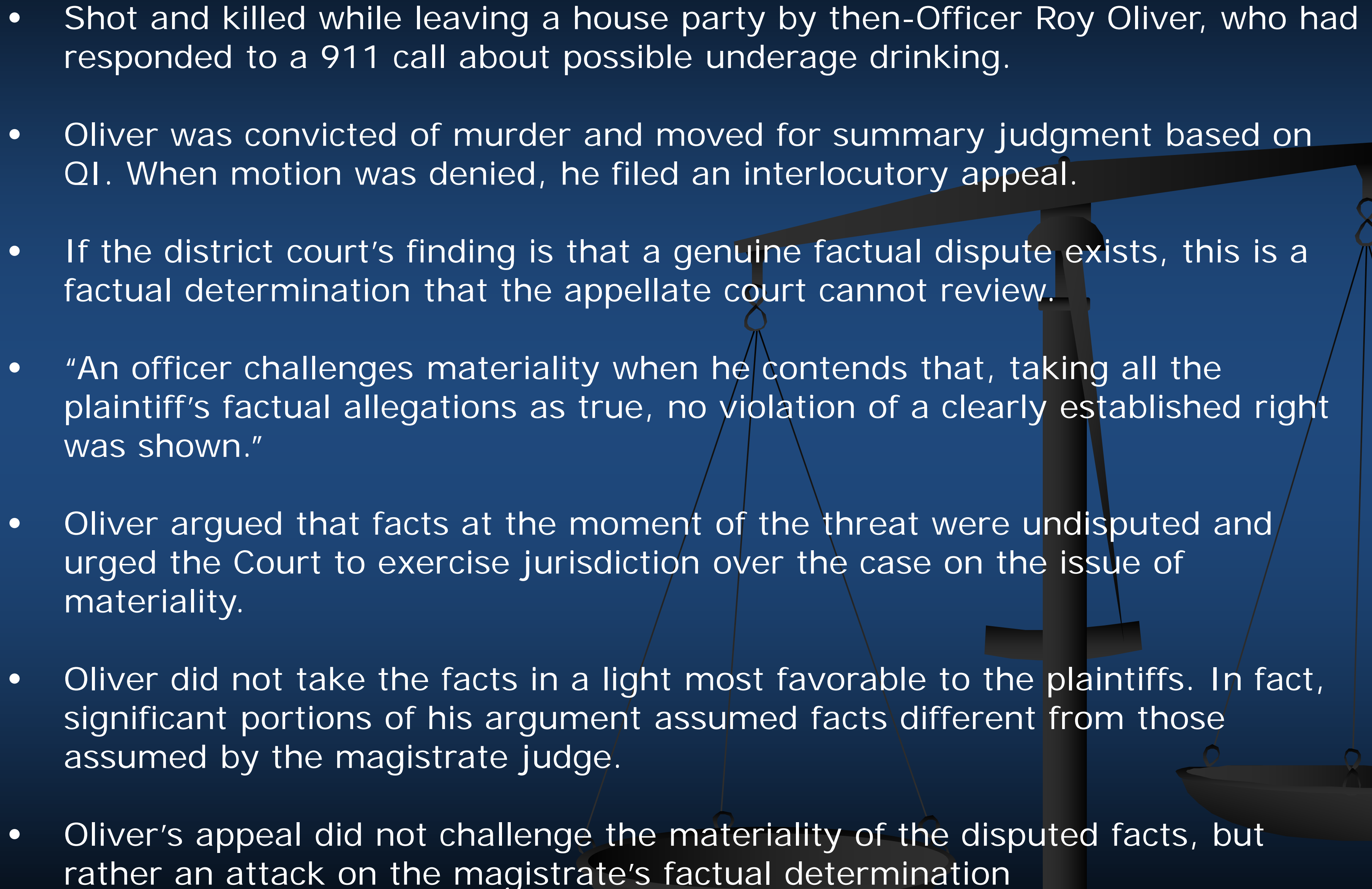
Tucker v. City of Shreveport



- 1983 action against police officers and the City of Shreveport, alleging that members of the police department used excessive force in his arrest.
- Specifically, Plaintiff alleges that the police officers' conduct – forcing him to the ground and then beating him in order to place him in handcuffs – violated his rights protected by federal constitutional law.
- The Fifth Circuit concluded that district court erred in concluding that factual issues precluded application of qualified immunity as to Plaintiff's claims against the officers in their individual capacities.
- Facts and circumstances in their entirety created a scenario sufficiently "tense, uncertain, and rapidly evolving" to place the officers' takedown of Plaintiff, even if mistaken, within the protected "hazy order between excessive and acceptable force," established by then-existing Fourth Amendment excessive force jurisprudence.
- Furthermore, the district court erred in not granting summary judgment in the officers' favor relative to the force used against Plaintiff while he was on the ground.

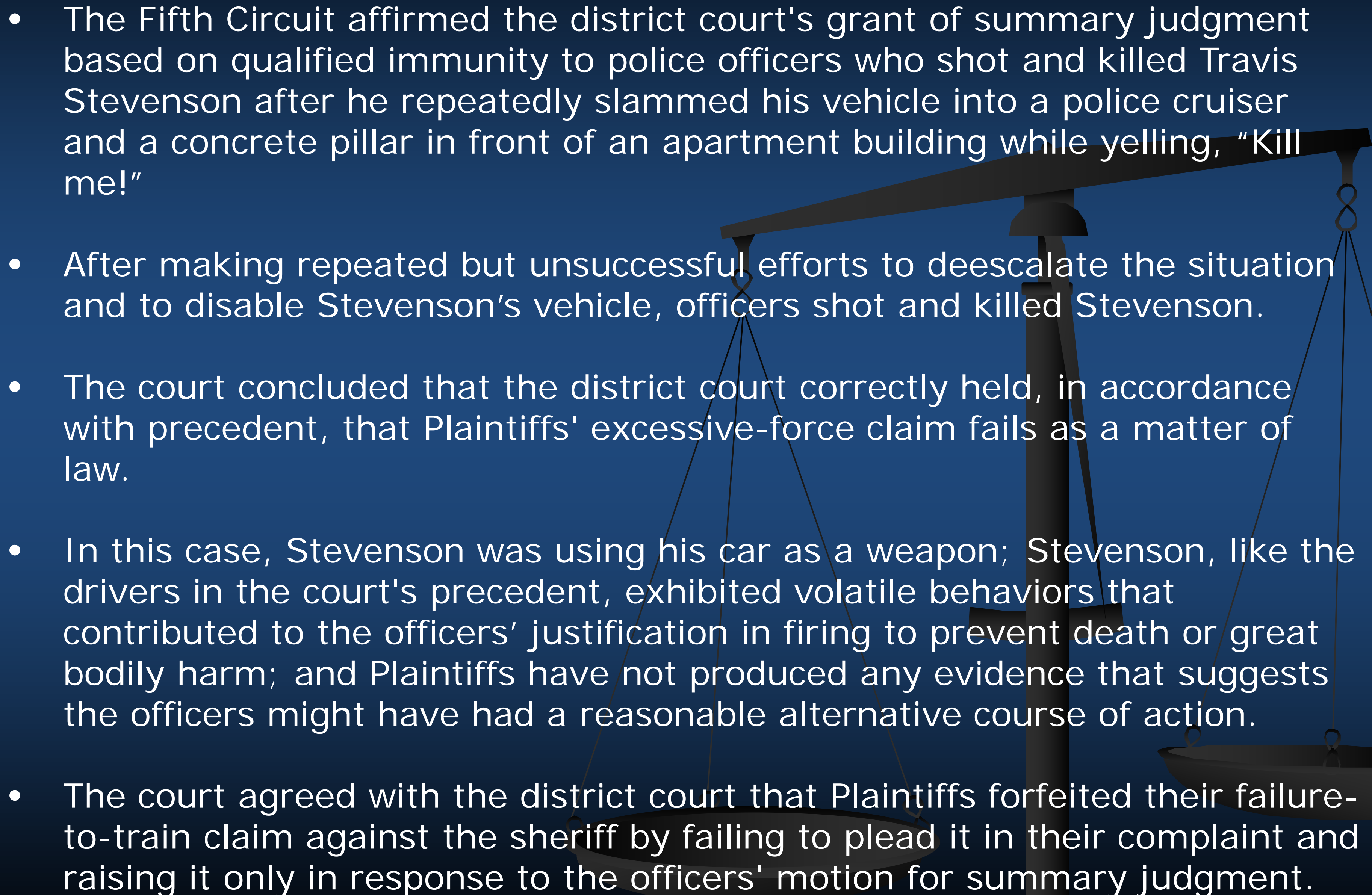
QUALIFIED IMMUNITY

Edwards v. Oliver



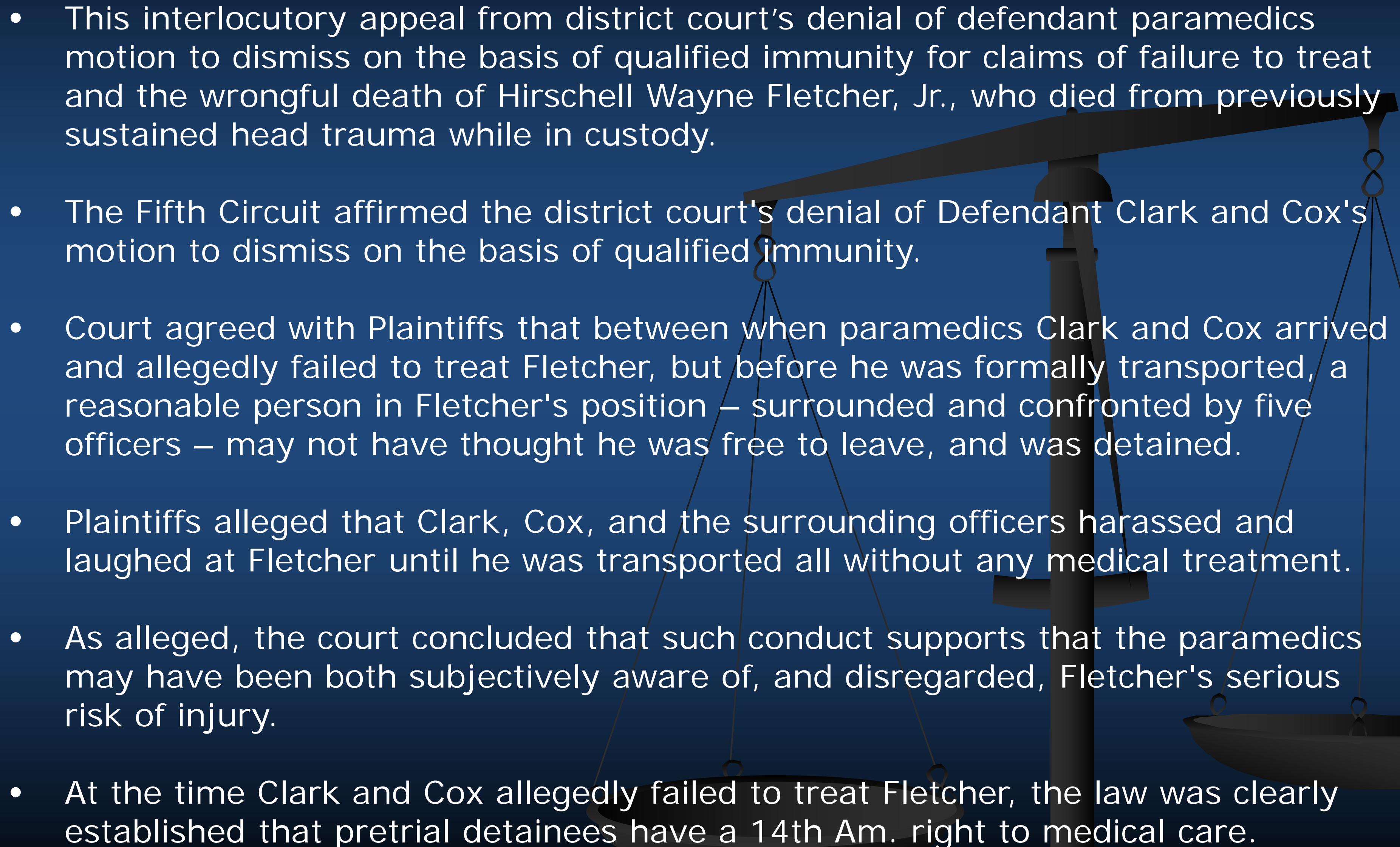
- Shot and killed while leaving a house party by then-Officer Roy Oliver, who had responded to a 911 call about possible underage drinking.
- Oliver was convicted of murder and moved for summary judgment based on QI. When motion was denied, he filed an interlocutory appeal.
- If the district court's finding is that a genuine factual dispute exists, this is a factual determination that the appellate court cannot review.
- "An officer challenges materiality when he contends that, taking all the plaintiff's factual allegations as true, no violation of a clearly established right was shown."
- Oliver argued that facts at the moment of the threat were undisputed and urged the Court to exercise jurisdiction over the case on the issue of materiality.
- Oliver did not take the facts in a light most favorable to the plaintiffs. In fact, significant portions of his argument assumed facts different from those assumed by the magistrate judge.
- Oliver's appeal did not challenge the materiality of the disputed facts, but rather an attack on the magistrate's factual determination

Jackson v. Gautreaux



- The Fifth Circuit affirmed the district court's grant of summary judgment based on qualified immunity to police officers who shot and killed Travis Stevenson after he repeatedly slammed his vehicle into a police cruiser and a concrete pillar in front of an apartment building while yelling, “Kill me!”
- After making repeated but unsuccessful efforts to deescalate the situation and to disable Stevenson’s vehicle, officers shot and killed Stevenson.
- The court concluded that the district court correctly held, in accordance with precedent, that Plaintiffs' excessive-force claim fails as a matter of law.
- In this case, Stevenson was using his car as a weapon; Stevenson, like the drivers in the court's precedent, exhibited volatile behaviors that contributed to the officers’ justification in firing to prevent death or great bodily harm; and Plaintiffs have not produced any evidence that suggests the officers might have had a reasonable alternative course of action.
- The court agreed with the district court that Plaintiffs forfeited their failure-to-train claim against the sheriff by failing to plead it in their complaint and raising it only in response to the officers' motion for summary judgment.

Kelson v. Clark



- This interlocutory appeal from district court's denial of defendant paramedics motion to dismiss on the basis of qualified immunity for claims of failure to treat and the wrongful death of Hirschell Wayne Fletcher, Jr., who died from previously sustained head trauma while in custody.

- The Fifth Circuit affirmed the district court's denial of Defendant Clark and Cox's motion to dismiss on the basis of qualified immunity.

- Court agreed with Plaintiffs that between when paramedics Clark and Cox arrived and allegedly failed to treat Fletcher, but before he was formally transported, a reasonable person in Fletcher's position – surrounded and confronted by five officers – may not have thought he was free to leave, and was detained.

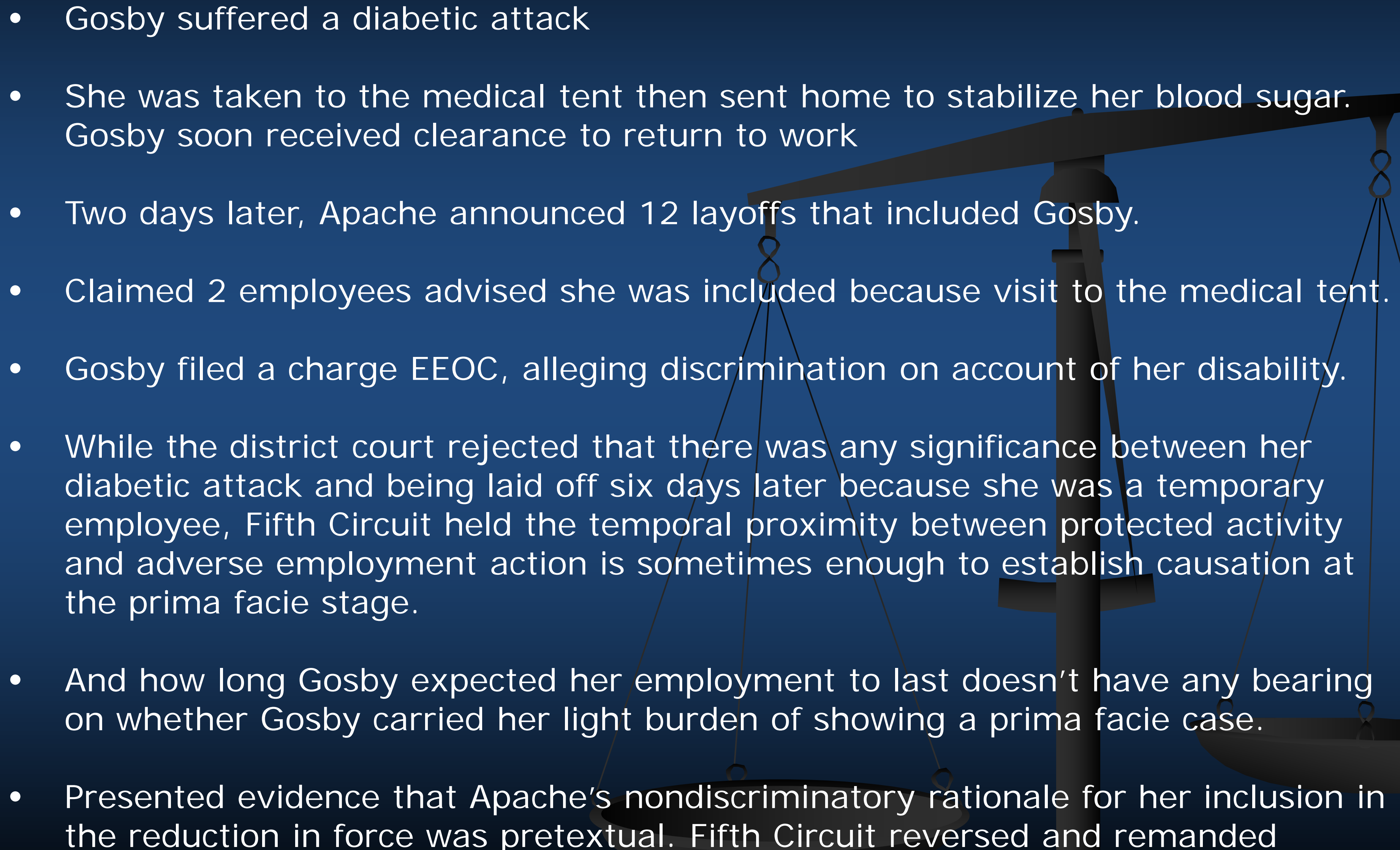
- Plaintiffs alleged that Clark, Cox, and the surrounding officers harassed and laughed at Fletcher until he was transported all without any medical treatment.

