RECENT FEDERAL CASES OF INTEREST TO CITIES

TEXAS CITY ATTORNEYS ASSOCIATION
SOUTH PADRE ISLAND, TEXAS
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TABLE OF CONTENTS

I. FIRST AMENDMENT

Pleasant Grove City, Utah v. Summum, 129 S.Ct. 1125 (2009)

The Supreme Court held in this case that the First Amendment does not entitle a private group to insist that a municipality place a donated monument in a city park. Even though a public park is traditionally considered a public forum, the placement of monuments is government speech and thus not subject to scrutiny under the Free Speech clause.

Pleasant Grove City, Utah has more than ten privately donated, permanent displays in Pioneer Park, including a monument of the Ten Commandments. The religious organization Summum requested that the City erect a monument containing its Seven Aphorisms, which the City rejected, explaining that Park monuments were limited to those either directly related to City history or donated by groups with longstanding community ties. Summum filed suit, claiming the City violated the Free Speech clause of the First Amendment by rejecting the Summum's proposed monument after accepting the Ten Commandments monument. While the District Court denied Summum's request for a preliminary injunction, the Tenth Circuit reversed on the basis that it had previously found the Ten Commandments monument to be private speech, the public park was traditionally considered a public forum, and the exclusion of the monument was unlikely to survive strict scrutiny analysis (that is, the City could not reject the Summum monument unless it had a compelling justification that could not be served by more narrowly tailored means).

The opinion, written by Justice Alito, first observes that the Free Speech clause does not regulate government speech; rather, it restricts government regulation of private speech. Further, the government is permitted to express its views even when receiving assistance from private sources for the purpose of delivering a government-controlled message (within the constraints of, *e.g.*, the Establishment Clause and accountability to the electorate). Recognizing that the government is strictly limited in regulation of private speech in public fora to reasonable time, place and manner restrictions, a strict scrutiny analysis applies to content-based restrictions, and viewpoint-based restrictions are prohibited.

In this context, the Supreme Court determined that the display of permanent monuments on public property represents government speech, even if the monuments are privately financed and donated to the government. Governments convey a message by selecting the monuments that portray what they view as appropriate for the forum in question, in light of content-based factors such as history, local culture and aesthetics. Summum raised the concern that government speech not be used to mask viewpoint-based favoritism of one private speaker over others; however, the Court observed that even monuments that feature the written word are interpreted by different observers in a variety of ways. Accordingly, a single "message" cannot always be identified in the display of a monument, and the intended and perceived significance of the monument may not coincide with the intent or thinking of the monument's donor or creator. Likewise, the "message" of any particular monument may change over time.

The Supreme Court rejected Summum's suggestion that "public forum" principles should govern the installation of permanent monuments in public parks. While numerous public speakers or temporary displays can be accommodated in public fora, only a limited number of permanent monuments can occupy such areas. Speakers and pamphleteers will eventually go home; by contrast, monuments monopolize the use of land on which they are placed. To allow every group wishing to place a permanent monument in a public place would put the government in the position of accepting permanent monuments with conflicting messages that do not represent the values and ideals of the community, or in the alternative, requiring the removal of all monuments from public space. Justice Alito observed that following Summum's proposal would have required New York to accept a Statue of Autocracy from the German Empire or Imperial

Russia when it accepted the Statue of Liberty from France.

Ysursa v. Pocatello Education Association,* 129 S.Ct. 1093 (2009*)

Government employee unions challenged Idaho's Voluntary Contribution Act's ban on public-employee payroll deductions for political activities on free speech grounds. While union dues could be deducted by the employer if authorized by the employee, political action committee dues could not. The Supreme Court held that the First Amendment does not confer a right to use municipal payroll mechanisms to obtain funds for free expression.

A group of Idaho public employee unions sued the Idaho Secretary of State, challenging the provisions of the state's Right to Work Act which permitted payroll deductions for general union dues but not union political activities. The District Court upheld the ban at the state level, but struck it down as it applied to local governments. The Ninth Circuit affirmed, applying a strict scrutiny analysis to hold that the statute was unconstitutional as applied at the local level.

The Supreme Court reversed, holding that the ban on political payroll deductions, as applied to local governmental units in Idaho, does not infringe the union's First Amendment rights. While content-based restrictions on speech are "presumptively invalid" and subject to strict scrutiny, the First Amendment does not impose an obligation on government to subsidize speech. Idaho's law does not restrict political speech; rather, the ban declines to promote political speech by allowing public employees to make deductions for political activities. Simply put, the unions—while free to make whatever speech they desire—cannot enlist the State of Idaho in making (or funding) that speech. As there is no restriction on political speech, Idaho need only demonstrate a rational basis to justify the ban, which it did with its stated interest in avoiding the reality or appearance of favoritism or entanglement with partisan politics. The response of the State is limited to its source; that is, political payroll deductions, which serves the State's interest in separating public employment from political activities. The Supreme Court further found there to be no significant reason to subject the ban to differing levels of analysis depending on the level of government affected; accordingly, the ban is legitimate for public employees at the local level.

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

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

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

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

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

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

Section 2252A(a)(3)(B) is not impermissibly vague under the Due Process Clause. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair, notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. *Hill v Colorado*, 530 U.S. 703, 732. In the First Amendment context plaintiffs may argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech. What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is. The statute's requirements are clear questions of fact. It may be difficult in some cases to determine whether the requirements have been met, but courts and juries every day pass upon the reasonable import of a defendant's statements and upon "knowledge, belief and intent." *American Communications Assn. v. Douds*, 339 U.S. 382, 411.

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

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

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

Of primary importance to the Fifth Circuit was the § 1983 claim against the County, as the claims against the officials in their individual capacities were properly dismissed. The Fifth Circuit reviewed a plaintiff's elements for proving a First Amendment retaliatory discharge claim: (1) plaintiff suffered an adverse employment action, (2) the speech involved a matter of public concern, (3) the *Pickering*

balancing test demonstrates his interenst in commenting on the matter of public concern outweighs the County's interest in promoting efficiency, and (4) his speech was a substantial or motivating factor behind the County's actions.

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

II. EQUAL PROTECTION AND DUE PROCESS

Van de Kamp v. Goldstein, 129 S.Ct. 855 (2009)

Goldstein was convicted of murder in 1980 in Los Angeles, based in part by the testimony of a jailhouse informant about Goldstein's confession to the murder. After serving 24 years, Goldstein was released upon a court finding that the informant had been given favorable treatment for his information, but that fact was never shared — as it should have been — with Goldstein's defense lawyer. Goldstein brought a § 1983 due process action against a former chief prosecutor, Van de Kamp, and his chief deputy, claiming that they knew about the informant's favorable treatment, but the word did not get passed to defense counsel, mainly because the leaders of the office failed to train line prosecutors to share such information, failed to supervise the line attorneys, and failed to create a system for retaining and sharing information about informants.

The prosecutors sought to dismiss the case under the doctrine of absolute prosecutorial immunity, which was denied at the District Court and on interlocutory appeal to the Ninth Circuit on a finding that the complained of conduct was administrative rather than prosecutorial. The Supreme Court reversed, holding the prosecutors were entitled to absolute prosecutorial immunity. The opinion of the Court extends the protection of total immunity from liability for decisions made in preparing criminal cases for trial up the chain of command within prosecutors' offices.

The decision extends the Court's 1976 opinion in *Imbler v. Pachtman* to include tasks such as training, supervision and information-sharing under the umbrella of absolute immunity as prosecutorial, rather than "administrative," in the sense of lacking legal immunity, when those tasks are found to be "directly connected with the conduct of a trial." Conceding that training, supervision or information-management tasks for supervisors might sometimes be lacking in immunity from damages liability, the Court interpreted the claimed lapses in Goldstein's case to be protected because they were keyed to an error by the line prosecutor. "The types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management." That is, the analysis should take into account the functional considerations in *Imbler* to determine whether the subject activities are intimately associated with the judicial phase of the criminal process, as opposed to purely administrative tasks.

Summing up, Justice Breyer observed that, when a civil rights lawsuit claims "that a prosecutor's management of a trial-related information system is responsible for a constitutional error at [a] particular trial, the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself."

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

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

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

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

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

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

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

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

After the ordinance was enacted, the Lindquists considered purchasing two separate pieces of property but after consulting with the

city officials were told that that neither lot qualified for a license nor were they told or aware that the city council sometimes issued licenses on appeal even if they violated the ordinance. Based on that, they did not seek a license to sell used cars.

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

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

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

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

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

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

III. EMPLOYMENT LAW

A. Title VII

14 Penn Plaza LLC v. Pyett, 129 S.Ct. 1456 (2009)

Plaintiff-employees in a commercial office building in New York City worked as night watchmen and belonged to a local Service Employees International Union chapter, falling under the Union's collective bargaining agreement ("CBA"). The building's owner hired a security company and reassigned the Plaintiffs to duties in other areas in the building. The Union filed a grievance, alleging that the employer violated the CBA and discriminated against the employees on the basis of age. Plaintiffs ultimately filed an age discrimination suit in federal court, claiming violation of the CBA. The Defendants moved to dismiss or alternatively to compel arbitration under the CBA. The motion to compel arbitration was denied at the trial court and on appeal to the Second Circuit.

A sharply divided 5-4 Supreme Court held that nothing in the National Labor Relations Act or the ADEA prevents unions from mandating arbitration to resolve statutory discrimination claims. The majority upheld the importance of allowing parties to bargain contractually for exchanges of rights and responsibilities, and noted that courts should

generally not interfere in the creation and enforcement of arbitration requirements in CBAs. In upholding the arbitration clause, the Supreme Court was forced to distinguish precedent which held that unions could not contractually waive an individual employee's substantive guarantees against discrimination. The substantive right in this case, according to Justice Thomas, is the right to a workplace free of age discrimination, not the right to litigate the age discrimination claim in a federal forum. Arbitration is an acceptable, if not more efficient, forum for addressing employment discrimination grievances.

