RECENT FEDERAL CASES OF INTEREST TO CITIES

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I. FIRST AMENDMENT

Morgan v. Quarterman, 570 F.3d 663 (5th Cir. 2009)

Prisoner George Morgan brought this *habeas corpus* action seeking relief from discipline actions imposed by the Texas Department of Criminal Justice ("TDCJ"). The TDCJ revoked fifteen days of good time credits after finding him guilty of using indecent or vulgar language in a note mailed to opposing counsel in connection with pending litigation. Morgan claims that the First Amendment protects his writing and that the Fourteenth Amendment protects his good time credits from loss. The district court and the Fifth Circuit Court agree that the TDCJ has a legitimate interest in rehabilitation and that the TDCJ did not deny Morgan his due process rights at his disciplinary hearing.

In response to the State of Texas' motion to dismiss on a separate *habeas* proceeding, Morgan wrote a note to Assistant Attorney General Susan San Miguel on toilet paper: "Dear Susan, Please use this to wipe your ass, that argument was a bunch of shit! You[rs] Truly, George Morgan." The note was returned to Morgan's prison unit, along with a letter describing the circumstances of the communication. Morgan was found guilty of the use of indecent or vulgar language under Rule 42.0 of the TDCJ Disciplinary Rules and Procedures. He was punished with the loss of fifteen days of good time credit. Morgan's appeals of the proceeding were denied. Morgan then filed this application for *habeas corpus*.

The TDCJ has a penological interest in the rehabilitation of prisoners, and it strives to correct behavior that mainstream society deems unacceptable. The Fifth Circuit stated that Morgan's note demonstrated a completely unjustified respect for authority and his expression of his opinion would be offensive in mainstream society and could not be tolerated from a member of the bar or other *pro se* litigant. Therefore, the disciplinary action against Morgan's offensive note was not an impermissible infringement of his First Amendment right to free speech.

Morgan also claims that he was denied due process at his disciplinary hearing because he was denied the right to present witnesses, there was insufficient evidence to support the charge, and the disciplinary hearing officer was biased. The Fifth Circuit found no merit in Morgan's claims. Morgan was allowed to question witnesses, the witness that did not show properly denied the request to appear, and Morgan failed to meet the burden of showing that the charging officer was biased. The Fifth Circuit affirmed the trial court's grant of summary judgment to TDCJ.

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

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

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

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

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

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

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

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

***U.S. v. Stevens*, 2010 WL 1540082 (U.S. 2010)**

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

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

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

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

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

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

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

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

The District Court initially granted RTM's request for preliminary injunction, but a year later granted summary judgment for the

City, explaining that commercial signs are far more numerous than are noncommercial ones, which provides "an adequate rationale for treating them differently given the objective of reducing visual clutter and distraction along public roadways." As the court affirmed the code's constitutionality, it abstained on the ETJ issue. RTM appealed, again alleging that the code violated the First Amendment and that the court should not have abstained.

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

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

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

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

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

In *Tinker*, the Supreme Court ruled that school officials in Iowa violated the First Amendment rights of several students when they enforced a ban on black armbands students had worn in part to protest U.S. involvement in Vietnam. *Tinker* established the standard that school officials can punish student expression only if they can reasonably forecast that such student expression will cause a substantial disruption or material interference with school

activities. In this case, a three judge panel of the Fifth Circuit held that the trial court had applied the *Tinker* standard correctly: "Applying the *Tinker* standard to the instant case, defendants reasonably anticipated that visible displays of the Confederate flag would cause substantial disruption of or material interference with school activities." Further, "there is ample, uncontroverted evidence that elements of the BHS student body have continually manifested racial hostility and tension."

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

II. EQUAL PROTECTION AND DUE PROCESS

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

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

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

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

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

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

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

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

and the defendant entered a conditional plea of guilty.

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

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

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

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

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

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

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

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

suppression hearing. The Louisiana Supreme Court reversed, holding that Jones had a fair opportunity to cross-examine Artberry at the suppression hearing and that Artberry's hearing testimony satisfied Louisiana's hearsay exception for prior recorded testimony.