- As alleged, the court concluded that such conduct supports that the paramedics may have been both subjectively aware of, and disregarded, Fletcher's serious risk of injury.

- At the time Clark and Cox allegedly failed to treat Fletcher, the law was clearly established that pretrial detainees have a 14th Am. right to medical care.

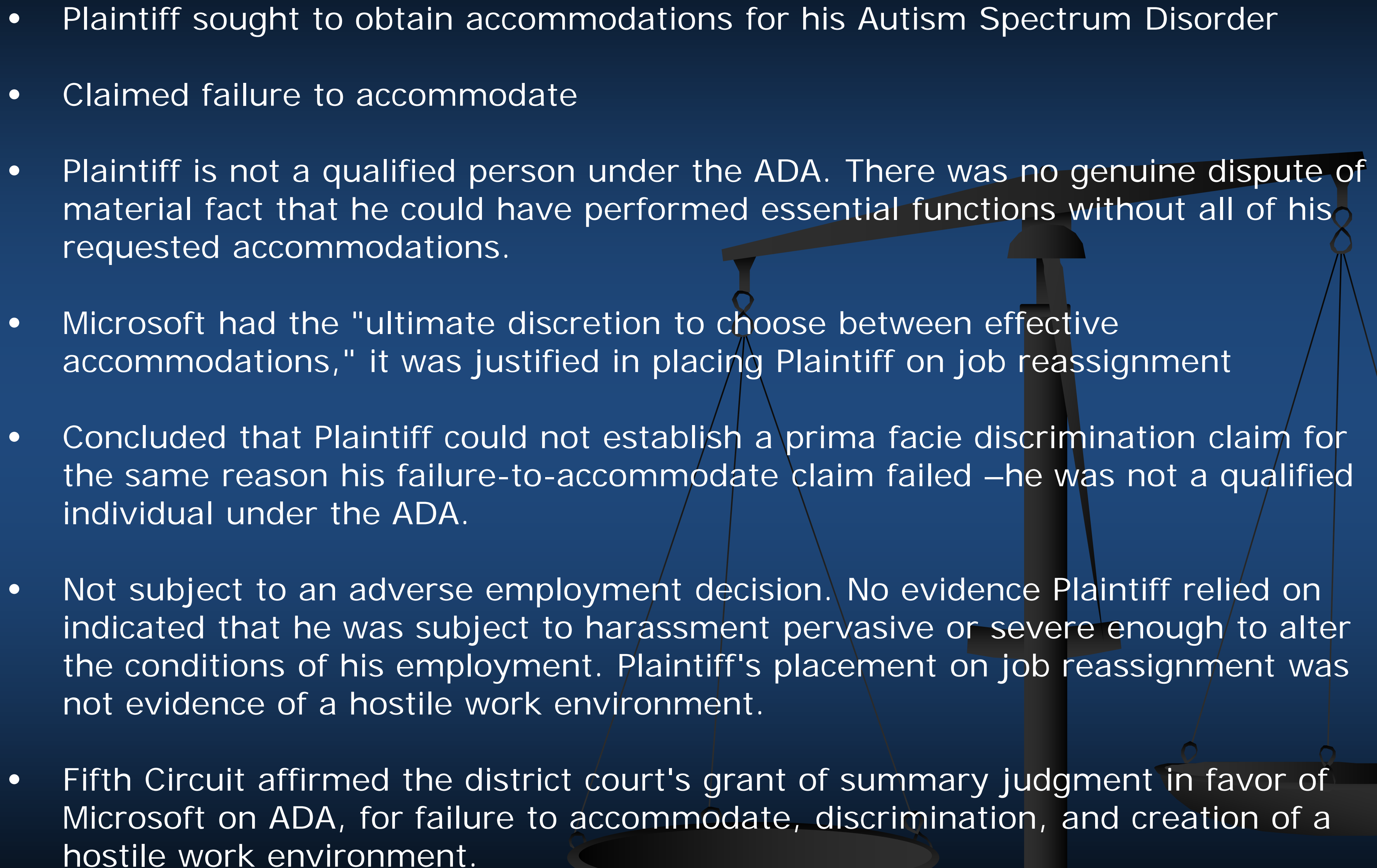
ADA

Gosby v. Apache Industrial



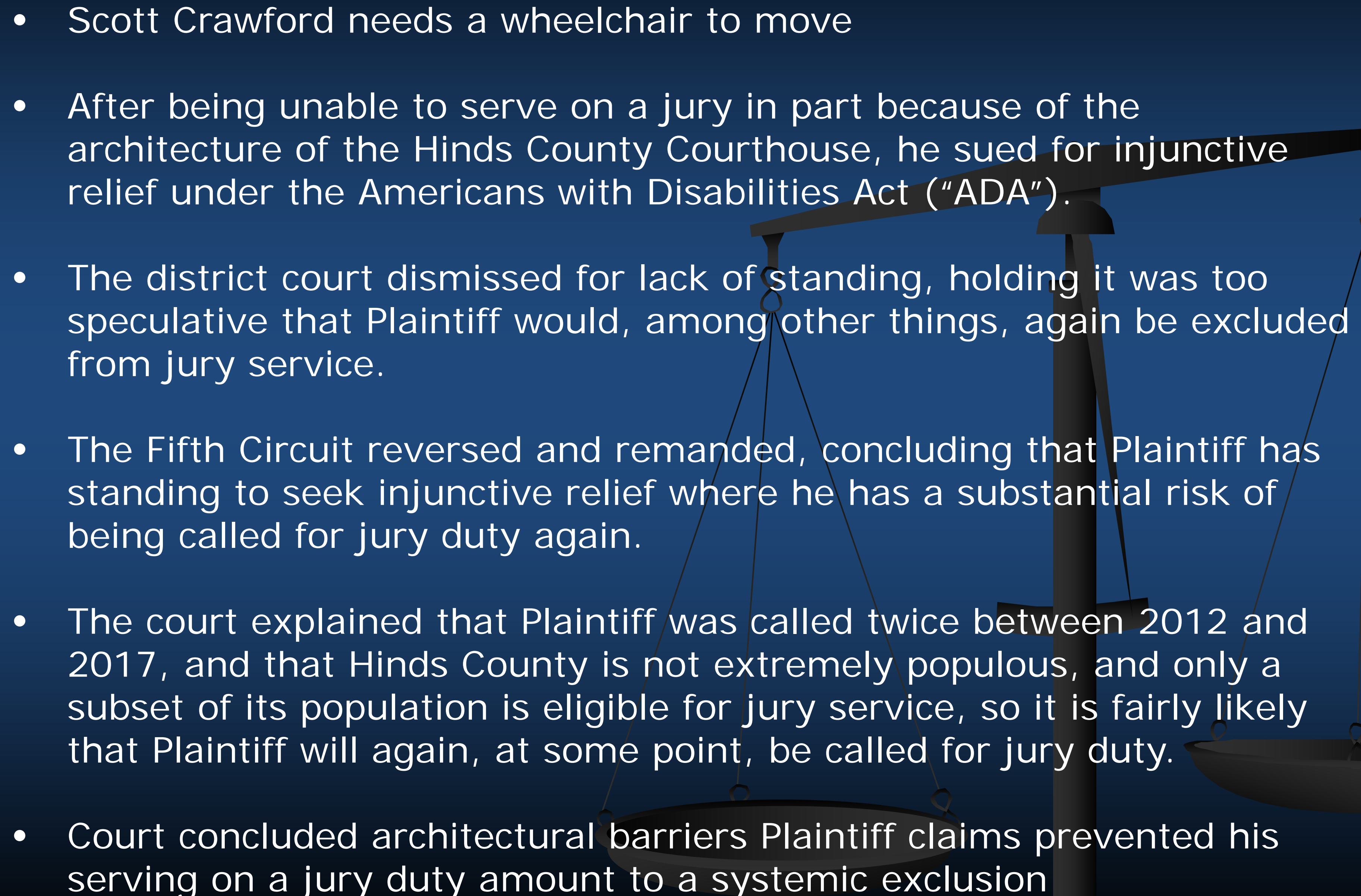
- Gosby suffered a diabetic attack
- She was taken to the medical tent then sent home to stabilize her blood sugar. Gosby soon received clearance to return to work
- Two days later, Apache announced 12 layoffs that included Gosby.
- Claimed 2 employees advised she was included because visit to the medical tent.
- Gosby filed a charge EEOC, alleging discrimination on account of her disability.
- While the district court rejected that there was any significance between her diabetic attack and being laid off six days later because she was a temporary employee, Fifth Circuit held the temporal proximity between protected activity and adverse employment action is sometimes enough to establish causation at the prima facie stage.
- And how long Gosby expected her employment to last doesn't have any bearing on whether Gosby carried her light burden of showing a prima facie case.
- Presented evidence that Apache's nondiscriminatory rationale for her inclusion in the reduction in force was pretextual. Fifth Circuit reversed and remanded

Thompson v. Microsoft Corp.



- Plaintiff sought to obtain accommodations for his Autism Spectrum Disorder
- Claimed failure to accommodate
- Plaintiff is not a qualified person under the ADA. There was no genuine dispute of material fact that he could have performed essential functions without all of his requested accommodations.
- Microsoft had the "ultimate discretion to choose between effective accommodations," it was justified in placing Plaintiff on job reassignment
- Concluded that Plaintiff could not establish a prima facie discrimination claim for the same reason his failure-to-accommodate claim failed –he was not a qualified individual under the ADA.
- Not subject to an adverse employment decision. No evidence Plaintiff relied on indicated that he was subject to harassment pervasive or severe enough to alter the conditions of his employment. Plaintiff's placement on job reassignment was not evidence of a hostile work environment.
- Fifth Circuit affirmed the district court's grant of summary judgment in favor of Microsoft on ADA, for failure to accommodate, discrimination, and creation of a hostile work environment.

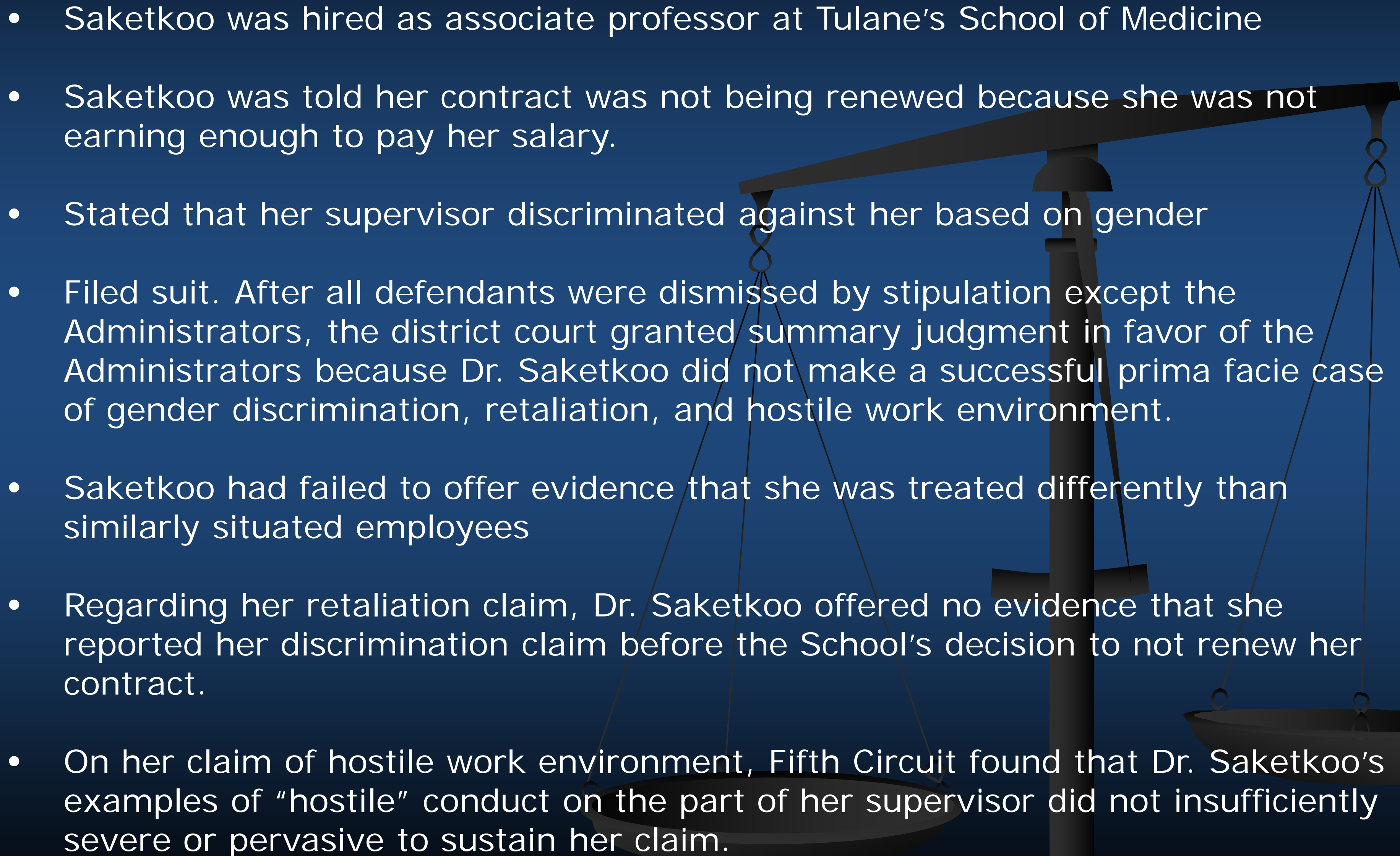
Crawford v. Hinds County Board of Supervisors



- Scott Crawford needs a wheelchair to move
- After being unable to serve on a jury in part because of the architecture of the Hinds County Courthouse, he sued for injunctive relief under the Americans with Disabilities Act (“ADA”).
- The district court dismissed for lack of standing, holding it was too speculative that Plaintiff would, among other things, again be excluded from jury service.
- The Fifth Circuit reversed and remanded, concluding that Plaintiff has standing to seek injunctive relief where he has a substantial risk of being called for jury duty again.
- The court explained that Plaintiff was called twice between 2012 and 2017, and that Hinds County is not extremely populous, and only a subset of its population is eligible for jury service, so it is fairly likely that Plaintiff will again, at some point, be called for jury duty.
- Court concluded architectural barriers Plaintiff claims prevented his serving on a jury duty amount to a systemic exclusion