***Crawford v. Metropolitan Government of Nashville,* 129 S.Ct. 846 (2009)**

Crawford, a government employee, took part in an internal investigation regarding sexual harassment claims against another employee. When the investigation concluded, Crawford was fired based on charges of embezzlement and drug use. When these charges were later proven untrue, Crawford filed suit against her employer claiming retaliatory discharge under Title VII based on her participation in the investigation. The district court directed a verdict for her employer.

On appeal, the Sixth Circuit affirmed the district court's ruling.The court stated that Crawford's participation in the investigation did not constitute "opposition" and her activity in that regard was not "protected" as those terms are defined in Title VII, making the Civil Rights Act inapplicable to her claim.

In a unanimous decision, the Supreme Court reversed the Sixth Circuit. It held that the anti-retaliation provision of Title VII extends to people who speak out, not just on their own initiative, but when prompted by an employer's internal investigation. The Court reasoned that the plain meaning of the statute includes people who "oppose" sexually obnoxious behavior by merely disclosing the violation and need not initiate the disclosure.

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

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

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

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

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

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

***Duron v. Albertson's LLC,* 560 F.3d 288 (5th Cir. 2009)**

In this brief per curiam decision, the Fifth Circuit decided a Title VII (national origin) suit was timely notwithstanding a Katrina-delayed receipt of a right to sue notice from the EEOC. Vacating and remanding the case to the District Court, the Fifth Circuit observed: "In closing, we note that if the EEOC had followed its former practice of sending right-to-sue letters by certified mail, this dispute would, in all likelihood, have never arisen."

***Taylor v. United Parcel Serv., Inc.*, 554 F.3d 510 (5th Cir. 2008)**

The Fifth Circuit vacated and remanded this case where the plaintiff Taylor alleged discriminatory and retaliatory failure to promote, as well as discriminatory and retaliatory pay disparity, holding that the District Court erred in calculating the tolling of the statute of limitations, and therefore, erred in granting summary judgment for the employer.

Taylor, an African American, brought claims for racial discrimination, retaliation, and hostile work environment in violation of Title VII, § 1981, and Louisiana state law against his employer, United Parcel Service, Inc. (UPS). Taylor was previously part of a class action suit involving similar allegations that was filed in 1994. That case was dismissed in 2000. Taylor's individual claims arise from actions that allegedly occurred between 1993 and 2004, but he did not file his individual suit until 2003. Part of the issue in Taylor's appeal is whether the statute of limitations on Taylor's claims was tolled until 2000 or 2004.

The District Court determined that Taylor's claims were not tolled pending appeal of the class action suit because the class action suit was dismissed. The Fifth Circuit distinguished between situations where a district court denied certification of a class and where a district court dismissed a class action on the merits. Here, Taylor was a member of the class and the district court in that case did not deny certification of the class. Therefore, Taylor's claims of discriminatory and retaliatory promotion and pay prior to 2002 are not barred by operation of law, as was determined by the District Court, but the statute of limitations on Taylor's claims was tolled until 2004. The Fifth Circuit remanded Taylor's Title VII claims for the district court to determine whether these claims are timely, as Taylor only had 300 days to file these particular claims.

The Fifth Circuit vacated the district court's dismissal of Taylor discriminatory pay claims and held that the expert evidence offered by Taylor was sufficient to establish a *prima facie* case of discriminatory pay disparity. The evidence consisted mostly of statistical data, which alone is insufficient to make out a prima facie case. But the report also compared Taylor's salary to that of two apparently similarly situated white employees, which met the plaintiff's initial burden. According to the Fifth Circuit, UPS did not offer a sufficient non-

discriminatory reason for the disparity. Thus, summary judgment was improper on this issue.

***Stover v. Hattiesburg Pub. School Dist.*, 549 F.3d 985 (5th Cir. 2008)**

Stover brought claims against her employer, the Hattiesburg Public School District, for race discrimination under Title VII, violation of the Equal Pay Act (29 U.S.C. §206(d), hereinafter "EPA"), gender discrimination, retaliation, and constructive discharge after the District hired a white male to a position similar to hers at a substantially larger salary. The Fifth Circuit upheld the jury verdict for the District but reversed and vacated the award of attorneys' fees to the District.

Stover, an African American female with a bachelor's degree, began working as a secretary for the District in 1996 at a salary of $12,945 per year. Her salary steadily increased until she resigned from the position in 2006, at which time she earned $37,438 per year. Between 1999 and 2005, the then-superintendent created a "cabinet" composed of high-level administrators. One such cabinet member resigned in 2001, but, for budgetary reasons, his position was not immediately filled. In 2003, the District hired Oubre, a white male, to fill the vacancy. No public advertisement was made about the vacancy, and Oubre was the only candidate considered for the position. Oubre's starting salary was $48,380 for the partial school year and $62,845 for the full school year. Oubre holds a master's degree in Educational Administration. Stover contended that both she and Oubre were administrative assistants who performed substantially equal work and should have been paid the same.

The District Court denied the District's motions for summary judgment on all claims except constructive discharge, and the case proceeded to jury trial. The jury returned a unanimous, special verdict in favor of the District on all claims. The District Court awarded attorneys fees to the District and taxed costs against Stover. In awarding attorneys fees, the District Court cited numerous examples of diverseness in the jobs and stated that Stover and her attorney should have realized that her claims were baseless by the end of discovery.

The Fifth Circuit broke Stover's claims down into five categories: constructive discharge, jury instructions, jury verdict, evidentiary rulings, and attorneys fees and costs. On the first issue, the Court concluded that the evidence did not rise to the level necessary to support a claim for constructive discharge and upheld the summary judgment. On the issue of jury instructions, the Fifth Circuit concluded that the "same actor" jury instruction was not in error. Additionally, the Fifth Circuit decided that the jury verdict was properly supported and should not be overturned on appeal. The Fifth Circuit noted that Stover failed to raise a Rule 50 motion; therefore, the proper standard to apply on appeal is the plain error standard: whether some evidence exists to support the jury verdict.

Regarding the evidentiary rulings, the Fifth Circuit upheld the judgment of the District Court on all issues. First, the court concluded that sufficient evidence existed at trial for the jury to conclude that the school district did not discriminate against Stover. Second, regarding the Title VII and EPA claims, the District Court properly permitted evidence of Oubre's qualifications and demonstrations of skill, effort, and responsibility required of both Stover and Oubre. Third, the District Court properly permitted character evidence against Stover for the purpose of impeachment where Stover claimed to be a victim in her place of employment. Finally, the Fifth Circuit found no reversible error where the District Court permitted evidence of the District's lack of advertising for the vacant position before hiring Oubre.

The Fifth Circuit only deviated from the District Court on the issues of attorney's fees and costs. The Fifth Circuit concluded that attorney's fees were not properly awarded to the District but the costs, although improperly calculated, were properly taxed to Stover. Title VII does not, on its face, automatically award attorney's fees to a prevailing defendant. Plaintiff's claim must be frivolous, unreasonable, or without foundation. The Fifth

Circuit reasoned that if there was enough evidence for Stover's claims to survive summary judgment, then the claim is not frivolous. The fact that the jury returned a unanimous verdict in favor of the District only shows that the weight of the evidence at trial favored the District.

***Abner v. Kan. City S. Ry. Co.*, 541 F.3d 372 (5th Cir. 2008)**

Plaintiff-Employees prevailed over their former employers on a hostile work environment claim and were awarded damages, attorneys' fees, and expenses. The first trial ended in a mistrial after the jury was unable to return with a unanimous verdict, but the plaintiffs prevailed at the second trial. The Defendant-employers argued on appeal that the plaintiffs should not be awarded attorneys' fees incurred for preparation of the first trial. The Fifth Circuit upheld an award of attorneys' fees and costs in favor of the employees.

Plaintiffs alleged violations under Title VII of the Civil Rights Act of 1964, hostile work environment, and intentional infliction of emotional distress under Louisiana law. The plaintiffs originally filed the case *pro se* but retained counsel during an ultimately unsuccessful attempt to obtain class action status. Both parties filed numerous pre-trial motions prior to both cases. For the most part, the motions submitted before the second trial aimed to prevent admission of certain inflammatory evidence presented at the first trial. The second jury returned a verdict for the plaintiff and awarded punitive damages in the amount of $125,000 against each defendant. The District Court granted plaintiffs' motion to award nominal compensatory damages of $1 to each plaintiff.

After trial, Plaintiffs also moved for an award of attorneys' fees in the amount of $463,850.75 and expenses in the amount of $140,978.42, as provided for by Rule 54(d)(2), 29 U.S.C. § 794 et seq., and the Civil Rights Attorney's Fees Awards Act. The District Court awarded the costs and fees but at a reduced rate, based on *Johnson v. Ga. Highway Express*, 488 F.2d 714, 717-719 (5th Cir. 1974), stating that the fee award may be adjusted based on the degree of success obtained. The District Court ultimately awarded $349,930.22 in attorneys' fees and $97,386.90 in costs, despite the fact that the Fifth Circuit has not allowed awards for work done for a first trial, reasoning that the work done for the first trial here was reasonable and ultimately resulted in success at the second.

Defendants argued on appeal that Plaintiffs were not entitled to fees and expenses from the first trial because they were not the "prevailing party" at the first trial and because the amount was unreasonable. The Fifth Circuit ultimately relied on the Supreme Court's guidance in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). The Court explained that a district court has the discretion to adjust the amount of an award based on factors such as whether the plaintiff failed to prevail on claims unrelated to the successful claims and whether the hours expended appropriately corresponded to the level of success the plaintiff achieved. The Fifth Circuit held that the District Court's adjustments were appropriate under *Hensley* and affirmed the award as adjusted.

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

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

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

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

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

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

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

On the issue of constructive discharge, the court looked to whether working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Id.* at 480. The court identified six factors to aid them in looking into whether or not it is constructive discharge: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (6) offers of early retirement that would make the employee worse off whether the offer were accepted or not. *Hunt v. Rapides Healthcare Sys., L.LC.*, 277 F.3d 757, 771-72 (5th Cir. 2001).