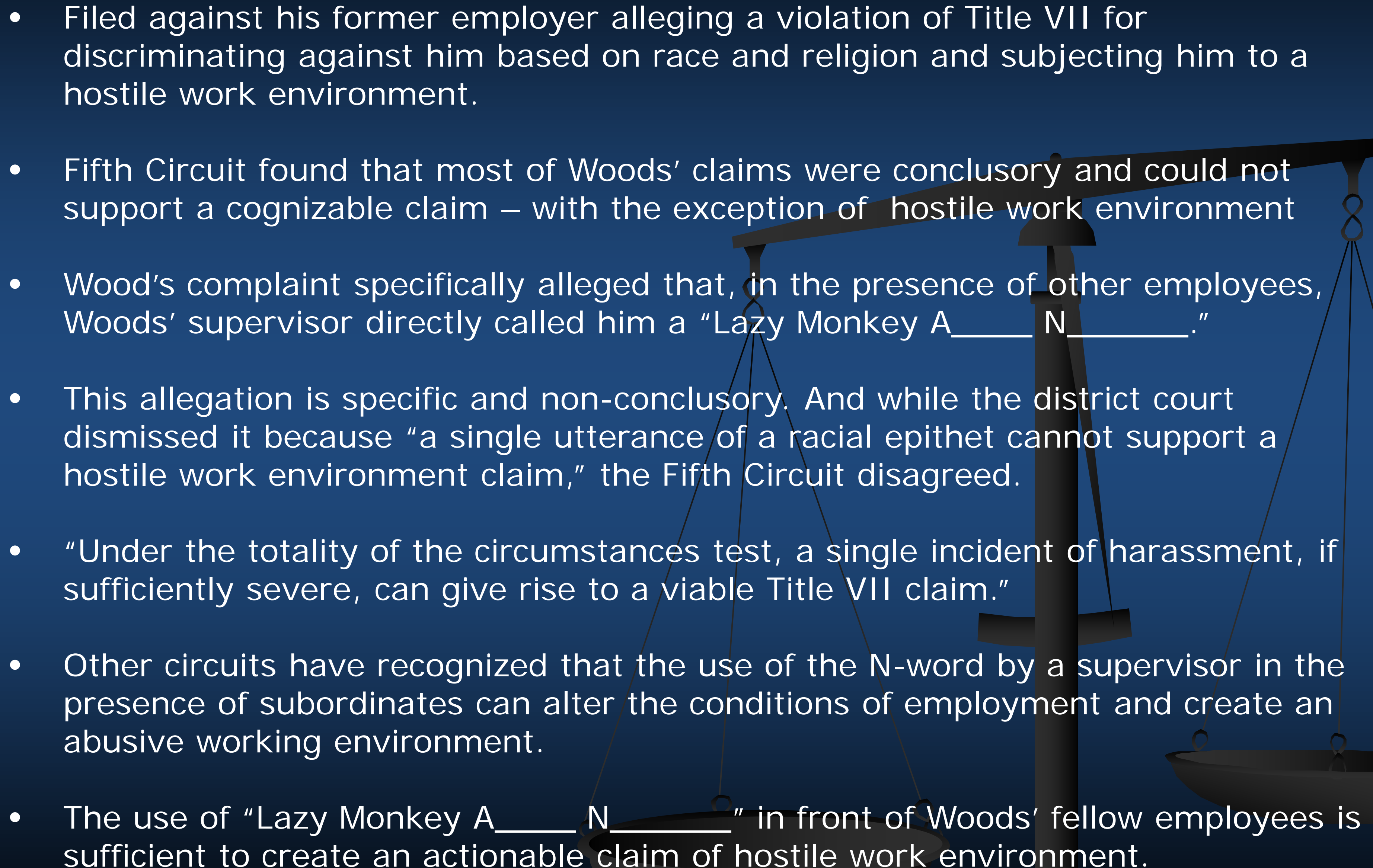
TITLE VII

Saketkoo v. Admin Tulane Educ.



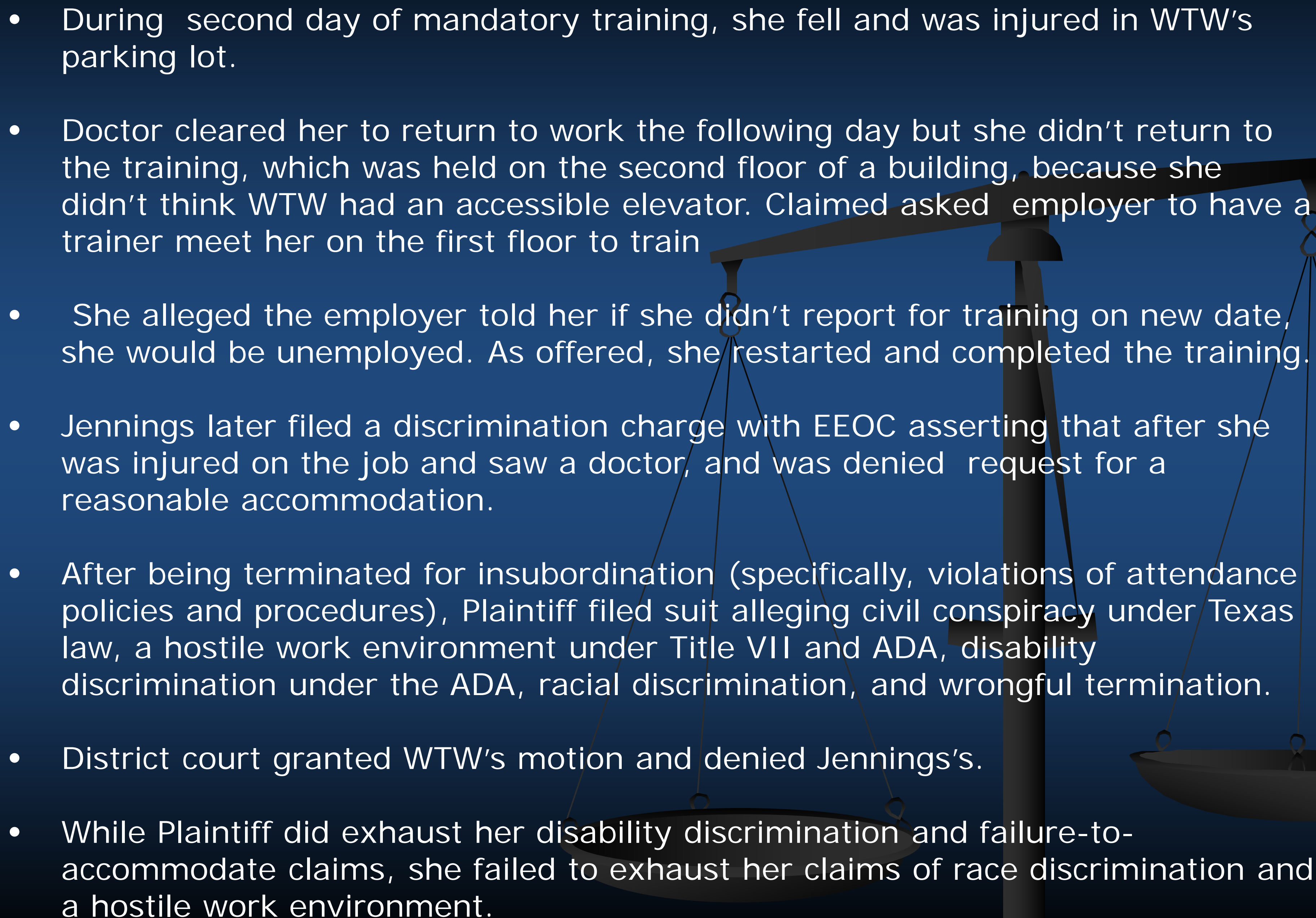
- Saketkoo was hired as associate professor at Tulane's School of Medicine
- Saketkoo was told her contract was not being renewed because she was not earning enough to pay her salary.
- Stated that her supervisor discriminated against her based on gender
- Filed suit. After all defendants were dismissed by stipulation except the Administrators, the district court granted summary judgment in favor of the Administrators because Dr. Saketkoo did not make a successful prima facie case of gender discrimination, retaliation, and hostile work environment.
- Saketkoo had failed to offer evidence that she was treated differently than similarly situated employees
- Regarding her retaliation claim, Dr. Saketkoo offered no evidence that she reported her discrimination claim before the School's decision to not renew her contract.
- On her claim of hostile work environment, Fifth Circuit found that Dr. Saketkoo's examples of "hostile" conduct on the part of her supervisor did not insufficiently severe or pervasive to sustain her claim.

Woods v. Cantrell



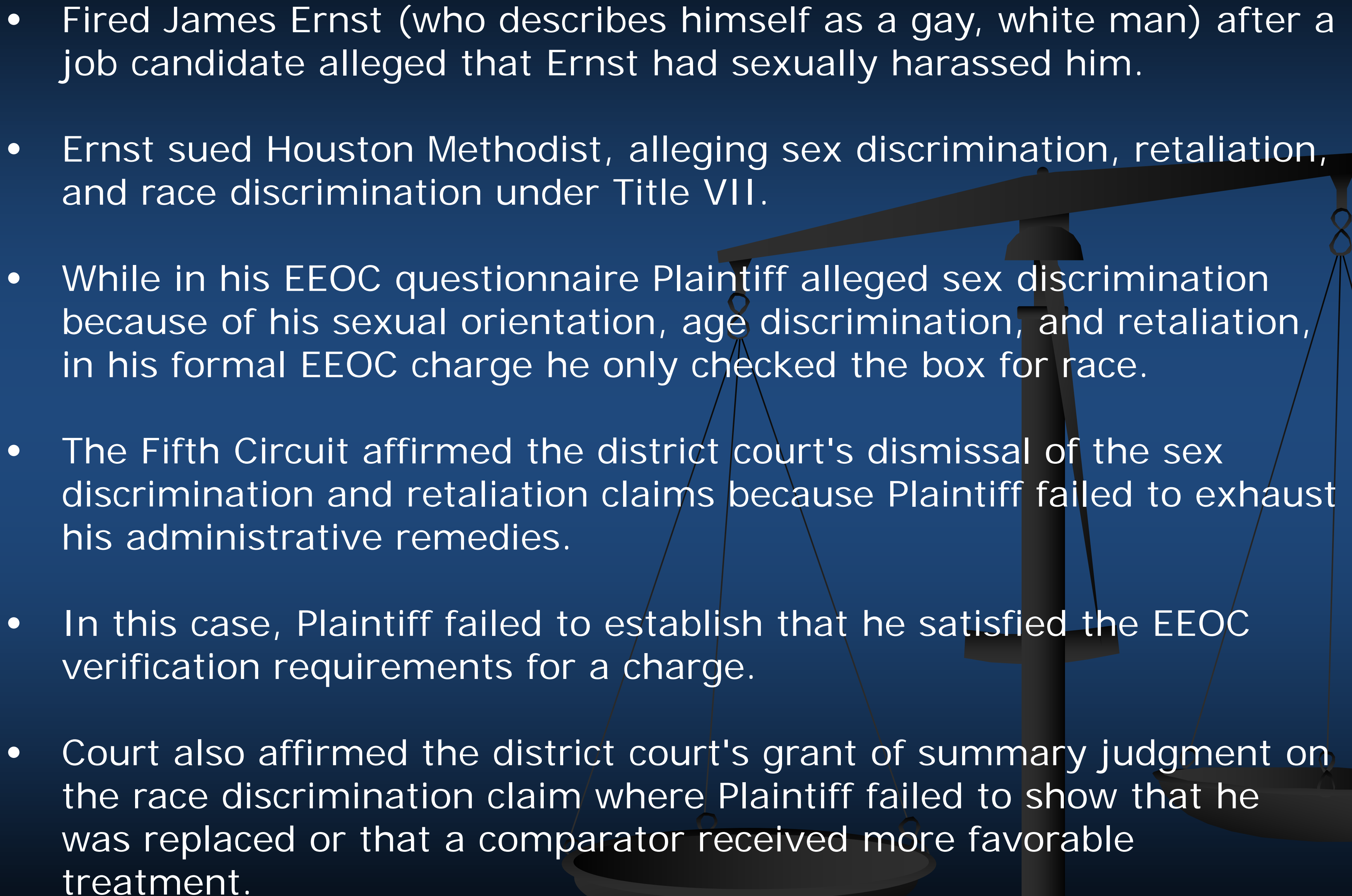
- Filed against his former employer alleging a violation of Title VII for discriminating against him based on race and religion and subjecting him to a hostile work environment.
- Fifth Circuit found that most of Woods' claims were conclusory and could not support a cognizable claim – with the exception of hostile work environment
- Wood's complaint specifically alleged that, in the presence of other employees, Woods' supervisor directly called him a "Lazy Monkey A_____ N_______."
- This allegation is specific and non-conclusory. And while the district court dismissed it because "a single utterance of a racial epithet cannot support a hostile work environment claim," the Fifth Circuit disagreed.
- "Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, can give rise to a viable Title VII claim."
- Other circuits have recognized that the use of the N-word by a supervisor in the presence of subordinates can alter the conditions of employment and create an abusive working environment.
- The use of "Lazy Monkey A_____ N_______" in front of Woods' fellow employees is sufficient to create an actionable claim of hostile work environment.

Jennings v. Towers Watson



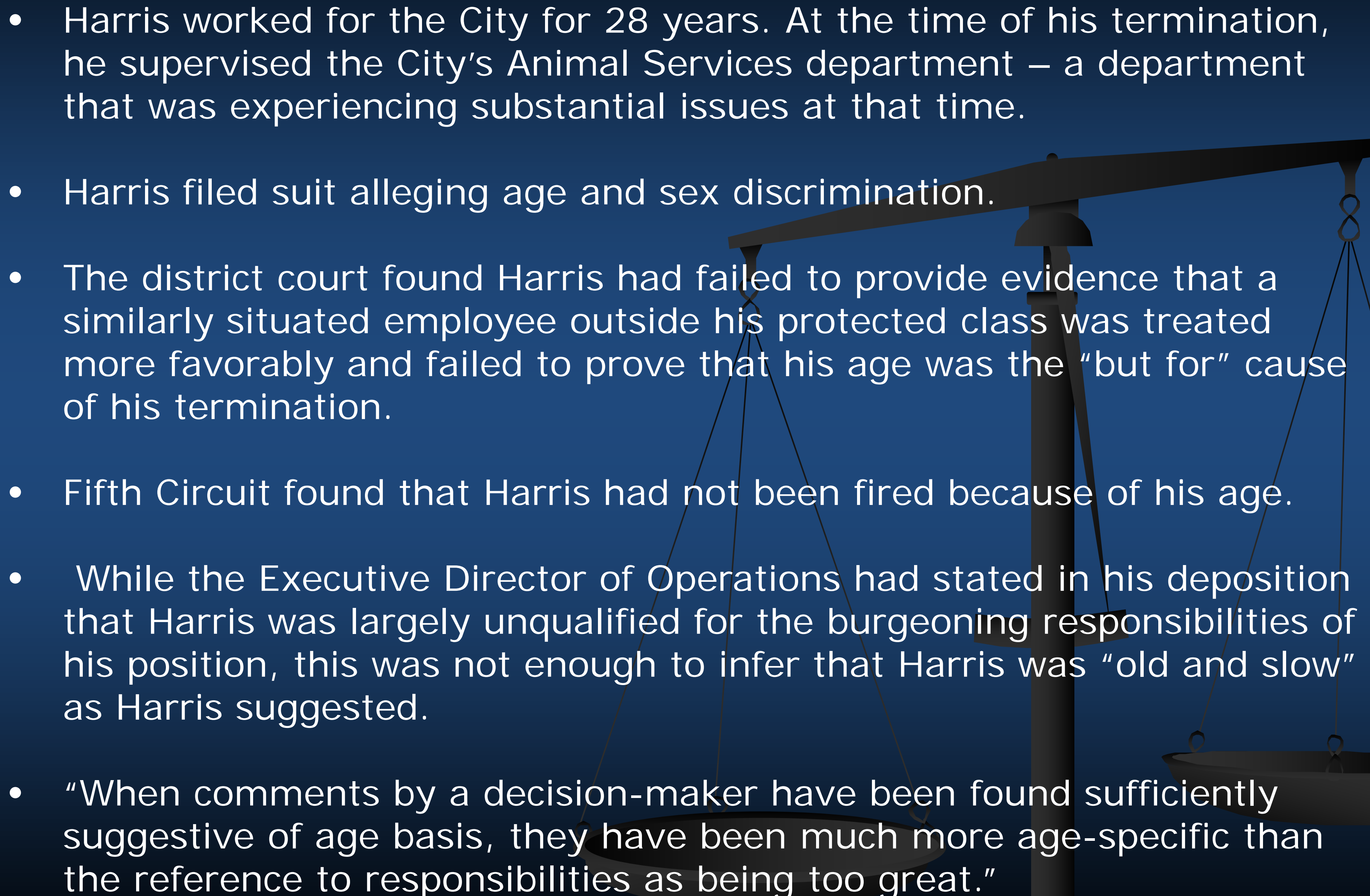
- During second day of mandatory training, she fell and was injured in WTW's parking lot.
- Doctor cleared her to return to work the following day but she didn't return to the training, which was held on the second floor of a building, because she didn't think WTW had an accessible elevator. Claimed asked employer to have a trainer meet her on the first floor to train
- She alleged the employer told her if she didn't report for training on new date, she would be unemployed. As offered, she restarted and completed the training.
- Jennings later filed a discrimination charge with EEOC asserting that after she was injured on the job and saw a doctor, and was denied request for a reasonable accommodation.
- After being terminated for insubordination (specifically, violations of attendance policies and procedures), Plaintiff filed suit alleging civil conspiracy under Texas law, a hostile work environment under Title VII and ADA, disability discrimination under the ADA, racial discrimination, and wrongful termination.
- District court granted WTW's motion and denied Jennings's.
- While Plaintiff did exhaust her disability discrimination and failure-to-accommodate claims, she failed to exhaust her claims of race discrimination and a hostile work environment.