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

B. Other Employment Cases

EEOC v. Bd. of Sup'rs for Univ. of Louisiana System,* 559 F.3d 270 (5th Cir. 2009*)

In this decision, the Fifth Circuit held that the Eleventh Amendment does not bar the EEOC from seeking make-whole relief for the benefit of private individuals. McGraw, a former university professor and dean in the University of Louisiana system, challenged a policy prohibiting the re-employment of retirees on a regular full-time basis. McGraw filed a discrimination charge with the EEOC and a state court lawsuit against the university. The EEOC filed a separate action seeking injunctive relief against the policy as well as make-whole relief for McGraw, including backpay, placement in the position of his choice, and other monetary relief. The university moved to dismiss the EEOC's claims on the basis that Eleventh Amendment immunity barred the proceedings, and the district court denied the motion. This interlocutory appeal followed.

The Fifth Circuit opened its discussion by observing that the ADEA imposes "substantially higher burdens on state employers" in prohibiting age-based employment discrimination than the Constitution's equal protection requirements. In addition, the Court noted that Eleventh Amendment sovereign immunity protects States only from private lawsuits—not suits brought by the federal government. Further, the Fifth Circuit recognized that, in some circumstances, the Supreme Court has permitted the EEOC to play an independent public interest role in allowing it to seek victim-specific relief even when such relief could not be pursued by the employee. Acknowledging that in other contexts the Fifth Circuit limited the EEOC's ability to seek damages for private parties barred from pursuing employment-related claims, *see, e.g., EEOC v. Jefferson Dental Clinics, P.A.*, 478 F.3d 690, 699 (5th Cir. 2007) (holding EEOC cannot seek make-whole relief for employees who have already litigated their claims in state court), the Fifth Circuit held that such precedent did not bar the EEOC's claims against the State for make-whole relief for the benefit of McGraw. Accordingly, the trial court's judgment was affirmed.

***Sandoz v. Cingular Wireless LLC,* 553 F.3d 913 (5th Cir. 2008)**

Defendants regularly use a vauable tactic to defend against putative collective actions under the FLSA: a Federal Rule 68 offer of judgment to the class representatives, thus satisfying their claims in full and mooting the representative's claims. In *Sandoz,* the Fifth Circuit limited the availability of this process, holding that the "relation back" doctrine ensures that defendants cannot unilaterally "pick off" class action representatives to thwart FLSA collective actions.

Sandoz, a part-time sales consultant for Cingular, filed suit claiming that the company failed to pay its part-time employees minimum wage, in violation of the FLSA. After removing the case to federal court, Cingular offered Sandoz $1,000.00 plus attorneys' fees to satisfy her claims in full. The offer was not accepted. Cingular thereafter filed a motion to dismiss Sandoz' complaint, arguing the offer of judgment satisfied her claims. Therefore, Cingular argued, her cause of action was moot under the FLSA. The district court denied the motion to dismiss but granted Cingular's motion for interlocutory appeal to the Fifth Circuit to determine whether the district court had jurisdiction to decide the matter. After the district court denied the motion to dismiss, and 13 months after filing her original petition in state court, Sandoz filed a motion to certify a collective action under the FLSA.

The Fifth Circuit recognized that the offer of judgment practice creates an "incentive for employers to use Rule 68 as a sword, 'picking off' representative plaintiffs and avoiding ever having to face a collective action." Further, the tactic has the potential to "frustrate" the objectives of the FLSA, while sustaining duplicative individual lawsuits under the Act. In this case, the Fifth Circuit observed, "when Cingular made its offer of judgment, Sandoz represented only herself, and the offer of

judgment fully satisfied her individual claims. If our analysis stopped there, Sandoz' case would be moot." What remained unsettled was Sandoz' putative status as the class representative for other part-time employees of Cingular, and whether the company's offer of judgment prevented her representation.

The Fifth Circuit resolved its concerns with this practice by finding that the relation back doctrine "provides a mechanism to avoid this anomaly." In sum, "when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date the plaintiff filed the initial complaint, particularly when one of the defendant's first actions is to make a Rule 68 offer of judgment. If the court ultimately grants the motion to certify, then the Rule 68 offer to the individual plaintiff would not satisfy the claims of everyone in the collection action; if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot."

The court's application of the relation back doctrine effectively precludes the preemptive use of Rule 68 offers of judgment except in limited circumstances: (1) plaintiff's motion for certification is untimely; or (2) plaintiff's motion for certification is denied and only the named plaintiff's claims remain. In this case, the Fifth Circuit remanded the case to the District Court to resolve whether Sandoz filed her motion for certification in a timely manner.

While it appears that an offer of judgment remains a viable defensive maneuver in the Fifth Circuit, its usefulness has been sharply curtailed. Nevertheless, it is important that a defendant facing a potential FLSA collective action extend such an offer early in the course of litigation, in the event that the named plaintiffs fail to file a timely motion for certification or the motion is denied.

C. Americans with Disability Act (ADA)

***EEOC v. Argo Distribution, LLC*, 555 F.3d 462 (5th Cir. 2009)**

The EEOC brought this claim under the Americans with Disabilities Act (ADA) alleging that Argo failed to reasonably accommodate its employee Valez and fired him because of his disabilities. The District Court determined that Valez was not disabled within the meaning of the ADA, the suit lacked foundation, and an award of attorneys' fees and costs to Defendant was warranted. The Fifth Circuit affirmed.

Valez works in a manual labor position and has a medical condition that makes him unable to sweat; therefore, he must take frequent breaks to cool off. Valez was assigned to work on a specific project, but he told his supervisor that he would become ill if he performed the requested work. The issue of taking breaks was never discussed. Valez failed to appear at this shift and was terminated. Valez filed a complaint with the EEOC. In reviewing the EEOC's actions and reports, the District Court concluded that the EEOC did not attempt conciliation with Argo in good faith.

The Fifth Circuit began by addressing the issue of subject matter jurisdiction *sua sponte*, citing cases holding that federal courts do not have jurisdiction where the EEOC has not attempted conciliation in good faith. Following the lead of the Supreme Court, however, the Fifth Circuit concluded that the EEOC's conciliation requirement is a precondition to a suit but not a jurisdictional prerequisite. In practice, a district court may impose a stay to continue negotiations or dismiss a case where the EEOC fails to attempt conciliation in good faith. Here, the Fifth Circuit stated that attorneys' fees were appropriately awarded because the EEOC acted unreasonably by disregarding procedural requirements in the suit and proceeding after it was clear from Valez' deposition that he was not substantially limited in a major life activity and Argo had not denied him accommodation.

In determining whether a condition is a disability under the ADA, a court is allowed to consider mitigating measures taken by the

individual as well as factors such as the nature and severity of the impairment and the duration or permanency of the condition. Because Valez is able to control the effects of his condition with activities such as drinking cold water and using air conditioning just like others without his condition, he is not disabled within the meaning of the ADA. The Fifth Circuit determined that no issues of material fact exist, and summary judgment was appropriate on this issue.

The Fifth Circuit further determined that even if Valez was disabled under the ADA, evidence suggested that Argo provided reasonable accommodation by allowing Valez to take frequent breaks as needed. The reasonable accommodation analysis of the incident in question is hampered by Valez' failure to appear for his assigned shift and a lack of evidence suggesting that past accommodation would not have been available to Valez on this occasion. As the evidence did not demonstrate a fact issue, the Fifth Circuit affirmed summary judgment for Argo.

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

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

In 2002, Pinkerton's first line supervisor—who had supervised him for five years—proposed Pinkerton's removal for unacceptable performance. The Regional Director terminated Pinkerton, whereupon Pinkerton filed an EEOC complaint, which resulted in a finding of no discrimination. The district court asked the jury to decide whether Pinkerton was discharged "solely because of his disability." The jury said he was not and Pinkerton appealed.

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

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

D. Family Medical Leave Act (FMLA)

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

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

On appeal, the Fifth Circuit treated Nelson's suit as one against the State of Texas and reviewed the case to see whether there was an exception to immunity. Nelson relied on the Supreme Court decision, *Ex Parte Young*, 209 U.S. 123 (1908), which states that the Eleventh Amendment does not bar suits for prospective relief against a state employee acting in his

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

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

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

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

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

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

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

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

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

give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.

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

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

E. Section 1981

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

A former assistant manager at a Cracker Barrel restaurant sued CBOCS West, Inc., alleging he was dismissed for racial bias (Humphries is a black man) and because he had complained to management about the dismissal of an employee for race-based reasons. Humphries brought a "direct discrimination" claim under Title VII and a retaliation claim under the "equal contract rights" provision in Section 1981. Humphries' Title VII claims were dismissed, and the Supreme Court was presented with the question of whether Section 1981 encompasses retaliation claims. The Supreme Court answered "Yes."

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

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

IV. SECTION 1983

Fitzgerald v. Barnstable School Committee, 129 S.Ct. 788 (2009)

In February 2001 Jacqueline Fitzgerald, a kindergarten student, told her parents that an older student on the school bus, on several occasions, bullied her into lifting up her skirt. Jacqueline's mother reported these allegations to the school. The school's initial investigation into the matter, including interviewing the supposed perpetrator, the school bus driver, and many students on the bus, did not provide any further proof of the sexual harassment. Jacqueline told her parents about further instances of mistreatment, the local police department began its own investigation but was unable to find sufficient evidence to bring criminal proceedings against the alleged harasser.

Jacqueline continued to report other incidents throughout the year, and each was addressed by the school's principal as it occurred. In April of 2002 the Fitzgerald's brought suit against the school district in federal court alleging violations of both Title IX of the Education Act Amendments of 1972 and 42 U.S.C. 1983 (Section 1983). Title IX prohibits discrimination by any educational entity receiving federal funding. The district court granted the school district's motion to dismiss both counts.

The First Circuit affirmed the district court's dismissal of both claims. First, discussing the Title IX claim, the court stated that five conditions must be met for a plaintiff to succeed: the student must prove that (1) the institution is a recipient of federal funding, (2) severe, pervasive, and objectively offensive harassment occurred, (3) the harassment denied the student of educational opportunities or benefits, (4) the institution had actual knowledge of the harassment, and (5) the institution's deliberate indifference caused the student to be subjected to the harassment. The First Circuit held that even if the first four factors were met in this case, the school's "prompt" and "diligent" investigation was not clearly unreasonable and therefore did not amount to deliberate indifference. Rather, the school looked into each allegation quickly and thoroughly. The court also affirmed the dismissal of the Fitzgeralds' Section 1983 claim, applying the so-called "remedial" exception prohibiting such claims when the allegedly violated federal law is itself specific enough to demonstrate Congress' intention to allow only those remedies referred to in the statute itself. According to the First Circuit, Title IX is one of these remedial statutes and therefore any alleged violations of the statute cannot be litigated under Section 1983.

In a unanimous decision the Supreme Court reversed the First Circuit. It held that a claim filed under Title IX for violation of the Equal Protection Clause of the Fourteenth Amendment does not preclude the use of 42 U.S.C. Section 1983 to further constitutional claims. The Court reasoned that Title IX was not meant to be the exclusive tool for addressing gender discrimination in schools, or a substitute for actions filed under Section 1983 to enforce constitutional rights.

Herring v. U.S., 129 S.Ct. 695 (2009)

Herring was arrested based on a warrant listed in a neighboring county's database. The search incident to that arrest disclosed a gun and drugs. Later, it was determined that the warrant had been recalled months before the arrest, but the database had not been properly updated. Herring was indicted and moved to suppress the evidence on the grounds that the initial arrest was illegal. The District Court and Eleventh Circuit concluded that the exclusionary rule did not apply, as the arresting officers were innocent of wrongdoing and that the neighboring county's failure to update the database was merely negligent. The Supreme Court affirmed, holding that when police mistakes leading to an unlawful search are "the result of isolated negligence attenuated" from the search and arrest, as opposed to systemic error or reckless disregard of constitutional requirements, the exclusionary rule does not apply.

The Supreme Court, after acknowledging that the arrest in this case violated the Fourth Amendment, focused on "the

culpability of the police and the potential of exclusion to deter wrongful police conduct" in deciding whether the fruits of a search incident to an unlawful search must be excluded in a later prosecution. A Fourth Amendment violation in itself—that is, the fact that a search or arrest was unreasonable—does not mean that the exclusionary rule necessarily applies. The Court looked rather to the efficacy of the rule in deterring Fourth Amendment violations in the future. In addition, the benefits of deterrence in enforcing the exclusionary rule must outweigh its costs. In the case—as here—that only marginal deterrence would be achieved, in light of officers' objectively reasonable reliance on subsequently invalidated warrants, the exclusionary rule did not apply. Application of the rule would not have a significant effect in deterring record-keeping errors of the type made here. Rather, in order to "trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." That is, the rule is designed to deter "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." As the facts in this case did not rise to that level, the exclusionary rule was properly not applied.

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

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

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

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

Justice Souter noted the narrowness of the Court's decision, as the Court did not address what constitutes a reasonable time for the appointment of counsel once the right has attached and the request has been made by the criminal defendant. Specifically, the Court did not determine whether the six month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, nor did it determine the standards to apply in this determination. In dissent, Justice Thomas argued that a criminal prosecution could not begin without the involvement of a prosecutor,

and thus there could be no right to counsel which would attach after the initial hearing. Two separate concurrences also noted the narrowness of the Court's holding, and in one concurrence Chief Justice Roberts and Justice Scalia agreed that Justice Thomas' arguments were "compelling." The case has been vacated and remanded to the Western District of Texas for further proceedings.

***Tebo v. Tebo,* 550 F.3d 492 (5th Cir. 2008)**

Lucille Tebo's violent behavior prompted her stepsons (the Tebo brothers) to contact local authorities to investigate her. The affidavits filed by the Tebo brothers with the Court, Mrs. Tebo's admissions, and two psychological evaluations completed by doctors previously unknown to the Tebos showed that Mrs. Tebo was a danger to herself and others due to her behavior. The commitment proceedings were never finalized, however, as the Tebo brothers dropped the suit upon learning their father intended to divorce Mrs. Tebo. Mrs. Tebo instituted this suit against her stepsons and the evaluating physicians, alleging that all Defendants conspired to have her involuntarily committed to a mental institution for the purpose of taking her property. She claimed they violated her Fourteenth Amendment due process rights and sought relief under 42 U.S.C. § 1983. She alleged intentional infliction of emotional distress, malicious prosecution, and negligence *per se* against all Defendants, and medical malpractice against the physician defendants.

The Fifth Circuit denied Mrs. Tebo's due process claim against her stepsons on a state actor theory because the allegation was conclusory. In order to prevail, Mrs. Tebo must prove that the Tebo brothers, who were not state actors, conspired with state actors to commit an illegal act. Mrs. Tebo presented no such evidence linking the Tebo brothers to the state actors; here, a social worker and a public hospital employee. In her due process claim against the doctors, Mrs. Tebo relied on the so-called "stigma-plus" theory. Under this theory, a public official's actions may rise to the level of a due process violation where the infliction of a stigma on a person's reputation is accompanied by an infringement of some other interest. The Fifth Circuit rejected Mrs. Tebo's arguments because the public officials in this case neither published any comments about Mrs. Tebo nor actually deprived her of her liberty interest.

The Fifth Circuit engaged in a lengthy analysis of the probable cause element of the malicious prosecution claim. The standard used by the District Court in the context of commitment proceedings is that probable cause exists if the defendants honestly believed and also had reasonable basis for believing that facts existed warranting the proceedings that were later challenged. In short, the brothers must have actually and reasonably believed that Mrs. Tebo was in need of treatment. The Fifth Circuit affirmed summary judgment on the issue, noting that the affidavits submitted by the Tebo brothers and Mrs. Tebo's admissions of erratic behavior eliminated a genuine issue of material fact.

The Fifth Circuit easily affirmed the summary judgment ruling regarding the intentional infliction of emotional distress claim due to the absence of any facts in the pleadings to support Mrs. Tebo's claim. The Fifth Circuit also failed to find any basis for the claim of negligence *pro se*. Regarding the claim of medical malpractice, the Fifth Circuit affirmed that the doctors in this case were protected by statutory immunity against these claims.

***Mapes v. Bishop,* 541 F.3d 582 (5th Cir. 2008)**

In this *per curiam* opinion, the Fifth Circuit resolved the conflict between its precedent and the Supreme Court's recent holding in *Wallace v. Kato*, 549 U.S. 384 (2007), which provided: "the statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process." In this case, Mapes filed his complaint exactly one year after his criminal prosecution terminated in his favor. The Fifth

Circuit remanded the case to the District Court as the record did not reflect the date upon which Mapes became detained pursuant to legal process. The Fifth Circuit confirmed that Wallace governed the District Court's action and anticipated dismissal of the case, as it was likely to have been filed untimely under *Wallace*.

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

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

McIntosh was the director of dentistry and the treating dentist for the residents at the Richmond State School (RSS). David Partridge was the medical director of the school and direct supervisor. McIntosh was a member of the U.S. Navy Reserve and was called to active duty in October 2004 causing Richmond to contract with another dentist while McIntosh was on his tour of duty. During his absence, it was noted that many of the patients' teeth were in poor condition and it was believed that McIntosh quality of dental care at RSS was lacking.

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

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

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

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

sufficient process to meet the requirements of the federal due process clause before his suspension with pay.

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

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

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

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

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

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

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

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

In April 2004, police officers arrested 23-year-old Jamie Whitt on three misdemeanor charges and took him to the Stephens County

Jail. Whitt was in the Stephens County Jail for approximately 7 hours before found hanging by a belt from the ceiling of his jail cell.

When Whitt was booked in the jail around 2:00 p.m., and his items of clothing were inventoried, there was no notation of a belt. He was also administered a mental health questionnaire where he answered "no" to almost all the questions, including whether he had ever attempted suicide or had suicidal thoughts. He did, however, answer "yes" to a question of "Have you experienced a recent loss or death of a family member or friend or are you worried about major problems other than your legal situation?" Contrary to normal jail protocol, the jailor did not report the answers to his supervisors and assigned Whitt to a general holding cell.

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

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

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

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

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

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

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

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

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

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

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

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

The Fifth Circuit also rejected Waltman's Fourteenth Amendment claim that he was deprived of due process by seizing the plants without a warrant, as that claim was only an extension of the Fourth Amendment claim. Finally, the Fifth Circuit found that as Waltman had not exhausted his potential state judicial procedures relating to his takings claim, such a claim was not ripe and it was dismissed for lack of subject matter jurisdiction without prejudice to Waltman's right to seek compensation in other venues.

***Sossamon v. The Lone Star State of Texas,* 560 F.3d 316 (5th Cir. 2009)**

A Christian inmate at the Robertson Unit of the TDCJ contended that he had been deprived of access to the Unit's chapel for worship, and further that he was forbidden to attend any worship services at all while on cell

restriction, both in violation of various Constitutional rights and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). With regard to the cell-restriction policy, the warden at the Robertson Unit amended the policy after Sossamon filed a grievance on the issue, and accordingly inmates at Sossamon's custody level were then permitted to attend worship services while on cell restriction. This policy was later adopted by the TDCJ for all Texas correctional facilities. On the chapel-use claim, the TDCJ acknowledged that the chapel was closed to all religious worship on safety and security grounds, but religious services were permitted at alternative locations throughout the Unit, posing less security and safety issues. The District Court granted summary judgment to the Defendants on sovereign and qualified immunity grounds and denied Sossamon his requested injunctive relief.