Ernst v. Methodist Hospital



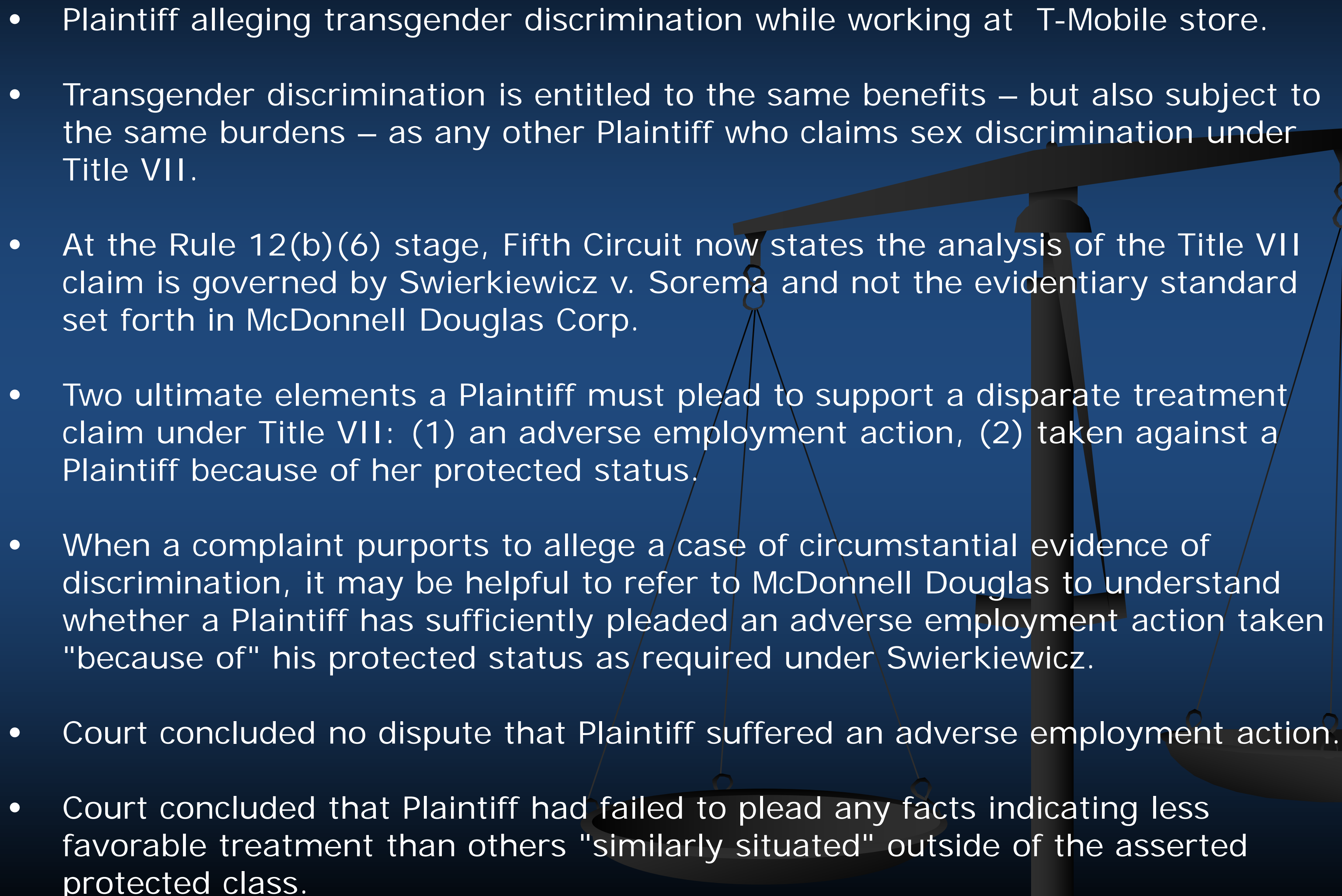
- Fired James Ernst (who describes himself as a gay, white man) after a job candidate alleged that Ernst had sexually harassed him.
- Ernst sued Houston Methodist, alleging sex discrimination, retaliation, and race discrimination under Title VII.
- While in his EEOC questionnaire Plaintiff alleged sex discrimination because of his sexual orientation, age discrimination, and retaliation, in his formal EEOC charge he only checked the box for race.
- The Fifth Circuit affirmed the district court's dismissal of the sex discrimination and retaliation claims because Plaintiff failed to exhaust his administrative remedies.
- In this case, Plaintiff failed to establish that he satisfied the EEOC verification requirements for a charge.
- Court also affirmed the district court's grant of summary judgment on the race discrimination claim where Plaintiff failed to show that he was replaced or that a comparator received more favorable treatment.

Harris v. City of Schertz



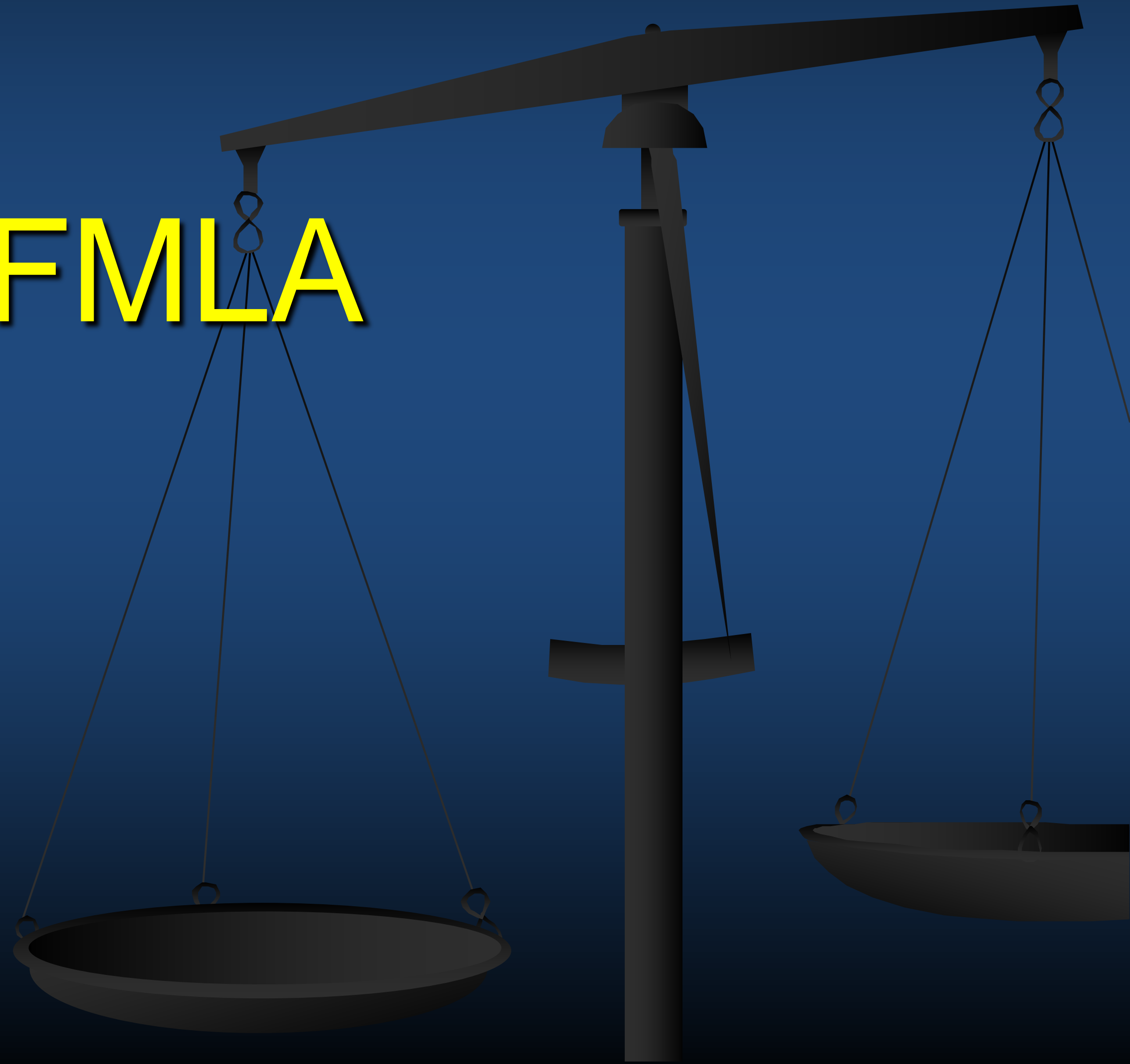
- Harris worked for the City for 28 years. At the time of his termination, he supervised the City's Animal Services department – a department that was experiencing substantial issues at that time.
- Harris filed suit alleging age and sex discrimination.
- The district court found Harris had failed to provide evidence that a similarly situated employee outside his protected class was treated more favorably and failed to prove that his age was the "but for" cause of his termination.
- Fifth Circuit found that Harris had not been fired because of his age.
- While the Executive Director of Operations had stated in his deposition that Harris was largely unqualified for the burgeoning responsibilities of his position, this was not enough to infer that Harris was "old and slow" as Harris suggested.
- "When comments by a decision-maker have been found sufficiently suggestive of age basis, they have been much more age-specific than the reference to responsibilities as being too great."

Olivarez v. T-Mobile USA, Inc.

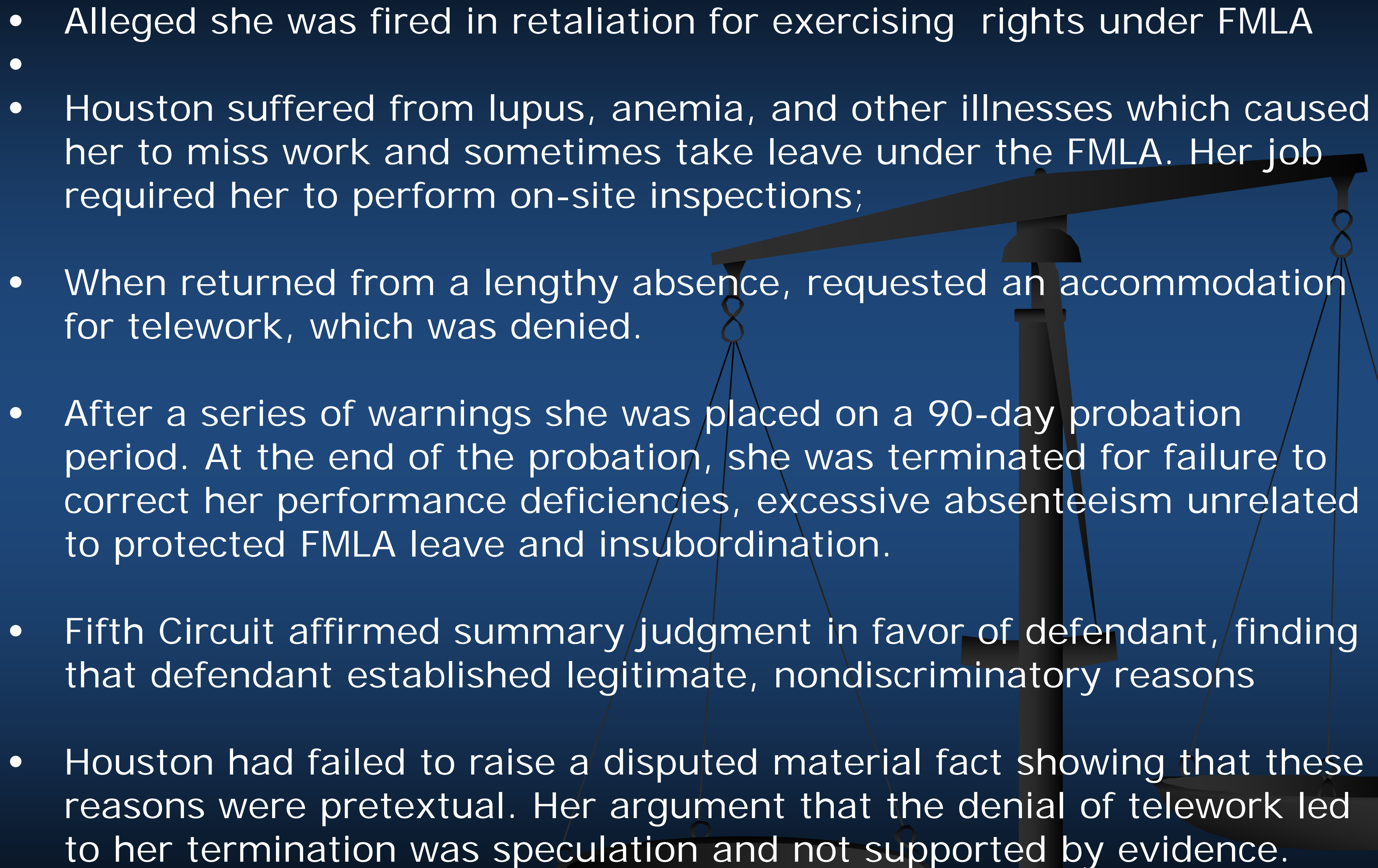


- Plaintiff alleging transgender discrimination while working at T-Mobile store.
- Transgender discrimination is entitled to the same benefits – but also subject to the same burdens – as any other Plaintiff who claims sex discrimination under Title VII.
- At the Rule 12(b)(6) stage, Fifth Circuit now states the analysis of the Title VII claim is governed by Swierkiewicz v. Sorema and not the evidentiary standard set forth in McDonnell Douglas Corp.
- Two ultimate elements a Plaintiff must plead to support a disparate treatment claim under Title VII: (1) an adverse employment action, (2) taken against a Plaintiff because of her protected status.
- When a complaint purports to allege a case of circumstantial evidence of discrimination, it may be helpful to refer to McDonnell Douglas to understand whether a Plaintiff has sufficiently pleaded an adverse employment action taken "because of" his protected status as required under Swierkiewicz.
- Court concluded no dispute that Plaintiff suffered an adverse employment action.
- Court concluded that Plaintiff had failed to plead any facts indicating less favorable treatment than others "similarly situated" outside of the asserted protected class.