On appeal, the Fifth Circuit dismissed as moot those parts of Sossamon's appeal that related for injunctive and declaratory relief from the cell-restriction policy, as TDCJ had not only changed the policy for his unit but also for all Texas correctional facilities: "Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing." However, the Fifth Circuit applied a strict scrutiny analysis to Sossamon's claims under RLUIPA for the enforcement of the chapel-use and cell-restriction policies against him. After determining that RLUIPA was enacted under Congress' Spending Clause power, and not under the Section 5 power of the Fourteenth Amendment, the Fifth Circuit held that suits against RLUIPA defendants in their individual capacities were not permitted; only the state may be liable for its violation. The Fifth Circuit likewise held that Sossamon's RLUIPA claims for monetary relief from Texas and its officers in their official capacities are barred by sovereign immunity.

The Fifth Circuit then turned to the issue of whether Sossamon was entitled to declaratory and injunctive relief from the chapel-use policy. To be so entitled, a RLUIPA claimant must show: (1) that the burdened activity is "religious exercise," and (2) that the burden imposed by the policy is "substantial;" that is, that "it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." The focus of the Court's discussion was the second factor: whether the restriction on the use of the chapel substantially burdened religious exercise. Interestingly, the Fifth Circuit focused on the rituals Sossaman claimed important to *him*—kneeling at the altar in the view of the cross and other religious acts in the presence of Christian symbols in the chapel—and disregarded both the alternative venues offered for services and also the chaplain's testimony that actual presence in a chapel for service was not a basic tenet of Christianity. Thus, the Fifth Circuit found there to be a fact issue on the "substantial burden" question, as the religious practice Sossaman claims to be important to *him* is denied at all times.

The next RLUIPA issue is whether that substantial burden is nevertheless justified by a compelling governmental interest achieved through the least restrictive means; the Fifth Circuit rejected Texas' argument that offering religious services elsewhere was an adoption of the least restrictive means of accommodating Sossaman, in light of the prior finding that Texas had, in fact, banned the kind of Christian worship *he* claims is indispensible to *his* Christianity. Finding that there was a fact issue on this element as well, the Fifth Circuit remanded the case for further development of these RLUIPA issues at the District Court.

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

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

be attended by a security-trained, religious volunteer—the closest one of which lives in Arkansas.

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

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

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

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

The Fifth Circuit noted that the RLUIPA claims carry a higher burden, in that the statute requires that the government justify a "substantial burden on the religious exercise" by demonstrating that the imposition of the challenged government action is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. Under the same factual background, Mayfield's claims regarding the volunteer policy and runestones should have survived summary judgment. In essence, the disparate application of the volunteer policy and the limited access of Odinists to alternative means of worship provide a reasonable basis for a finder of fact to conclude that the volunteer policy imposes a substantial burden on Odinists, and there were unresolved issues of fact which called into question whether the application of the policy was narrowly tailored to a legitimate interest. Furthermore, the policy of disallowing runestones could not be shown to be narrowly tailored to serve a compelling governmental interest, as prison regulators cannot compare a not-previously-disallowed religous exercise (possession of runestones) to another disallowed behavior (possession of gambling-related items). Accordingly, dismissal of Mayfield's RLUIPA claims was dismissed.

V. WARRANT ISSUES

Arizona v. Johnson, 129 S.Ct. 781 (2009)

In this unanimous opinion, the Supreme Court expanded the control that police officers can exercise at the scene of roadside traffic stops, enlarging the "stop and frisk" authority granted to officers to permit them to control a scene.

Tucson police officers on gang patrol was checking out a neighborhood known to associate with the Crips gang when they observed a vehicle which was determined to have its insurance suspended. While there was no suspicion of any other crime, officers stopped the vehicle and one officer (Trevizo) engaged a backseat passenger, Johnson, in conversation, after noting his blue bandana (indicia of Crips membership) and a scanner in his pocket. The officer learned Johnson was from Eloy, a town with prominent Crips activity, and that he had served time on a burglary conviction. Trevizo ordered Johnson out of the car and frisked him, finding a gun near his waist, at which time Johnson began to struggle and Trevizo placed him in handcuffs.

Johnson was charged with illegal possession of a firearm, among other charges. The trial court denied his motion to suppress the evidence as fruit of an unlawful search, but the Arizona Court of Appeals reversed the conviction, finding that Trevizo had no right to conduct a frisk of Johnson as she had no reason to believe he had committed any crime.

Justice Ginsburg, writing for the unanimous Court, reviewed *Terry v. Ohio* and its progeny, and concluded that the "combined thrust" of the past cases was that officers who conduct routine traffic stops may perform a frisk of a driver and any passenger if they have "reasonable suspicion that they may be armed and dangerous." If search activity does not unduly prolong the initial stop, the stop is not concluded—for Fourth Amendment purposes—until officers have completed exercising control of the scene.

Arizona v. Gant, 129 S.Ct. --- (2009)

In a 5-4 opinion, the Supreme Court held that police may conduct a warrantless vehicle search incident to an arrest only if the arrestee is within reaching distance of the vehicle, or if the officers have reasonable belief that "evidence of the offense of arrest might be found in the vehicle."

Gant was contacted by police at a home that was the subject of a tip of narcotics activity. The officers later conducted a records search and found Gant had an outstanding warrant for driving with a suspended license. Returning to the house, officers observed Gant driving up to the house, whereupon he was summoned by an officer and arrested. While Gant was handcuffed and locked in the back of a patrol car, an officer searched the passenger compartment of Gant's car and found cocaine and a gun. Four other officers and two other arrestees, but no other persons, were present on the scene. One officer testified at trial that the scene was "secure" during the search of Gant's car. Gant filed a motion to suppress the evidence found in the search of the car, which was denied. In the course of several appeals, the search was determined to not be contemporaneous with the arrest.

The Supreme Court granted review to answer the question: Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicle search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured? As Gant could not have reached in his car during the search and posed no safety threat to the officers, the search was unreasonable under the "reaching distance rule." The Court further held that circumstances unique to arrests in the motor vehicle context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

***United States v. Zavala,* 541 F.3d 562 (5th Cir. 2008)**

Zavala appealed the denial of a motion for a new trial, contending that the trial court erred in failing to suppress testimony by a Drug Enforcement Administration (DEA) official concerning knowledge acquired during an unlawful search. The Fifth Circuit held that the search was unconstitutional and the Government did not meet its burden of demonstrating that this constitutional error was harmless beyond a reasonable doubt. The District Court's judgment was reversed and remanded for new trial.

This case centers on information obtained from the search of a cell phone where the cell phone was not part of a consensual search, the officers present had no warrant for the search, the possessor was not properly under arrest, and no exception applies to validate the warrantless search. As part of an ongoing investigation by the DEA, officers arrested Luna, who then gave information on other men in his drug ring. The DEA began surveillance on one of Luna's contemporaries. Shortly after DEA agents believed they witnessed a drug transaction involving Zavala, the agents ordered police to initiate a vehicle stop of Zavala's car. DEA agent Moreman attended the stop, interviewed Zavala, and searched Zavala's cell phone, justifying the search as incident to arrest. The cell phone Zavala was carrying that day was registered to an anonymous account holder. Through Moreman's search, authorities were able to put a name on that anonymous account. Moreman testified at trial that the phone Zavala carried connected Zavala to Luna and Luna's illegal activities, based on Luna's phone records. Zavala moved for a new trial alleging Moreman's testimony was improper. The motion was denied.

The Fifth Circuit agreed with the District Court that DEA agents had a reasonable suspicion of drug activity that was sufficient to justify the vehicle stop, but the suspicion did not rise to the level of probable cause before Zavala's cell phone was searched. The Fifth Circuit explained that probable cause did not arise until about ninety minutes later, at which time another suspect actually confessed to drug trafficking activity and implicated Zavala. Consequently, the search of the cell phone was not justifiable under an "incident to arrest" theory.

The State argued that Zavala gave consent to search his car at the time of the vehicle stop, and that this consent included the cell phone. The District Court agreed, but the Fifth Circuit did not. Importantly, the officers who made the initial stop asked Zavala to remove his wallet and cell phone from his pockets and place these items on top of the car. The Fifth Circuit reasoned that because these items were not *in* the car, the voluntary consent given by Zavala to search the car did not reasonably extend to the cell phone. Thus, the search was impermissible. The State further argued that the search of the cell phone was akin to a license request. The Fifth Circuit rejected this argument, stating that a government-issued document is not at all similar to a cell phone, which likely contains personal information and over which a person has a reasonable expectation of privacy.

The Fifth Circuit refused to apply the independent source exception to Moreman's objectionable testimony because no other witness could provide that particular piece of information. At the time of the trial, another, less credible witness testified as to the connection between Zavala and Luna, but this witness did not have first hand knowledge as to the number of the phone Zavala carried at the time of the vehicle stop.

The Fifth Circuit also rejected the inevitable discovery exception to allow the testimony, focusing on Zavala's hour and a half detention while officers were questioning other suspects. The court concluded that the detention exceeded the outer bounds of a *Terry* detention and that Zavala should have been released after the vehicle search failed to uncover evidence of drugs. Without any evidence from the State that an alternative means to acquire the information that was the subject of Moreman's testimony even existed, the admission of the testimony was improper.

Moreman's testimony was the cornerstone of the prosecution's case against Zavala. The Fifth Circuit concluded that the constitutional error was not harmless beyond a reasonable doubt because jurors might have convicted Zavala based, in whole or in part, on the admissible testimony of Moreman. Thus, the Fifth Circuit Court reversed and remanded the case for a new trial.

VI. MISCELLANEOUS CASES

***Hinojosa v. Butler*, 547 F.3d 285 (5th Cir. 2008)**

While in criminal cases no adverse inference may be drawn when a criminal defendant asserts his Fifth Amendment privilege against self-incrimination, different rules apply in civil cases, as shown by the Fifth Circuit in *Hinojosa*.

Hinojosa brought an excessive force and deliberate indifference claim against Officer Butler and the City of San Antonio to recover damages arising out of a 2:00 a.m. traffic stop. While the parties disputed what happened after the car stopped (Hinojosa claimed he ran for the car, fearing for his safety), Butler ultimately detained Hinojosa, who ended up with a broken finger and charges for evading arrest. The only claims that proceeded to trial were against Butler, in both his official and individual capacities. Butler moved to exclude evidence concerning his prior conduct, which included submitting false reports, a complaint regarding his on-duty conduct, and his resignation. Under examination outside the presence of the jury, Butler asserted his Fifth Amendment rights against self incrimination about this prior conduct, and the trial court precluded Hinojosa from this cross-examination before the jury. The jury ruled for Butler, and Hinojosa appealed, claiming the jury might draw adverse inferences from a defendant's silence and invocation of the Fifth Amendment.

The Fifth Circuit held that a trial court may decide whether to allow the jury to draw an adverse inference when a party in a civil case asserts the Fifth Amendment privilege. *See, e.g., Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (noting "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"). The Fifth Circuit concluded that the trial court erred in excluding the evidence as it was admissible under FRE 608(b). Considering the facts of this case against three prior opinions weighing undue prejudice from the invocation of the Fifth Amendment in a civil trial, the Fifth Circuit concluded that because Hinojosa's excessive force claim turned on Butler's credibility, the error in excluding the evidence was ***not*** harmless. However, the Fifth Circuit concluded that Hinojosa failed to show the exclusion of the invocation of the Fifth Amendment privilege evidence would have affected the jury verdict on the deliberate indifference claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***Fahim v. Marriott Hotel Services, Inc.*, 551 F.3d 344 (5th Cir. 2008)**

Fahim, a Muslim Egyptian-American with self-described "light brown" skin, missed a connecting flight in Houston. Air France provided her with a voucher for a hotel room and directed her to the airport Marriott. At the airline's request, Fahim agreed to assist another passenger with a voucher who did not speak English. Fahim and the other passenger, who spoke Arabic and wore a hijab (head scarf), proceeded to the Marriott, where Fahim claims the desk clerk refused to provide them with rooms based on their appearance. Fahim brought suit against Marriott, claiming discrimination on the basis of her religion and color, in violation of Title II of the Civil Rights Act.

The District Court dismissed Fahim's claims for damages, because damages are not available under Title II. The District Court then denied Fahim's motion to amend to ask for relief under § 1981, for which damages are available. Finding no genuine issue of material fact that Marriott discriminated against Fahim, the District Court granted summary judgment to Marriott. This appeal followed.

With regard to the denial of Fahim's Motion to Amend, the Fifth Circuit noted that the Motion came after Marriott's motion to dismiss filed after the parties' pleading deadline. The Fifth Circuit agreed with the District Court's assessment that such an amendment would be untimely and would add an entirely

new claim, rather than clarifying her existing claims. As Fahim did not offer any explanation for her failure to timely move for leave to amend, the Fifth Circuit accepted the trial court's discretion and determination that no good cause to amend was shown.

On the summary judgment aspect of the case, the Fifth Circuit determined that Fahim presented no direct evidence of discrimination in public accommodations: she did not allege that Marriott or its employees used language containing racial or religious slurs, nor that any other incident was directly linked to her race or religion. As the Fifth Circuit has not articulated a clear test for determining whether a plaintiff has established a *prima facie* case under Title II, the Fifth Circuit agreed with the District Court that Title VII caselaw (and specifically, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)) should fill that void. Specifically, to make a *prima facie* case of discrimination, Fahim would have to show: (1) she is a member of a protected class; (2) she attempted to contract for the services of public accommodation; (3) she was denied those services; and (4) the services were made available to similarly situated persons outside her protected class. Even if Fahim had established her *prima facie* case, the District Court found—and the Fifth Circuit agreed—that Fahim did not effectively rebut Marriott's legitimate, non-discriminatory reason for not providing her a room: that at the time of her attempted check-in, the hotel had no available rooms. Further, Fahim failed to establish that this reason was pretextual. Accordingly, the Fifth Circuit affirmed the judgment for Marriott.

***United States v. Brown,* 561 F.3d 420 (5th Cir. 2009)**

In this case brought by the United States on behalf of white minority voters in Noxubee County, Mississippi, the District Court held that the Noxubee County Democratic Executive Committee (NDEC) and its chairman, Ike Brown, violated § 2 of the Voting Rights Act by intentionally diluting the vote of white democrats in the 2003 primary election. The District Court's decision was issued after the 2007 primary elections, but the conduct of the defendants in both elections was considered in the rendition of the remedial order. The Fifth Circuit affirmed the District Court's finding of liability and the its remedial order.

The Fifth Circuit concluded that the District Court's holding was not clearly erroneous based on ample evidence showing a series of episodic practices by the NDEC that were motivated by and resulted in the discrimination of white voters. The District Court found that white votes were diluted due to NDEC and Brown's condoning such acts as (1) obtaining large numbers of defective absentee ballots from black voters, (2) facilitating the improper counting of absentee ballots in order to ensure tat the defective ballots were counted, and (3) permitting the improper assistance of black voters. The court heard evidence from several black residents who, at the encouragement of Brown and agents of the NDEC, voted by absentee ballot even though they were not properly qualified as absentee voters or received other improper assistance to vote. These ballots were then counted without observance of proper procedure regarding absentee ballots in both the 2003 and 2007 primary elections. Challenges to the absentee ballots by candidate representatives went unheeded. The District Court concluded from this evidence that the NDEC had violated § 2 of the Voting Rights Act.

The Fifth Circuit stated that the remedial order issued to correct the § 2 violation should be sufficiently tailored to the circumstances giving rise to the § 2 violation. The NDEC argued that federal observers would be sufficient to remedy the violations. The Fifth Circuit rejected this suggestion and upheld the District Court's decision to place a Referee-Administrator in charge of the election process. Brown and the NDEC are forbidden to interfere with the duties and decisions of the Referee-Administrator. The remedial order also bars Brown from communicating with or instructing poll officials and managers regarding electoral duties and vote counting. The Fifth Circuit rejected Brown's argument that this arrangement

violated Brown's or NDEC's freedom of expression or equal protection of the laws.

VII. CRIMINAL LAW

Waddington v. Sarausad, 129 S.Ct. 823 (2009)

After Sarausad was convicted of second-degree murder and two attempted second-degree murder charges in a jury trial arising out of his involvement in a drive-by shooting near a school, Sarausad filed a petition for habeas corpus. The district court granted Sarausad's motion, holding that the evidence was insufficient to support the conviction and that certain confusing jury instructions related to accomplice liability unconstitutionally relieved the State of its burden of proof.

The Ninth Circuit reversed the district court's ruling on the insufficiency of evidence claim but affirmed on the jury instructions claim. The court stated that the evidence at trial was sufficient to support a conviction under *Jackson v. Virginia*. However, the jury instructions were ambiguous on the question of whether Sarausad could be convicted of murder and attempted murder on a theory of accomplice liability without proof beyond a reasonable doubt that he knew an accomplice intended to commit a murder. The Ninth Circuit found there was a reasonable chance the jury misapplied these instructions.

The issue addressed by the Supreme Court under a due process challenge to a jury instruction was whether federal courts accept state court findings that instructions were correct?

In a 6-3 decision, the Supreme Court reversed the Ninth Circuit, holding that a federal court may reject state court conclusions with respect to the appropriateness of a state court jury instruction, so long as the instructions were "not only erroneous, but objectively unreasonable." Here, the standard was not met and the Ninth Circuit should have accepted the conclusions of the state court.

Blanton v. Quarterman, 543 F.3d 230 (5th Cir. 2008)

Blanton, an African-American, was convicted for capital murder and sentenced to death. He sought habeas relief, arguing ineffective assistance of counsel. The district court granted a certificate of appealability on several issues, including whether Blanton's trial counsel was ineffective in failing to properly preserve a *Batson* challenge with respect to a requested jury shuffle. The Fifth Circuit affirmed the judgment of the district court and denied habeas relief.

During his trial for capital murder, Blanton's attorney failed to raise a *Batson* challenge when the prosecutor requested a jury shuffle. In the original panel order, three African-American venire members were seated in the first twenty positions. After the prosecutor requested a shuffle, the first African-American venire member was seated in the 64th position. Blanton's trial attorney raised no *Batson* challenge at the time. When the prosecution later exercised a peremptory strike on an African-American venire member, Blanton's counsel raised a *Batson* challenge. The prosecutor responded with a race-neutral explanation and the court overruled the objection. Blanton's counsel then lodged a second *Batson* challenge regarding the shuffle and demanding that the prosecutor give an explanation for the jury shuffle. The trial court refused the demand and again overruled the objection. Blanton was ultimately convicted and sentenced to death.

On review, Blanton argued that his trial counsel was ineffective in failing to properly preserve his *Batson* challenge for appeal in that the lawyer failed to properly object to the jury shuffle when it occurred. Blanton contended that *Batson* required the trial court to consider all relevant circumstances when determining whether a defendant has made the requisite showing of purposeful discrimination. Thus, Blanton claimed that his attorney should have known the jury shuffle would be a relevant circumstance in a future *Batson* challenge if the State subsequently used a race-based peremptory

challenge. Both the state habeas court as well as the Fifth Circuit concluded that Blanton's claim of ineffective assistance of counsel failed because, at the time of Blanton's trial, neither Texas nor federal law recognized any relationship between a jury shuffle and a *Batson* challenge. Based on the current state of the law at the time of trial, it was reasonable for Blanton's trial counsel to believe that the prosecution could request a jury shuffle without cause and that a jury shuffle alone was not an adequate basis for a *Batson* challenge.