FMLA



Houston v. Texas Dep’t of Agriculture

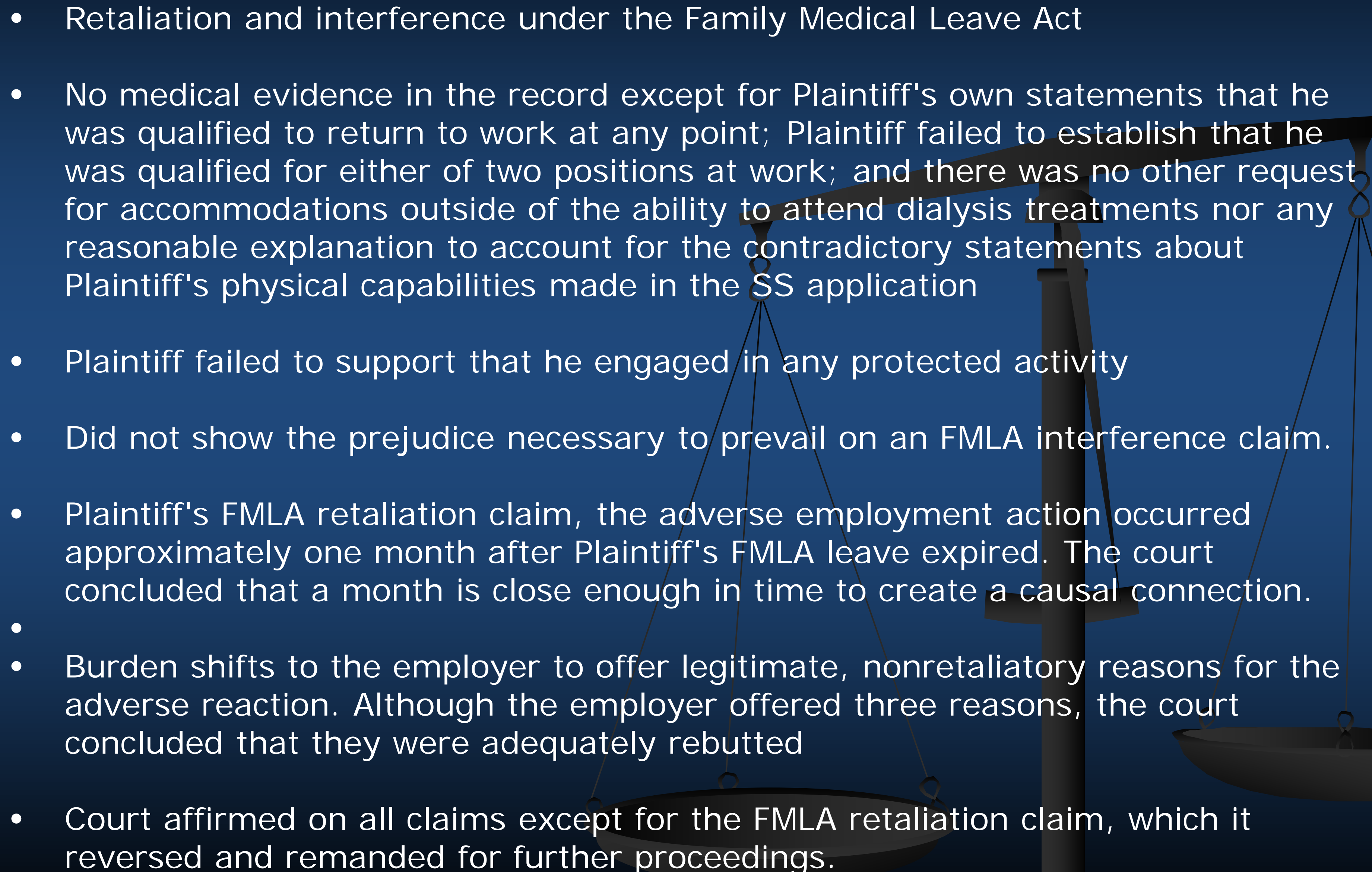


- Alleged she was fired in retaliation for exercising rights under FMLA
- Houston suffered from lupus, anemia, and other illnesses which caused her to miss work and sometimes take leave under the FMLA. Her job required her to perform on-site inspections;
- When returned from a lengthy absence, requested an accommodation for telework, which was denied.
- After a series of warnings she was placed on a 90-day probation period. At the end of the probation, she was terminated for failure to correct her performance deficiencies, excessive absenteeism unrelated to protected FMLA leave and insubordination.
- Fifth Circuit affirmed summary judgment in favor of defendant, finding that defendant established legitimate, nondiscriminatory reasons
- Houston had failed to raise a disputed material fact showing that these reasons were pretextual. Her argument that the denial of telework led to her termination was speculation and not supported by evidence.

Hester v. Bell-Textron, Inc.

- Suffers from epilepsy and glaucoma. Hester also assists his wife, who has stage-four cancer.
- In 2017, Hester reported to Cribb, who was aware of Hester's medical history
- In 2018, Cribb issued Hester's first poor performance review. Months later, Cribb issued Hester a final warning related to a part that broke during testing.
- Hester was granted short-term disability coverage and leave under the Family and Medical Leave Act (FMLA) based on his epilepsy and glaucoma. A human resources employee fired Hester by telephone weeks later, citing Hester's "poor mid-year performance review." Hester was informed that he still had several weeks of FMLA leave remaining.
- Alleging discriminatory termination during the pendency of his FMLA leave and interference with his right of reinstatement at the end of his FMLA leave.
- The alleged timeline of events indicates that termination decision was not "completely unrelated" to the exercise of his FMLA rights. The allegation that Bell-Textron directed Hester to an employee assistance program and guided him through the FMLA application process—rather than simply firing him outright on the basis of poor workplace performance—indicates that Hester's right to restored employment was still intact when he secured FMLA leave.

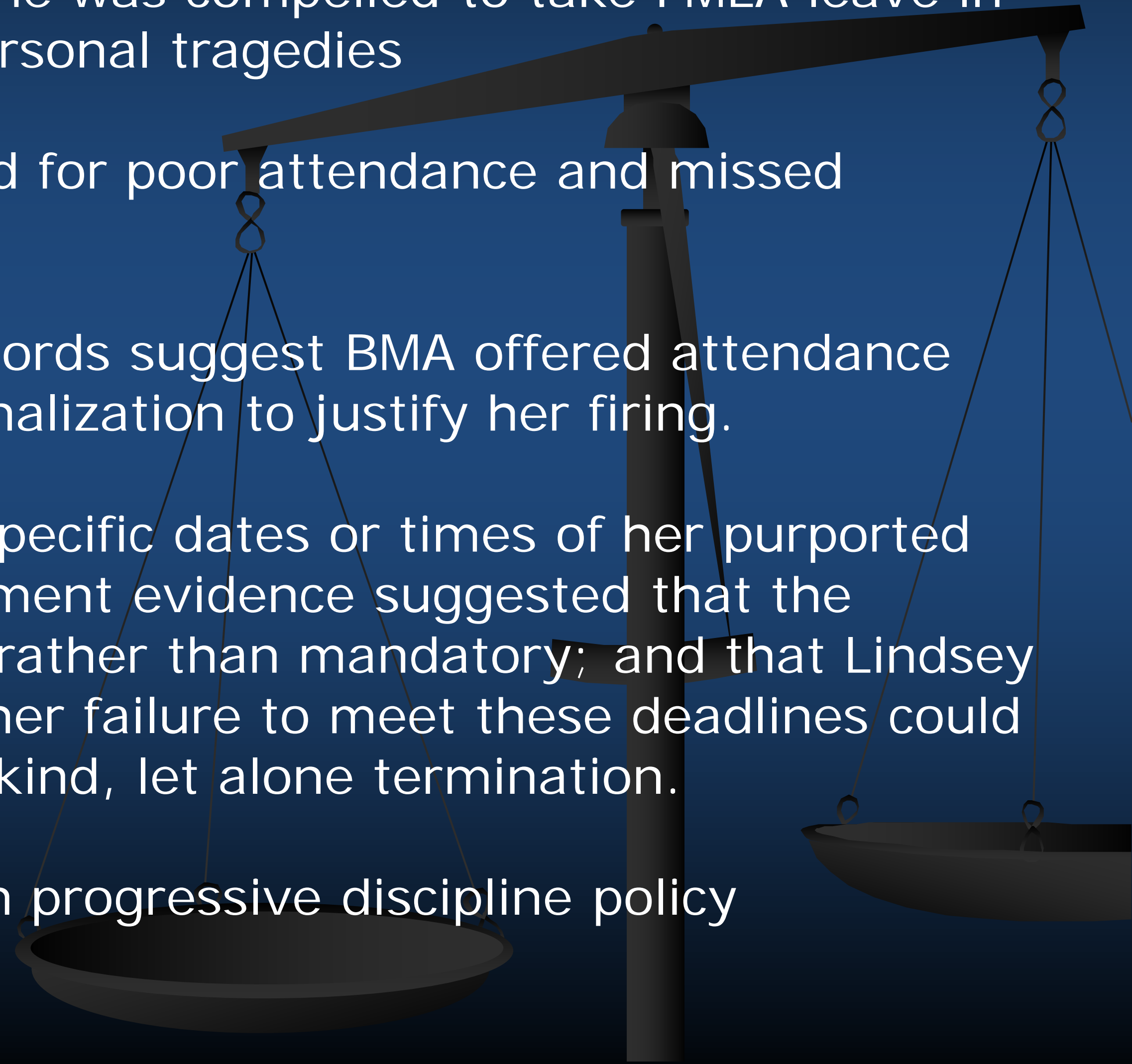
Campos v. Steves & Sons, Inc.



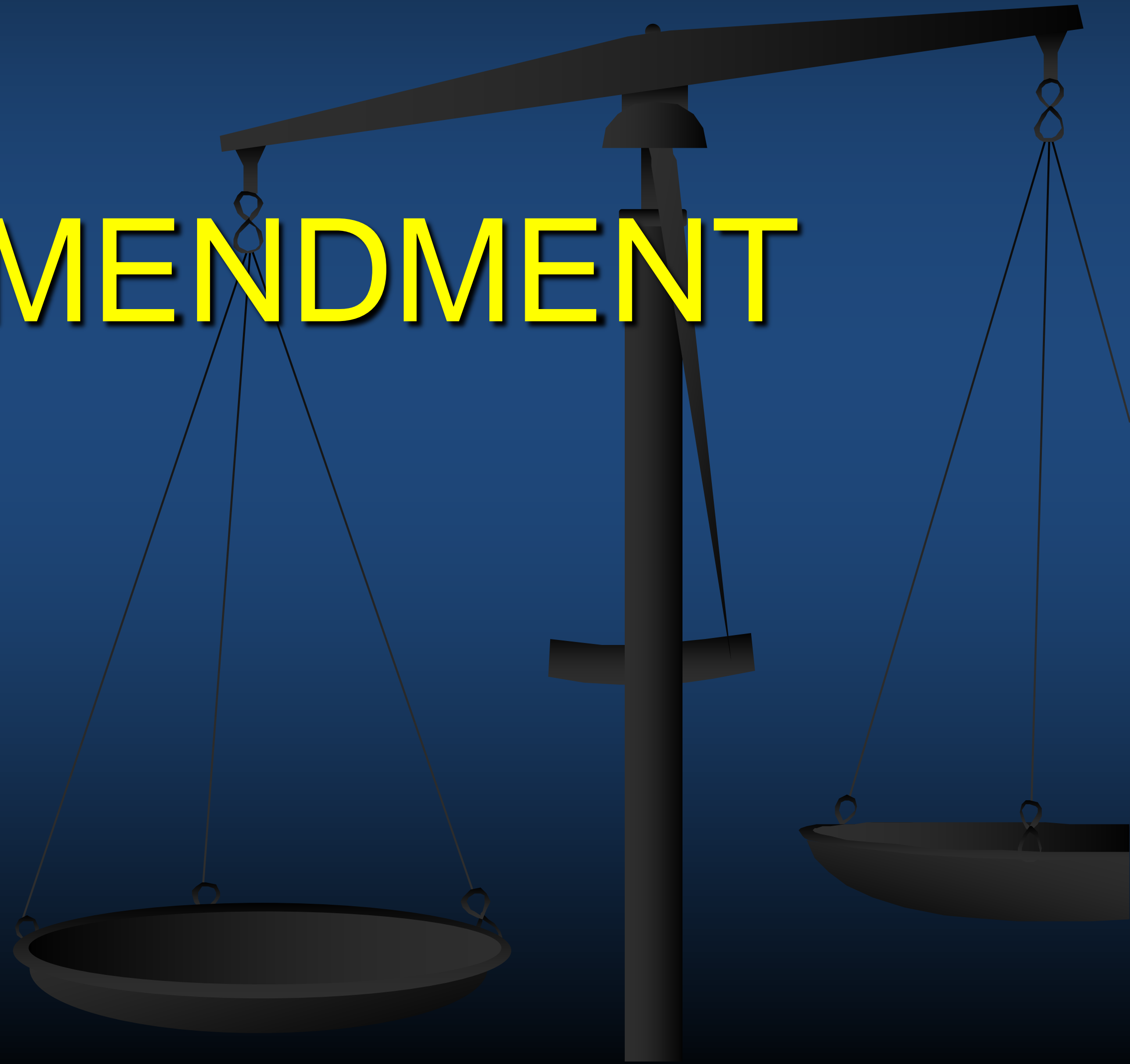
- Retaliation and interference under the Family Medical Leave Act
- No medical evidence in the record except for Plaintiff's own statements that he was qualified to return to work at any point; Plaintiff failed to establish that he was qualified for either of two positions at work; and there was no other request for accommodations outside of the ability to attend dialysis treatments nor any reasonable explanation to account for the contradictory statements about Plaintiff's physical capabilities made in the SS application
- Plaintiff failed to support that he engaged in any protected activity
- Did not show the prejudice necessary to prevail on an FMLA interference claim.
- Plaintiff's FMLA retaliation claim, the adverse employment action occurred approximately one month after Plaintiff's FMLA leave expired. The court concluded that a month is close enough in time to create a causal connection.
- Burden shifts to the employer to offer legitimate, nonretaliatory reasons for the adverse reaction. Although the employer offered three reasons, the court concluded that they were adequately rebutted
- Court affirmed on all claims except for the FMLA retaliation claim, which it reversed and remanded for further proceedings.

Lindsey v. Bio-Medical Applications of Louisiana, LLC,

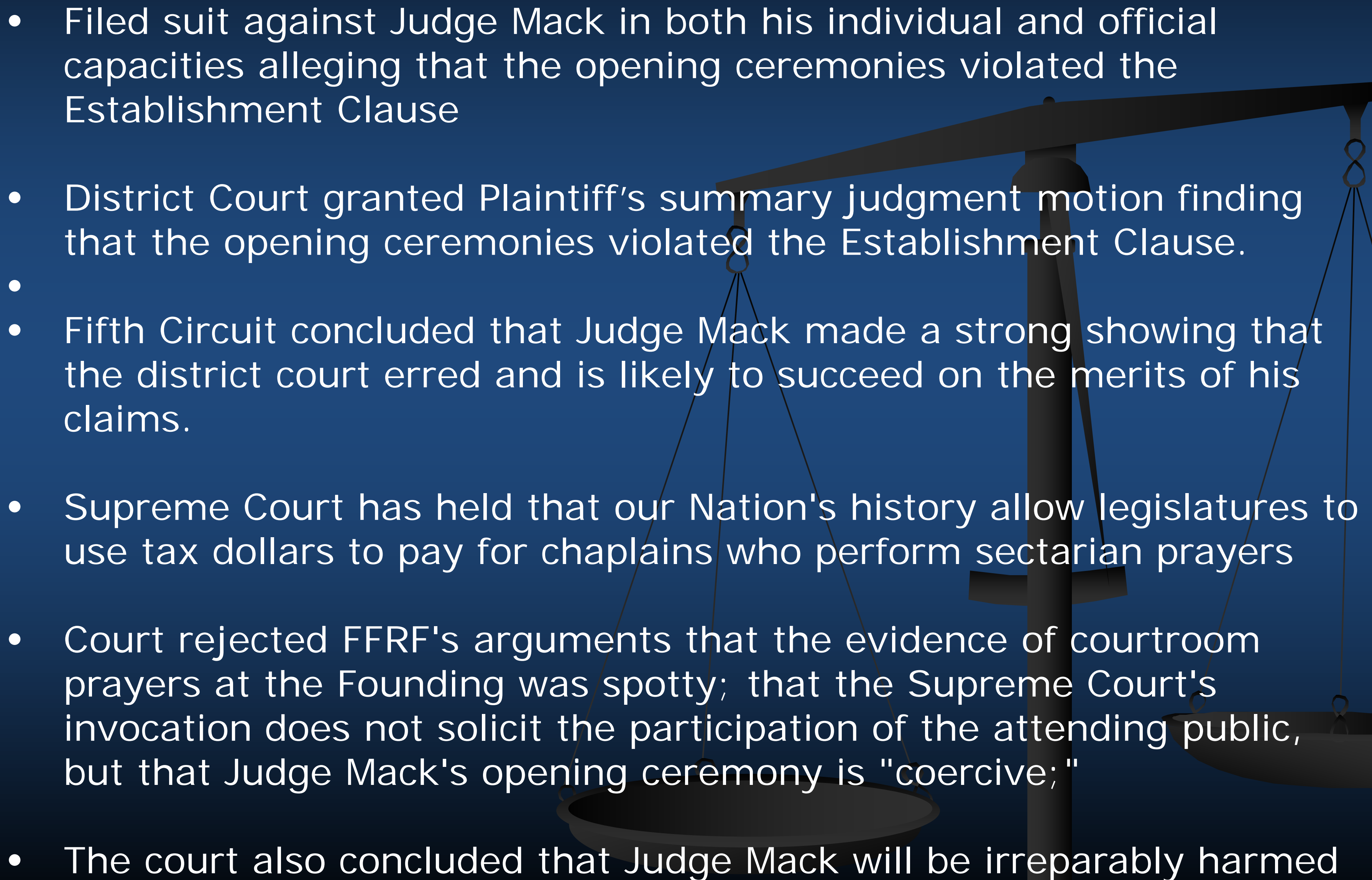
- Registered nurse, alleged that, after 17 years her employer terminated her because she was compelled to take FMLA leave in response to a series of personal tragedies
- BMA claimed she was fired for poor attendance and missed deadlines.
- Lindsey's employment records suggest BMA offered attendance issues as a post hoc rationalization to justify her firing.
- BMA was not able to list specific dates or times of her purported absences; summary judgment evidence suggested that the deadlines were hortatory rather than mandatory; and that Lindsey was never informed that her failure to meet these deadlines could result in discipline of any kind, let alone termination.
- BMA did not follow its own progressive discipline policy



14TH AMENDMENT



Freedom From Religion Foundation, Inc. v. Mack



- Filed suit against Judge Mack in both his individual and official capacities alleging that the opening ceremonies violated the Establishment Clause

- District Court granted Plaintiff's summary judgment motion finding that the opening ceremonies violated the Establishment Clause.
-
- Fifth Circuit concluded that Judge Mack made a strong showing that the district court erred and is likely to succeed on the merits of his claims.