***Price v. Cain*, 560 F.3d 284 (5th Cir. 2009)**

Price, an African-American, was convicted of rape by an all white jury. During the jury selection process, the 54-member venire contained 16 African-Americans. The State used 6 of its 12 peremptory challenges to strike African-Americans. Price used 1 peremptory challenge to strike an African-American. After the jury was empaneled but before the members were sworn in, Price raised a *Batson* challenge on the basis that the jury was all white. The trial court concluded that the basis for Price's challenge was insufficient to make a *prima facie* showing to support a *Batson* challenge and thus did not require the State to provide a race-neutral explanation.

On appeal, the Fifth Circuit examined the first step in making a *Batson* challenge, *i.e.*, what constitutes a prima facie case. In doing so, the Court looked to a recent Supreme Court case, *Johnson v. California*, 545 U.S. 162 (2005), which states, "a defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." The Fifth Circuit concluded that, in order to make a *prima facie* case, Price only needed to show that the facts and circumstances of his case gave rise to an inference that the State exercised peremptory challenges based on race. The Fifth Circuit found that Price carried this burden because the facts and circumstances – Price, an African-American, was tried for the rape of a Chinese-American by an all white jury panel – were sufficient to permit the judge to draw an inference that discrimination occurred.

***Haynes v. Quarterman*, 561 F.3d 535 (5th Cir. 2009)**

Haynes was convicted of capital murder of a peace officer and sentenced to death. After the exhaustion of his state post-conviction remedies, the Fifth Circuit granted a certificate of appealability as to whether the prosecution struck two potential jurors based on race.

During the jury selection process, two judges took turns presiding over the matter. Judge Wallace presided over the beginning of the phase when the potential jurors were addressed and questioned as a group. Judge Harper presided over the next stage when the attorneys questioned the jurors individually. Judge Wallace then presided over the final stage in which peremptory challenges were exercised and *Batson* challenges were made, considered, and ruled upon. During the *Batson* hearing, Haynes established a *prima facie* case of a *Batson* violation and the prosecutor justified his peremptory challenge solely on his impression of the potential juror's demeanor when responding to individual questioning (over which Judge Harper, and not Judge Wallace, presided). Haynes' challenge was overruled. On direct appeal, Haynes argued that Judge Wallace did not observe the *voir dire* of individual members and thus did not observe the demeanor, body language, responses, *etc.*; accordingly, Judge Wallace could not assess and scrutinize the veracity of the prosecutor's explanation.

The Fifth Circuit noted that the Supreme Court demands that the trial court especially scrutinize explanations based purely on demeanor. The Court further stated that it accords the trial court the primary role in adjudicating demeanor-based *Batson* challenges as opposed to the appellate court, which must rely on a cold paper record. The trial judge must use his observations of the demeanor of the prosecutor and of the venire panel. In this case, both the trial court and the appellate court relied on the paper record to render their decisions on

the *Batson* challenges. Neither court conducted a factual inquiry into the demeanor-based reason because neither court applied the relevant observations of the juror's demeanors despite the trial court's role and experience in overseeing the individual *voir dire*. Thus, the Fifth Circuit concluded that it could not apply deference to the state court because the state court engaged in purely appellate fact-finding. "[N]o court, including ours, can now engage in a proper adjudication of the defendant's demeanor-based *Batson* challenge as to [a] prospective juror…because we will be relying solely on a paper record and would thereby contravene *Batson* and its clearly-established 'factual inquiry' requirement."

***Oliver v. Quarterman,* 541 F.3d 329 (5th Cir. 2008)**

The question before the Fifth Circuit was whether a jury improperly consulted the Bible while deliberating during the sentencing phase of a capital murder trial. Oliver received the death penalty at his trial. Oliver argued that the jury was improperly exposed to external influences during its deliberations in violation of his Sixth and Eighth Amendment rights. Relying on Supreme Court precedent, the Fifth Circuit determined that the Bible was definitely an external influence—a decision shared by several but not all other circuit courts. The dispositive fact here was that the account of a murder in the particular passage consulted by the jurors was nearly identical in circumstance to that of the murder trial about which they were deliberating. Specifically, the Bible passage instructs that a person who kills by hitting another should be put to death, and Oliver was convicted of shooting the victim then hitting him on the head with a rifle butt. The jury heard evidence that either act alone could have caused the victim's death.

The District Court found that the Bible passage in question did not actually have any bearing on the jury's decision. Several jury members testified that their decision was based solely on the evidence presented at trial and the instructions given to them by the court. To rebut the District Court's finding on appeal, Oliver needed to present clear and convincing evidence that the jury's use of the Bible had a substantial and injurious effect or influence in determining the verdict. The Fifth Circuit held that, in this case, the jury's consultation of the Bible passage in question amounted to an external influence on the jury's deliberations. The court reasoned that given the nature of the similarity of the passage and the facts in the trial, the jury could have based its decision on the Bible rather than on the applicable law and instructions given by the court. The court also distinguished the present situation from one where a juror simply enters the jury room with particular knowledge of the contents of the Bible. Although some fact issues remain, the Fifth Circuit ultimately determined that Oliver was unable meet his burden. Accordingly, the Fifth Circuit affirmed the denial of habeas relief.

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

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

The Supreme Court reversed the Ninth Circuit and restored the conviction and sentence. Determining that the term "during" connotes a "temporal link," the Court held that Ressam's carrying of the explosives was contemporaneous with the underlying felony (knowingly making false statements to customs officials), and thus the explosives were carried

"during" the violation. The Supreme Court further concluded, after analyzing the statute violated and a similar firearm statute, that Congress did not intend that there be a relationship—other than temporal—between the explosive carried and the underlying felony. The sole dissenter—Justice Breyer—argued that while "during" does require a temporal link, other limitations may also be implied as well; that is, the context of the statute requires more of a relationship between carrying the explosives and the felony.

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

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

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

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

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

Where history provides no conclusive answer, the Supreme Court has analyzed a search or seizure in light of traditional reasonableness standards "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300. Applying that methodology, the Supreme Court has held that when an officer has probable cause to believe a person committed even a minor crime, the arrest is constitutionally reasonable. The Court's decisions counsel against changing the calculus when a State chooses to protect privacy beyond the level required by the Fourth Amendment.

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

The Court rejected Moore's argument that even if the Constitution allowed his arrest, it did not allow the arresting officers to search him. Officers may perform searches incident to constitutionally permissible arrests in order to ensure their safety and safeguard evidence.

United States v. Robinson, 414 U.S, 218. While officers issuing citations do not face the same danger, and thus do not have the same authority to search. the officers arrested Moore, and therefore faced the risks that are "an adequate basis for treating all custodial arrests alike for purposes of search justification.

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

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

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

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

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

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

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

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

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

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

***Rivera v. Illinois,* 129 S.Ct. 1446 (2009)**

Rivera was convicted in 1998 in an Illinois court on two counts of first degree murder and sentenced to 85 years in prison. Before the trial, Rivera's attorney moved to dismiss a potential juror. The judge did not allow it deeming the motion discriminatory towards the juror. On appeal after his conviction, Rivera argued that the trial court erred in dismissing the pre-trial motion and thus his conviction should be reversed. The Illinois Supreme Court remanded the case with instructions for the trial court to specify how the motion was discriminatory. After the trial court found that gender discrimination was at issue, the Illinois Supreme Court continued its review.

It held that Rivera was improperly denied his pre-trial motion to dismiss the juror. The Court stated that there was no evidence Rivera's attorney aimed to dismiss the juror because of her gender. The Court also found that this was harmless error. The Court found that there was no evidence that indicated Rivera was tried before a biased jury because of the improperly dismissed motion, Rivera's conviction should stand.

The issue to be determined was whether an error in dismissing a defendant's pre-trial motion to dismiss a juror requires automatic reversal of conviction because it denies the defendant's right to an impartial jury guaranteed by the Sixth Amendment?

A unanimous Supreme Court held that the Due Process Clause does not require the automatic reversal of a conviction because of the trial court's good-faith error in denying the defendant's preemptory challenge to a juror, provided that all the jurors are qualified and unbiased. The Court reasoned that since there is no constitutional right to preemptory challenges, the mistaken denial of a preemptory challenge does not on its own violate the Constitution. Rather, states are free to decide as a matter of

law whether the mistaken denial of a preemptory challenge is reversible error. In this case, the Court agreed that the Illinois Supreme Court acted within its powers in determining the mistaken denial of Rivera's preemptory challenge was mere harmless error.

***United States v. Campbell,* 544 F.3d 577 (5th Cir. 2008)**

The Fifth Circuit Court held that where a mistrial was declared on account of manifest necessity because one juror did not participate in jury deliberations due to a language barrier, a second trial on the issue did not constitute a violation of the Double Jeopardy Clause of the Fifth Amendment. The Fifth Circuit's review of this case centered on whether the record indicated that the trial judge carefully considered alternatives to a declaration of mistrial and did not act in a manner that was abrupt, erratic, or precipitous.

The trial court first became aware that one juror had a language issue through the jury's questions to the judge during deliberation. The note indicated that a Spanish-dominate juror had trouble participating in the discussion and requested a translator. The court had dismissed the lone alternate juror prior to deliberation. The judge discussed the issue with counsel, noting that if the juror had trouble understanding deliberations, then he probably also had trouble understanding the substance of the trial itself. When it became clear that the juror could not effectively communicate with other jurors, the court opted to declare a mistrial in reliance on the Advisory Committee Notes to FRCP Rule 23 rather than proceed with eleven jurors. Defense counsel objected to the second trial, arguing that another trial would be in violation of the Double Jeopardy Clause. The motion was denied, and the second jury found Campbell guilty.

Campbell argued on appeal that the juror should have been allowed to continue deliberations with the aid of an interpreter. The trial court rejected that idea because it believed that having a translator in the jury room was without precedent and because this solution did not compensate for the juror's lack of comprehension during the trial itself. The Fifth Circuit determined that the trial court was within its right to deny an interpreter in the jury room, although a review of cases outside the Fifth Circuit showed that the presence of a translator for the purpose of assisting a juror was not improper.