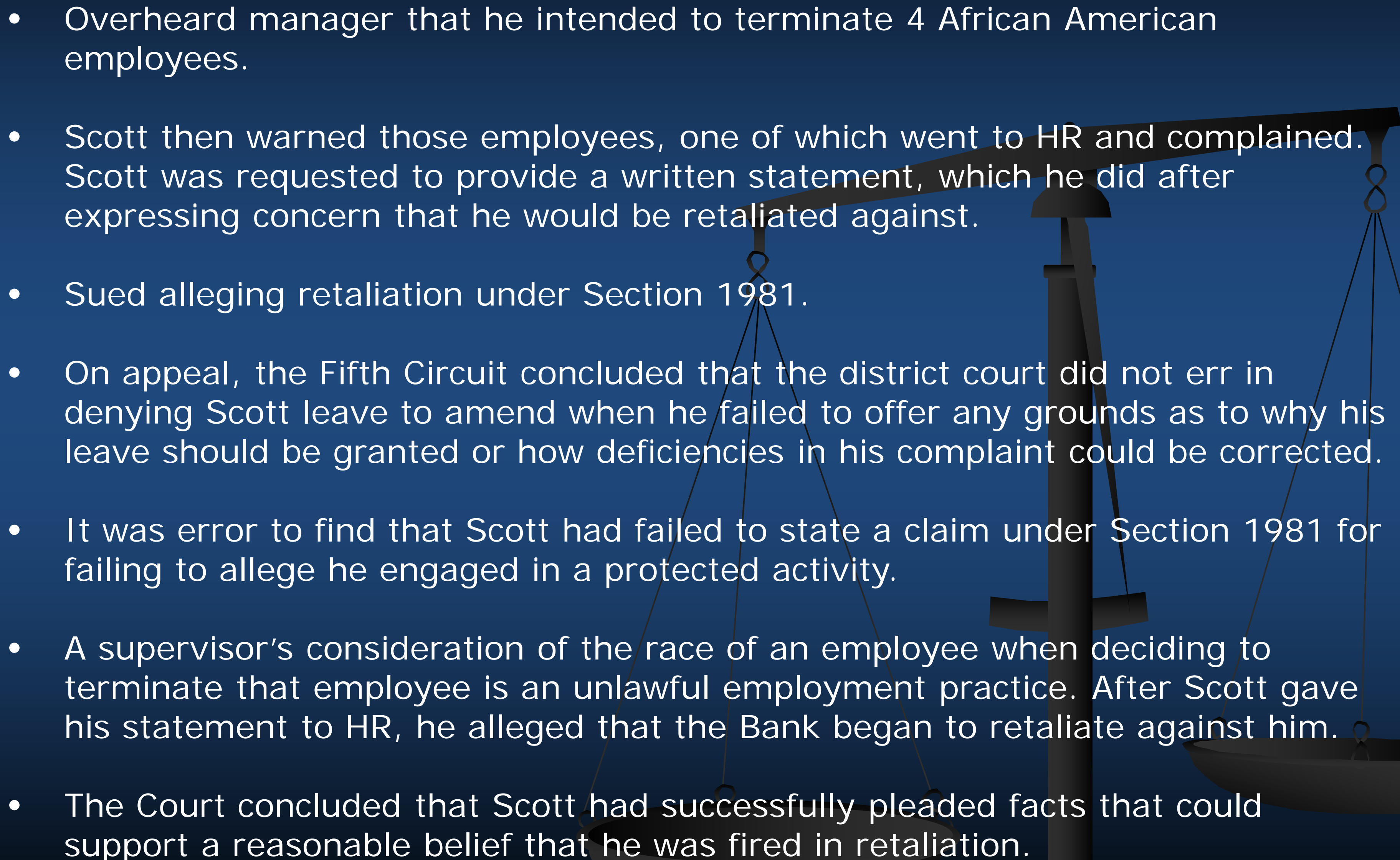
- Supreme Court has held that our Nation's history allow legislatures to use tax dollars to pay for chaplains who perform sectarian prayers

- Court rejected FFRF's arguments that the evidence of courtroom prayers at the Founding was spotty; that the Supreme Court's invocation does not solicit the participation of the attending public, but that Judge Mack's opening ceremony is "coercive;"

- The court also concluded that Judge Mack will be irreparably harmed

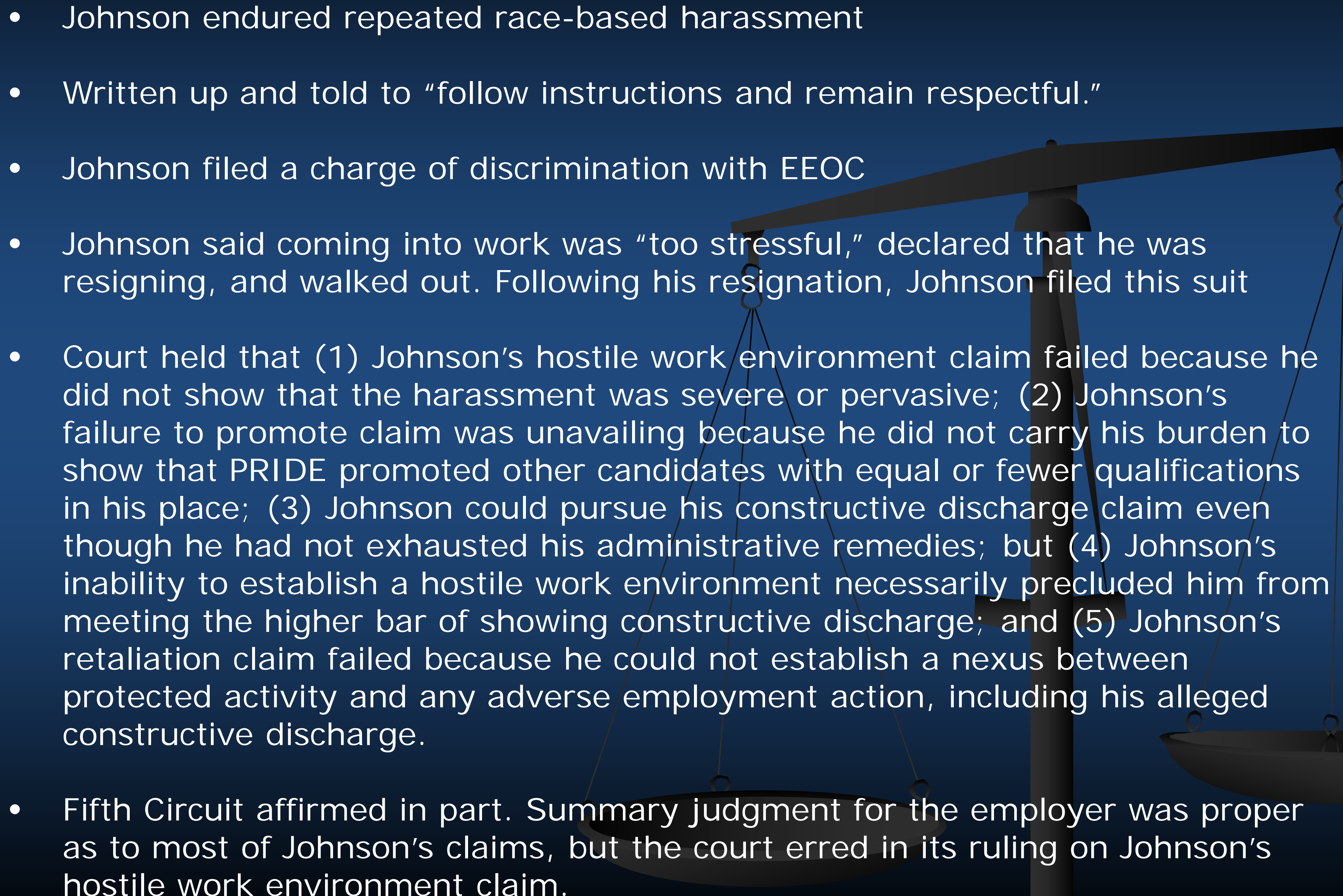
§ 1981

Scott v. U.S. Bank National Ass'n



- Overheard manager that he intended to terminate 4 African American employees.
- Scott then warned those employees, one of which went to HR and complained. Scott was requested to provide a written statement, which he did after expressing concern that he would be retaliated against.
- Sued alleging retaliation under Section 1981.
- On appeal, the Fifth Circuit concluded that the district court did not err in denying Scott leave to amend when he failed to offer any grounds as to why his leave should be granted or how deficiencies in his complaint could be corrected.
- It was error to find that Scott had failed to state a claim under Section 1981 for failing to allege he engaged in a protected activity.
- A supervisor's consideration of the race of an employee when deciding to terminate that employee is an unlawful employment practice. After Scott gave his statement to HR, he alleged that the Bank began to retaliate against him.
- The Court concluded that Scott had successfully pleaded facts that could support a reasonable belief that he was fired in retaliation.

Johnson v. PRIDE Industries, Inc



- Johnson endured repeated race-based harassment

- Written up and told to “follow instructions and remain respectful.”

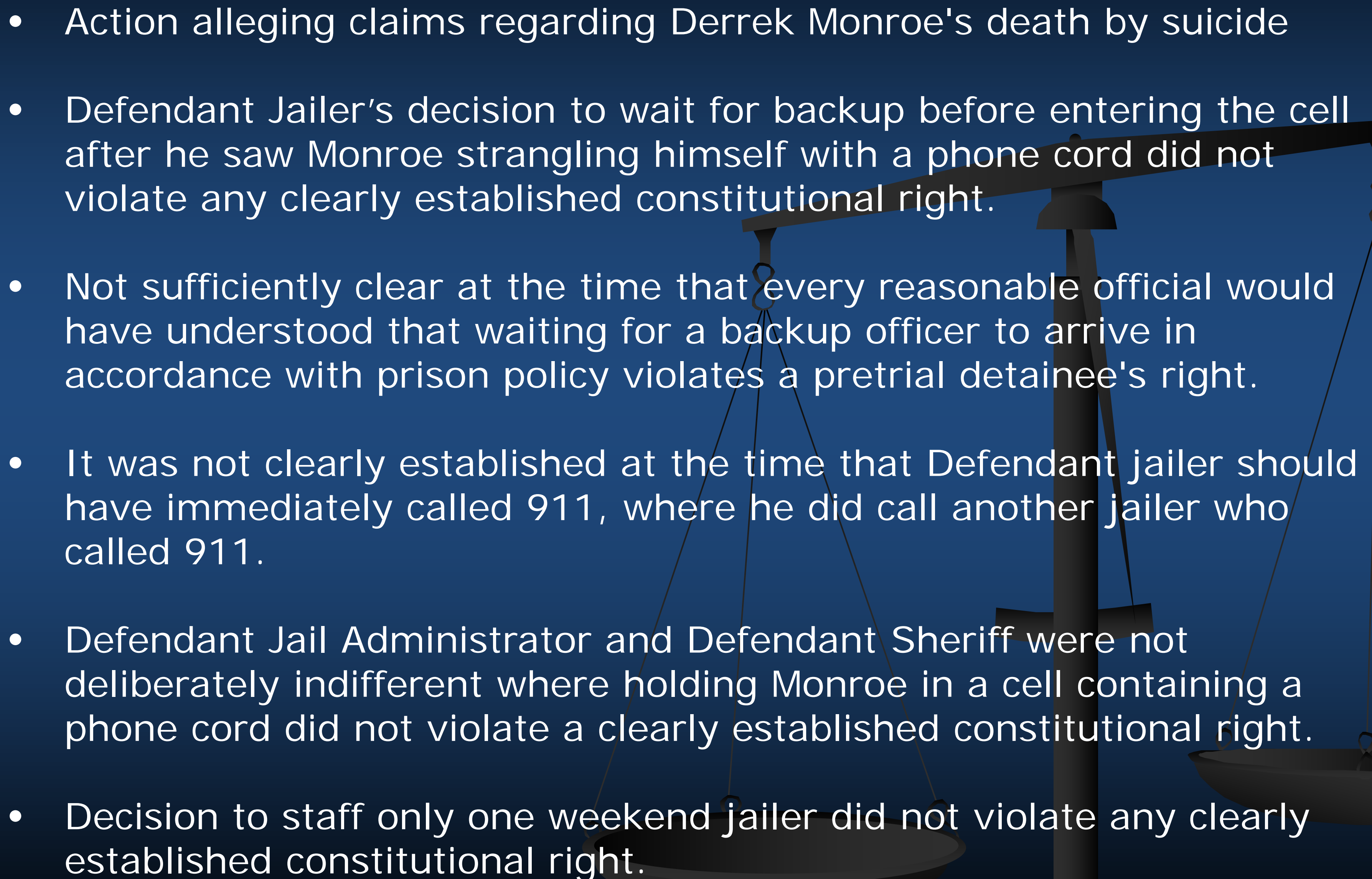
- Johnson filed a charge of discrimination with EEOC

- Johnson said coming into work was “too stressful,” declared that he was resigning, and walked out. Following his resignation, Johnson filed this suit

- Court held that (1) Johnson’s hostile work environment claim failed because he did not show that the harassment was severe or pervasive; (2) Johnson’s failure to promote claim was unavailing because he did not carry his burden to show that PRIDE promoted other candidates with equal or fewer qualifications in his place; (3) Johnson could pursue his constructive discharge claim even though he had not exhausted his administrative remedies; but (4) Johnson’s inability to establish a hostile work environment necessarily precluded him from meeting the higher bar of showing constructive discharge; and (5) Johnson’s retaliation claim failed because he could not establish a nexus between protected activity and any adverse employment action, including his alleged constructive discharge.

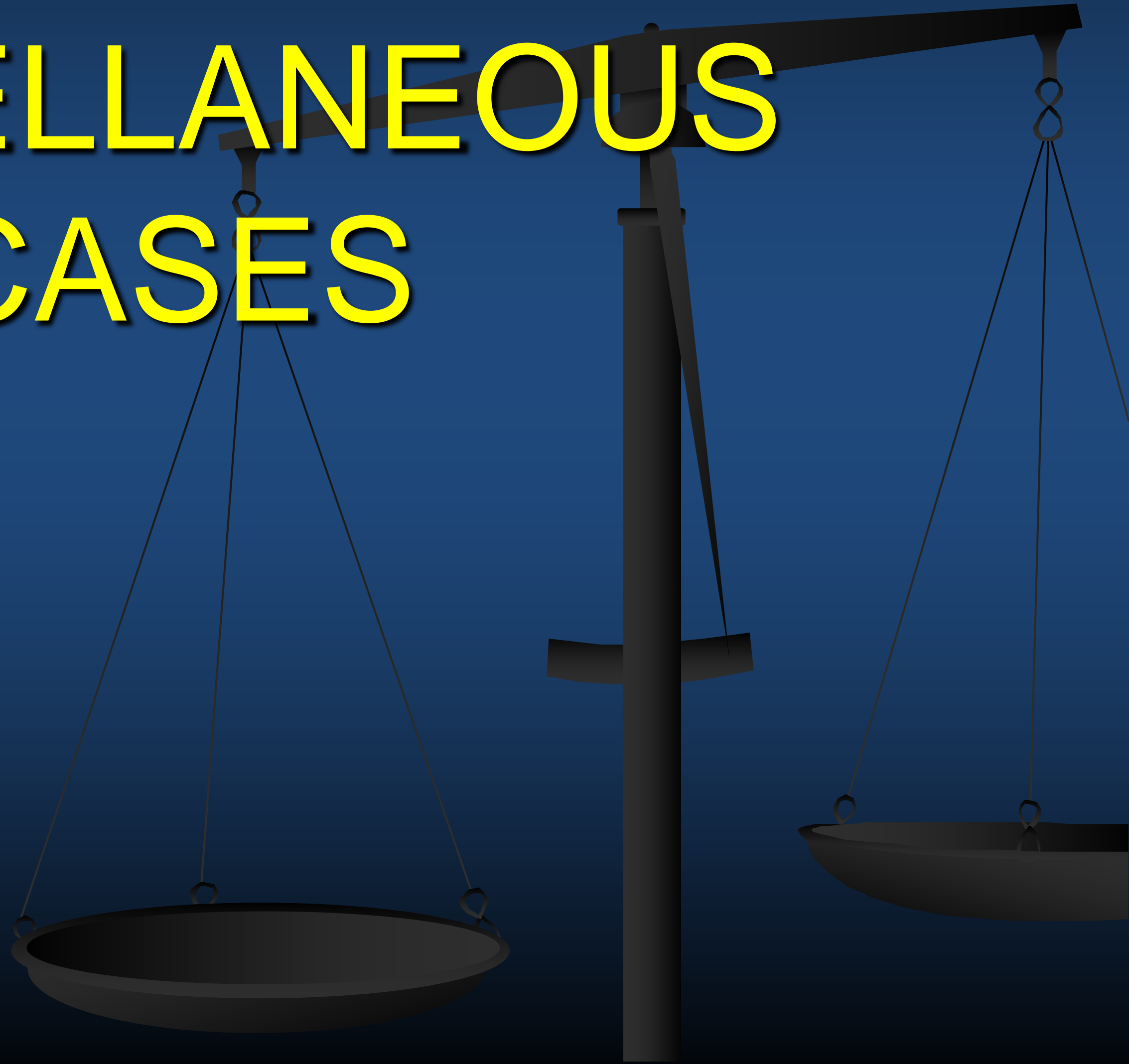
- Fifth Circuit affirmed in part. Summary judgment for the employer was proper as to most of Johnson’s claims, but the court erred in its ruling on Johnson’s hostile work environment claim.

Cope v. Cogdill

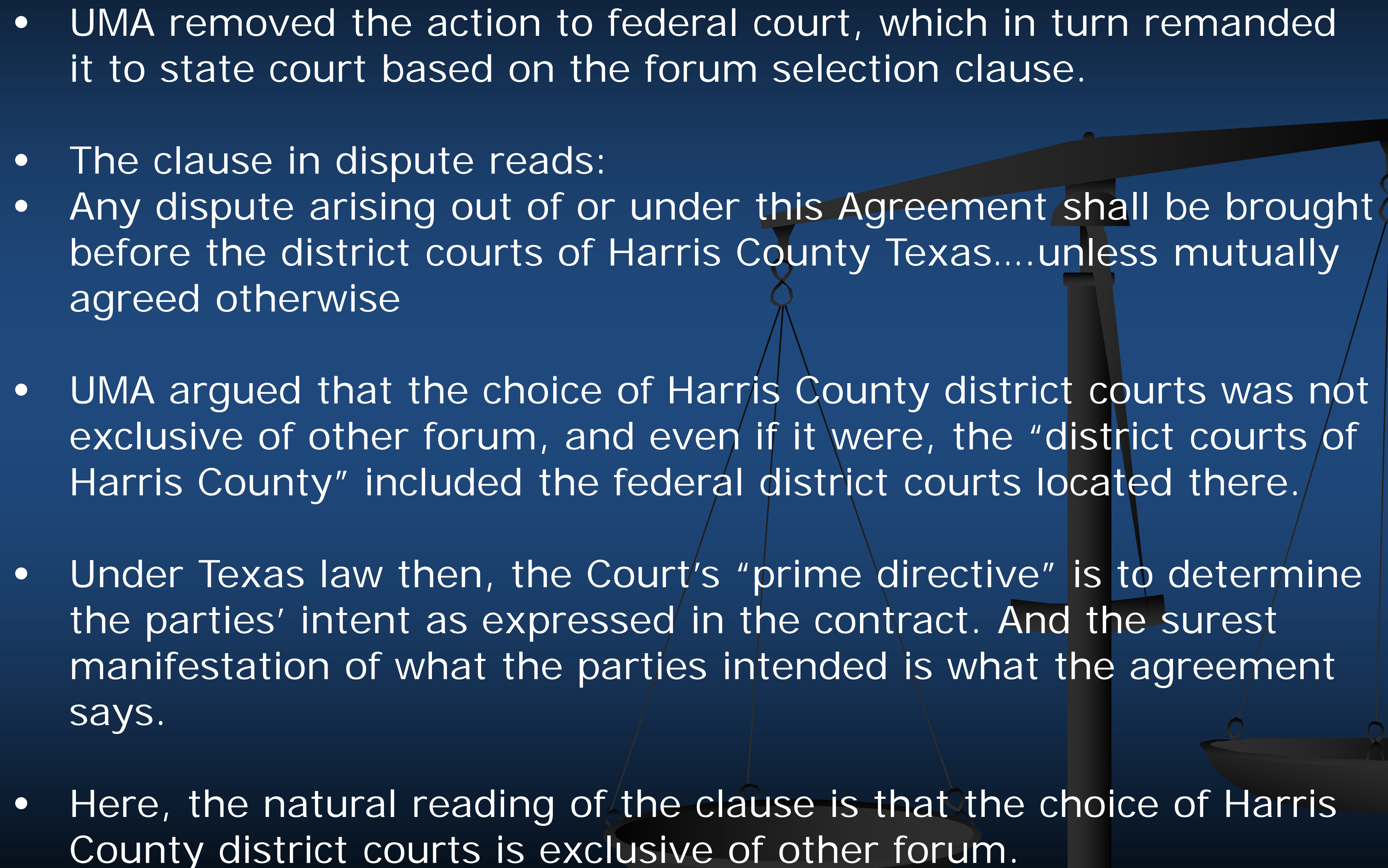


- Action alleging claims regarding Derrek Monroe's death by suicide
- Defendant Jailer's decision to wait for backup before entering the cell after he saw Monroe strangling himself with a phone cord did not violate any clearly established constitutional right.
- Not sufficiently clear at the time that every reasonable official would have understood that waiting for a backup officer to arrive in accordance with prison policy violates a pretrial detainee's right.
- It was not clearly established at the time that Defendant jailer should have immediately called 911, where he did call another jailer who called 911.
- Defendant Jail Administrator and Defendant Sheriff were not deliberately indifferent where holding Monroe in a cell containing a phone cord did not violate a clearly established constitutional right.
- Decision to staff only one weekend jailer did not violate any clearly established constitutional right.

MISCELLANEOUS CASES



Dynamic CRM v. UMA Education



- UMA removed the action to federal court, which in turn remanded it to state court based on the forum selection clause.

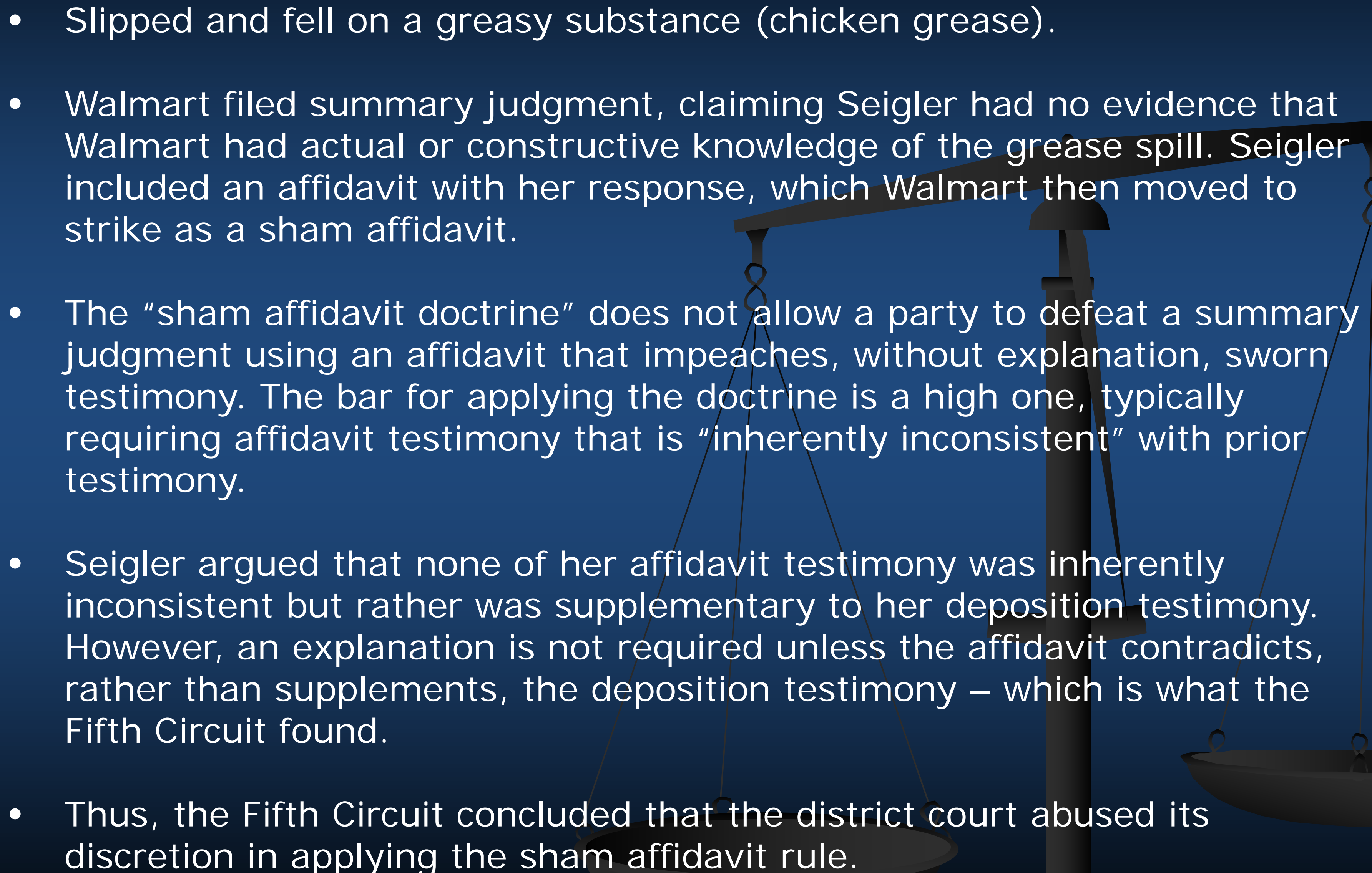
- The clause in dispute reads:
- Any dispute arising out of or under this Agreement shall be brought before the district courts of Harris County Texas....unless mutually agreed otherwise

- UMA argued that the choice of Harris County district courts was not exclusive of other forum, and even if it were, the “district courts of Harris County” included the federal district courts located there.

- Under Texas law then, the Court’s “prime directive” is to determine the parties’ intent as expressed in the contract. And the surest manifestation of what the parties intended is what the agreement says.

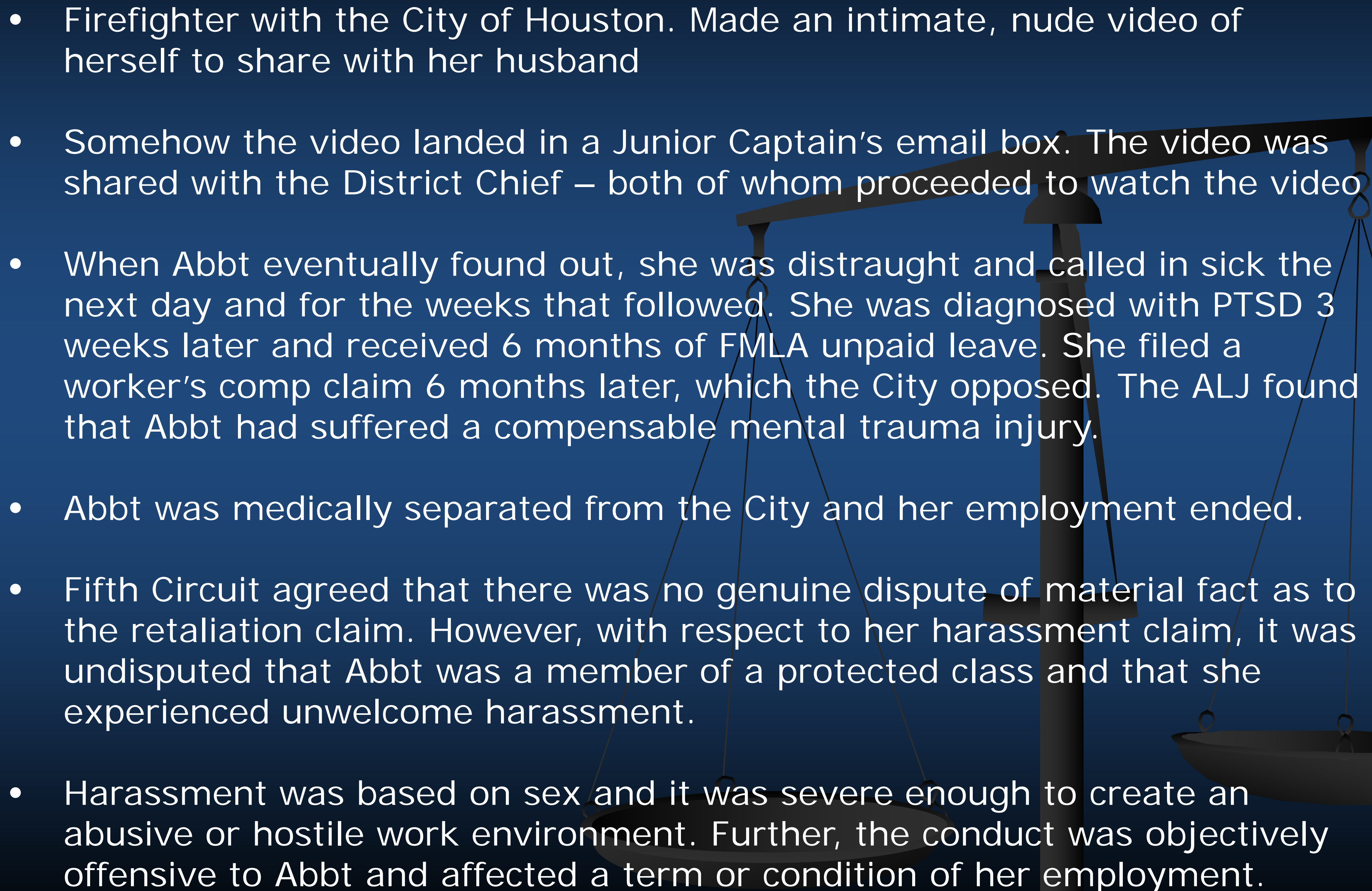
- Here, the natural reading of the clause is that the choice of Harris County district courts is exclusive of other forum.

Seigler v. Wal-Mart Stores TX



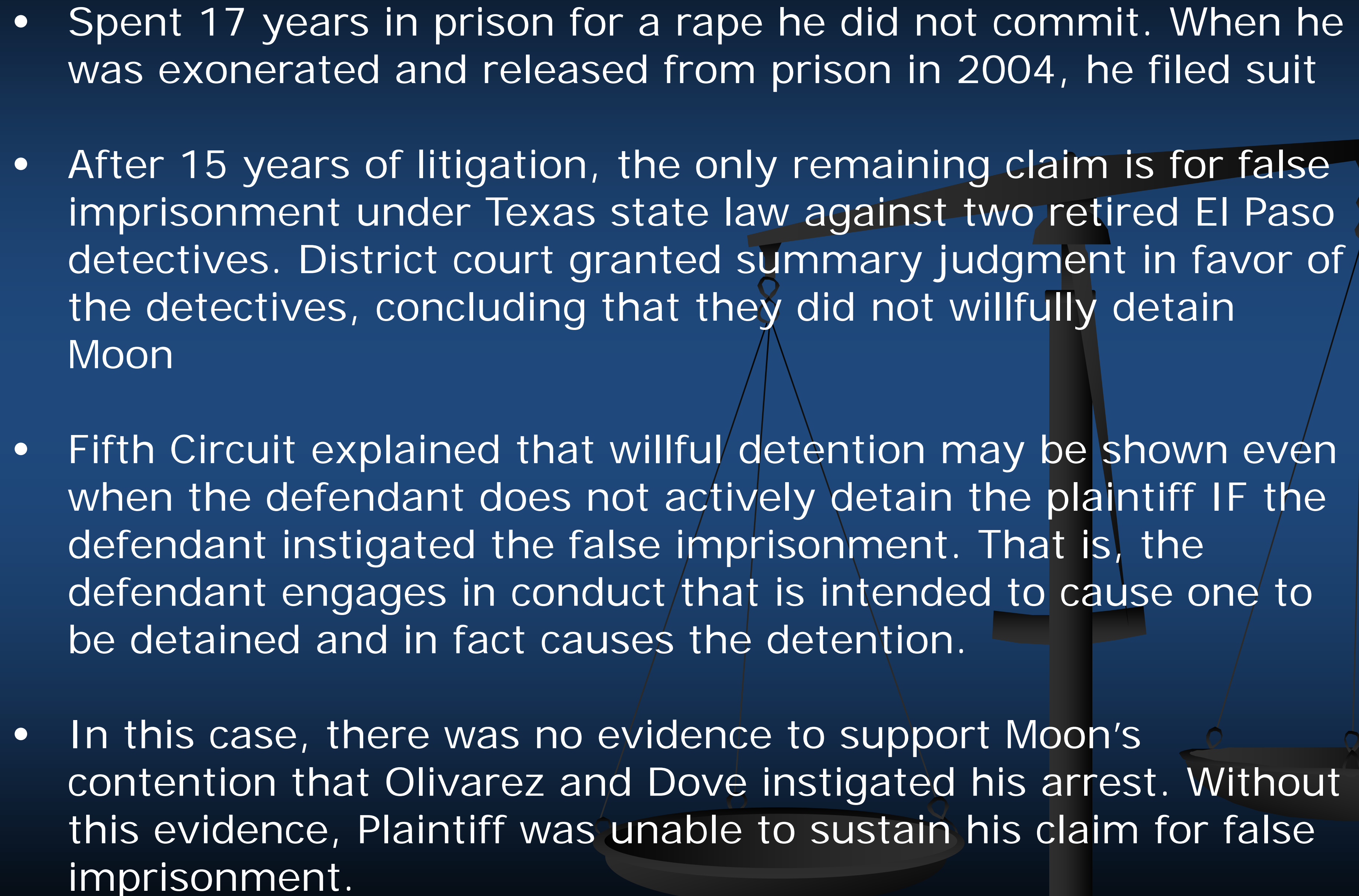
- Slipped and fell on a greasy substance (chicken grease).
- Walmart filed summary judgment, claiming Seigler had no evidence that Walmart had actual or constructive knowledge of the grease spill. Seigler included an affidavit with her response, which Walmart then moved to strike as a sham affidavit.
- The "sham affidavit doctrine" does not allow a party to defeat a summary judgment using an affidavit that impeaches, without explanation, sworn testimony. The bar for applying the doctrine is a high one, typically requiring affidavit testimony that is "inherently inconsistent" with prior testimony.
- Seigler argued that none of her affidavit testimony was inherently inconsistent but rather was supplementary to her deposition testimony. However, an explanation is not required unless the affidavit contradicts, rather than supplements, the deposition testimony – which is what the Fifth Circuit found.
- Thus, the Fifth Circuit concluded that the district court abused its discretion in applying the sham affidavit rule.