The Fifth Circuit determined that the declaration of mistrial due to manifest necessity was not an abuse of the trial court's discretion. Guidance from the Supreme Court gives great deference to the trial court's finding of necessity as long as the court exercised "sound discretion." Here, the trial was relatively short, and the advisory committee's notes to Rule 23 allow for mistrial where the parties have not lost much by throwing out the first case. Additionally, the Fifth Circuit previously affirmed a decision by a district court to declare a mistrial when one of twelve jurors was dismissed during deliberations due to a death in the family, noting that the decision not to proceed with eleven jurors was widely accepted. Having supported the District Court's finding of necessity, the Fifth Circuit affirmed the prior determination that the second trial did not constitute a violation of the Double Jeopardy Clause.

***Kansas v. Ventris,* 129 U.S. --- (2009)**

Ventris, who was charged with murder, admitted to an informant planted in his cell prior to trial that he had committed the crimes for which he was charged. At trial, Ventris testified that another committed the crimes, whereupon the State sought to use the informant to testify as to Ventris' contradictory statement. Over Ventris' objection, the trial court allowed the testimony and Ventris was convicted.

The Supreme Court decided that statements taken from a criminal defendant in the absence of counsel can be used to impeach his testimony at trial without violating his Sixth Amendment right to the assistance of counsel during interrogations, first articulated in *Massiah v. United States*, 377 U.S. 201 (1964). Justice Scalia wrote the majority opinion for the

7-2 Court, with Justice Stevens writing a dissenting opinion joined by Justice Ginsburg.

Critical to the Court's determination of this case was the distinction between constitutional violations in the gathering of evidence and constitutional violations in the use of evidence. The Court determined that "the *Massiah* right is a right to be free from uncounseled interrogation, and is infringed at the time of the interrogation." The Court framed the *Massiah* exclusionary rule merely as a remedy for a constitutional violation that had already taken place; thus, it followed for the Court to conclude that exclusion should not extend to use for impeachment purposes, as the costs of exclusion under those circumstances outweigh the benefits of any expected deterrent effect.

VIII. QUALIFIED IMMUNITY

Pearson v. Callahan, 129 S.Ct. 808 (2009)

In this opinion written by Justice Alito, the Supreme Court rejected its own rigid, two-step qualified immunity analysis set forth in *Saucier v. Katz*, 522 U.S. 194 (2001), and which required that federal courts first determine if a constitutional violation occurred and then decide whether the right infringed was "clearly established." This opinion gives federal courts back the discretion to decide which question they would answer first.

Pearson was identified as a drug dealer by a confidential undercover informant. Law enforcement officers sent the informant to Callahan's home to arrange a drug buy and later back to the house to complete the purchase. After the informant completed the sale, he signaled the officers who entered the home without a warrant, searched the premises and arrested Callahan.

Callahan was convicted of unlawful possession and distribution of methamphetamine, but the Utah Court of Appeals vacated that conviction, rejecting the State's "inevitable discovery" argument. Callahan then sued the law enforcement officers under 42 U.S.C. § 1983 for violating his Fourth Amendment rights by entering his home without a warrant. The district court granted the officers' motion for summary judgment because it found that the officers did not violate clearly established law in entering the premises, based on the "consent once-removed" doctrine recognized by several courts. The Tenth Circuit reversed, following the two-step *Saucier* process, which led that court to first find that the officers' conduct violated Callahan's Fourth Amendment rights (rejecting the "consent once-removed" doctrine). Second, the Tenth Circuit found that the officers' conduct violated Callahan's clearly established right "to be free in one's home from unreasonable searches and seizures." Therefore, the Tenth Circuit concluded that qualified immunity did not bar Callahan's claim against the officers.

The Supreme Court disagreed, noting that "[w]hen the entry at issue here occurred in 2002, the 'consent-once-removed' doctrine had gained acceptance in the lower courts." The Court held that the officers "were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on 'consent-once-removed' entries." Implicitly rejecting the Tenth Circuit's description of clearly established federal law as the "right to be free in one's home from unreasonable searches and seizures," the Supreme Court focused on the objective legal reasonableness of the officer's actions in light of the "consent-once-removed" doctrine.

The decision on the merits of the qualified immunity defense was almost an afterthought for the Supreme Court. That aspect of the case was addressed in less than two pages of the opinion, while Justice Alito spent nearly 13 pages explaining the decision to abandon the two-step *Saucier* process. While that process "is often beneficial" to help develop constitutional law, the Supreme Court noted the price that it carries, including: the disdain that lower court judges have for the procedure; the "substantial expenditure of scarce judicial resources" that it involves, even when the difficult constitutional questions may have no bearing on the resolution of the case; the resulting waste of the parties' resources; and the risk of bad decision making

that the process engenders, because qualified immunity is raised at the pleading stage of litigation, before discovery, where the factual basis of the plaintiff's claim may be unclear and the briefing inadequate. The Supreme Court emphasized that it was not telling lower courts to always address the "clearly established" prong of the qualified immunity defense first; rather, this opinion clarifies that the lower courts "should have the discretion to decide whether that procedure [*Saucier*] is worthwhile in particular cases."

The opinion did not address the merits of the Fourth Amendment question, which was the focus of the parties' briefing and oral argument, which leaves open the issue of the validity of the "consent-once-removed" doctrine.

***Ramirez v. Knoulton*, 542 F.3d 124 (5th Cir. 2008)**

In a suit alleging excessive force by defendant-police officer for shooting plaintiff during his arrest, denial of summary judgment to defendant was reversed where police officer acted reasonably in deciding to use deadly force, and no constitutional violation therefore occurred.

Officer Knoulton of the Kerrville Police Department was involved in the shooting of Ramirez during an arrest. Ramirez, who was under investigation for sexual contact with a thirteen-year old, had previously advised police that he had a handgun and intended to "take care of the problem," which they interpreted to mean he was suicidal. Knoulton and other officers arrived at Ramirez' home to find him leaving in his car; Ramirez did not stop in response to police commands. Ultimately, Knoulton shot Ramirez after the officers saw a handgun and Ramirez brought his hands together in front of his waist. Ramirez survived the injuries to his face and brought an excessive force claim against Knoulton. The district court denied Knoulton's summary judgment motion, finding a genuine issue of material fact existed on his qualified immunity defense.

The Fifth Circuit found that Knoulton's actions were objectively reasonable in light of clearly established law at the time of the shooting. From the perspective of a reasonable officer on the scene, the Fifth Circuit determined that given the totality of the circumstances, Knoulton had probable cause to believe that Ramirez posed a threat of serious harm. Further, the magistrate judge in the district court improperly criticized Knoulton's failure to consider non-lethal force or the use of a crisis negotiator; the Fifth Circuit was critical of such armchair quarterbacking: "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *U.S. v. Sharpe*, 470 U.S. 675, 686-87 (1985). Finally, the Court rejected the magistrate judge's assessment of the timing of the incident, observing that "courts should not second guess the timing" of the realization that Ramirez—"a defiant, disturbed and armed man"—posed a threat to the officers. In sum, the Fifth Circuit refused to second guess the officer's conduct, holding that the totality of Ramirez' conduct could reasonably have been interpreted as defiant and threatening, and the decision to use deadly force was therefore not objectively unreasonable; thus, there was no Fourth Amendment violation. As there was no Constitutional violation, the Fifth Circuit did not reach the issue of qualified immunity.

***Hampton Co. Nat'l Sur., LLC v. Tunica County, Miss.*, 543 F.3d 221 (5th Cir. 2008)**

Two agents of a surety company that provides bail bonds, Gardner and Dean, brought this suit against Tunica County and its Sheriff Calvin Hamp after the sheriff failed to reinstate the agents to the list of approved bail bondsmen in Tunica County. The bondsmen claimed violation of their Constitutional rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the First Amendment. The District Court granted summary judgment in favor of Defendants. The Fifth Circuit held that the sheriff was entitled to qualified immunity on the due process claim, but it reversed and remanded all other claims.

In the procedural due process claim, Gardner and Dean claimed a property right in their state-issue bail bondsman license and alleged that Sheriff Hamp removed them from the approved list without following the procedures required for suspending or revoking the license. The Fifth Circuit concluded that the license itself was not taken; rather, the issue is whether the county sheriff has the discretion to limit the use of the state license in certain counties due to acts or omissions in that county. This issue is currently under review in Mississippi state court, and the Fifth Circuit refrained from weighing in, stating only that qualified immunity applied to the due process claim against Hamp. The court further decided that as to Tunica County, all elements of a due process claim were present, qualified immunity did not apply to the county, and summary judgment was inappropriate because Tunica County may indeed be liable.

On the equal protection claim, the Fifth Circuit held that a factual dispute existed as to whether Hamp engaged in disparate treatment of black and white bail bondsmen. Gardner and Dean, both white, alleged that Hamp, an African American, improperly kept their names from the list of approved bondsmen for nearly two years. Gardner and Dean's names were removed from the list after three criminal defendants failed to appear at a scheduled arraignment. Two other bail bondsmen, both African American, were removed from the approved list for similar reasons. The two African American bondsmen were immediately reinstated after curing their defect with the Circuit Clerk, but Gardner and Dean were not. Hamp's defense to all claims was that Plaintiffs were not reinstated because they failed to inform his office that the defect had been cured. The Fifth Circuit found that the evidence presented suggested a discriminatory purpose for the failure to reinstate; therefore, summary judgment was inappropriate on this issue.

In their First Amendment claim, Gardner and Dean claim that Hamp did not reinstate them to the approved bail bondsmen list because of an investigation of Hamp's predecessor and public criticism of Hamp's policies towards bail bondsmen. Hamp's defense on this issue was simply that he did not know that Gardner and Dean had cured their arrearages. The Fifth Circuit found a genuine issue of material fact as to the credibility of Hamp's justification for failure to reinstate the bondsmen. The Fifth Circuit reversed and remanded on this issue as well as the equal protection claim and the due process claim against the County.