Abbt v. City of Houston



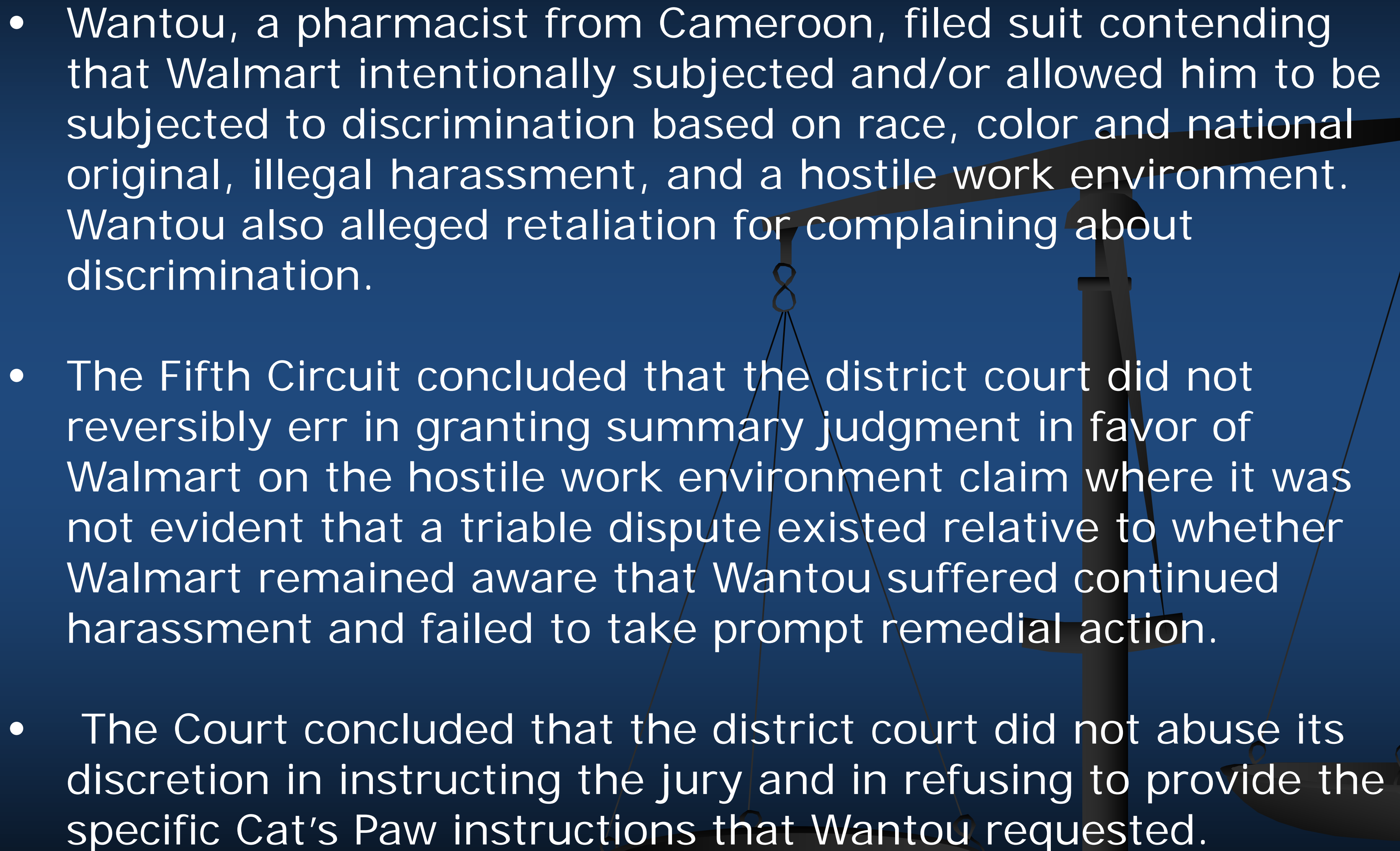
- Firefighter with the City of Houston. Made an intimate, nude video of herself to share with her husband
- Somehow the video landed in a Junior Captain's email box. The video was shared with the District Chief – both of whom proceeded to watch the video
- When Abbt eventually found out, she was distraught and called in sick the next day and for the weeks that followed. She was diagnosed with PTSD 3 weeks later and received 6 months of FMLA unpaid leave. She filed a worker's comp claim 6 months later, which the City opposed. The ALJ found that Abbt had suffered a compensable mental trauma injury.
- Abbt was medically separated from the City and her employment ended.
- Fifth Circuit agreed that there was no genuine dispute of material fact as to the retaliation claim. However, with respect to her harassment claim, it was undisputed that Abbt was a member of a protected class and that she experienced unwelcome harassment.
- Harassment was based on sex and it was severe enough to create an abusive or hostile work environment. Further, the conduct was objectively offensive to Abbt and affected a term or condition of her employment.

Moon v. Olivarez



- Spent 17 years in prison for a rape he did not commit. When he was exonerated and released from prison in 2004, he filed suit
- After 15 years of litigation, the only remaining claim is for false imprisonment under Texas state law against two retired El Paso detectives. District court granted summary judgment in favor of the detectives, concluding that they did not willfully detain Moon
- Fifth Circuit explained that willful detention may be shown even when the defendant does not actively detain the plaintiff IF the defendant instigated the false imprisonment. That is, the defendant engages in conduct that is intended to cause one to be detained and in fact causes the detention.
- In this case, there was no evidence to support Moon’s contention that Olivarez and Dove instigated his arrest. Without this evidence, Plaintiff was unable to sustain his claim for false imprisonment.

Wantou v. Wal-Mart Stores Texas, LLC,

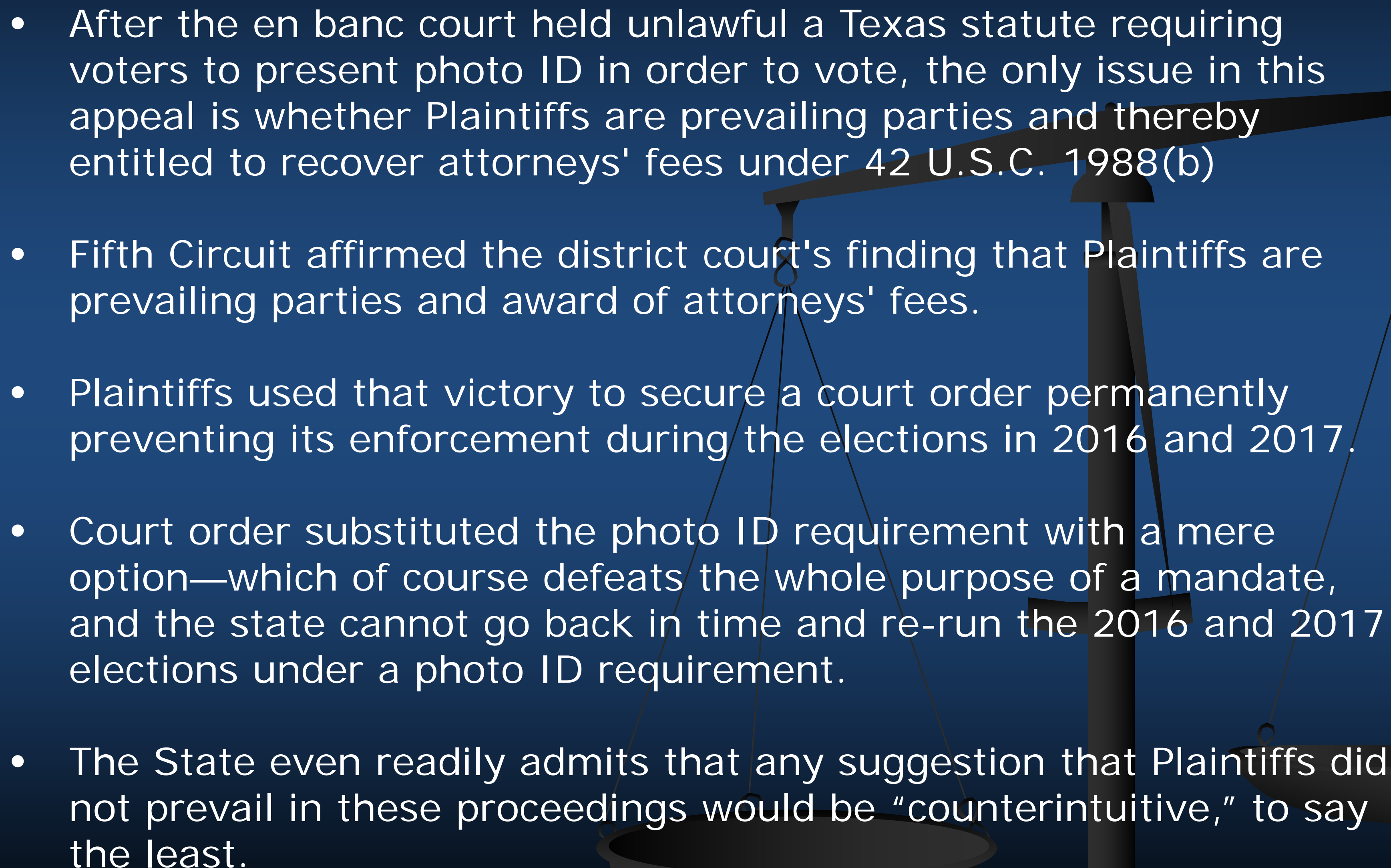


- Wantou, a pharmacist from Cameroon, filed suit contending that Walmart intentionally subjected and/or allowed him to be subjected to discrimination based on race, color and national original, illegal harassment, and a hostile work environment. Wantou also alleged retaliation for complaining about discrimination.

- The Fifth Circuit concluded that the district court did not reversibly err in granting summary judgment in favor of Walmart on the hostile work environment claim where it was not evident that a triable dispute existed relative to whether Walmart remained aware that Wantou suffered continued harassment and failed to take prompt remedial action.

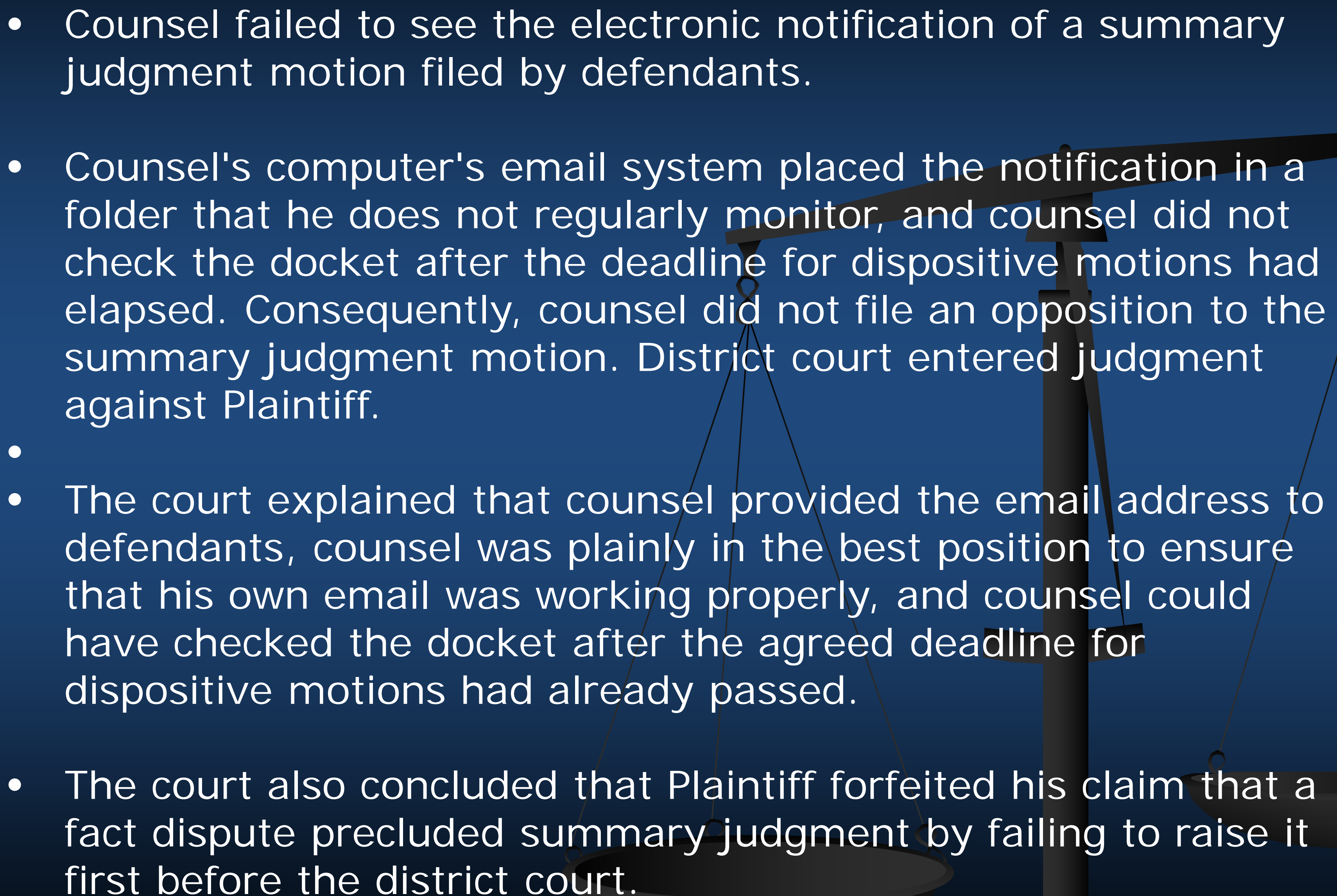
- The Court concluded that the district court did not abuse its discretion in instructing the jury and in refusing to provide the specific Cat's Paw instructions that Wantou requested.

Veasey v. Abbott



- After the en banc court held unlawful a Texas statute requiring voters to present photo ID in order to vote, the only issue in this appeal is whether Plaintiffs are prevailing parties and thereby entitled to recover attorneys' fees under 42 U.S.C. 1988(b)
- Fifth Circuit affirmed the district court's finding that Plaintiffs are prevailing parties and award of attorneys' fees.
- Plaintiffs used that victory to secure a court order permanently preventing its enforcement during the elections in 2016 and 2017.
- Court order substituted the photo ID requirement with a mere option—which of course defeats the whole purpose of a mandate, and the state cannot go back in time and re-run the 2016 and 2017 elections under a photo ID requirement.
- The State even readily admits that any suggestion that Plaintiffs did not prevail in these proceedings would be "counterintuitive," to say the least.

Rollins v. Home Depot USA



- Counsel failed to see the electronic notification of a summary judgment motion filed by defendants.

- Counsel's computer's email system placed the notification in a folder that he does not regularly monitor, and counsel did not check the docket after the deadline for dispositive motions had elapsed. Consequently, counsel did not file an opposition to the summary judgment motion. District court entered judgment against Plaintiff.
-
- The court explained that counsel provided the email address to defendants, counsel was plainly in the best position to ensure that his own email was working properly, and counsel could have checked the docket after the agreed deadline for dispositive motions had already passed.

- The court also concluded that Plaintiff forfeited his claim that a fact dispute precluded summary judgment by failing to raise it first before the district court.