The district court properly found that a state court unreasonably applied clearly established federal law by holding that no Sixth Amendment violation occurred when the jury heard recorded testimony from a deceased witness (the declarant) to the murder. The substance of the declarant's statements was related through a police detective, and then the statements themselves, which included a detailed description of the events leading up the murder, were played to the jury. The combination of the playing of the recordings, the detective's testimony about the declarant's statements, and his later reliance on the statements to explain his understanding of exactly how the shooting occurred, showed that the declarant's hearsay statements were admitted and used for their truth and thus implicated Confrontation Clause concerns. But the state court failed to consider these concerns. That lapse was constitutional error because the declarant's testimony lacked particularized guarantees of trustworthiness and did not fall within a firmly rooted hearsay exception. Thus, the use of the declarant's testimony violated the prisoner's Sixth Amendment right to confront the witnesses against him.

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

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

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

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

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

Defendant was charged with possession of methamphetamine with intent to distribute,

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

The Fifth Circuit affirmed, holding that Dollar had an objective basis for suspecting legal wrongdoing based on the fresh sealant, strong silicone odor, and scarred screws that strongly indicated the windshield had been recently replaced, which formed the basis of his reasonable suspicion. This allowed him to continue the detention until he confirmed or dispelled the suspicion that there was contraband held in the vehicle. The trooper also had probable cause to search the vehicle based on the replacement of the windshield, the alteration of the emblems on the car, and the trooper's observation that Defendant and his passenger were acting suspiciously, so that Defendant's consent was not necessary for a search. This court has previously held that evidence of a non-standard hidden compartment supports probable cause. *United States v. Estrada*, 459 F.3d 627, 633 (5th Cir. 2006).

III. EMPLOYMENT LAW

A. Title VII

***Lee v. Kansas City Southern Railway Co.*, 574 F.3d 253 (5th Cir. 2009).**

In this employment discrimination suit, the Fifth Circuit affirmed the defense summary judgment on Plaintiff's EEOC and FMLA claims but remanded the Title VII summary judgment in favor of Kansas City Southern Railway Co. ("KCS"). Lee, a former engineer for KCS, was terminated after he failed to observe and obey a stop signal. He claims that he was discriminated against in violation of Title VII and § 1981 and fired in retaliation for filings with the EEOC and absences taken under the FMLA. The Fifth Circuit held that the existence of a list of employees who frequently used FMLA absences and could be candidates for firing did not constitute race-based employment discrimination; further, that employment histories of Plaintiff and a white fellow employee were sufficiently similar to require comparison of the two; and finally that another engineer who had been fired for dishonesty and misuse of company property was not similarly situated to Plaintiff.

After nine years of employment, Lee was fired from KCS after committing what KCS considered to be a serious moving violation for which termination was appropriate. This was the last in a considerable list of violations by Lee. Lee appealed his termination before the Public Law Board under his union's collective bargaining agreement. The Board supported the termination. A subsequent investigation by the Federal Railroad Administration, however, caused the FRA to conclude that extenuating circumstances mitigated Lee's error and reinstated his license. Lee contends that KCS would have been more lenient and would have reinstated Lee but for his race, his leave taken under the FMLA to care for his wife and daughter, and the existence of two complaints Lee filed with the EEOC.

The Fifth Circuit found that evidence was insufficient to demonstrate the existence of a genuine issue of material fact as to whether Lee's supervisor actually knew that Lee had filed complaints with the EEOC. Also, the Fifth Circuit affirmed summary judgment for KCS on Lee's claim that his termination was in retaliation to his use of FMLA. Evidence suggests that KCS did not consider Lee's time off when he was terminated. In fact, Lee had ceased taking FMLA leave nearly a year before his moving violation.

Lee's main claim, that of discrimination under Title VII, turned on whether either or both of the engineers identified by Lee as comparators were similarly situated to him. The district court found that Lee did not satisfy his initial burden of establishing a *prima facie* case because he did not demonstrate that he had been

treated disparately from any other similarly situated KCS engineer. The Fifth Circuit agreed as to one of the comparators—this employee was fired for dishonesty and misuse of company property—offenses that were dissimilar to Lee's history. As to the other comparator, the appellate court disagreed with the district court. This employee, Bickham, was similarly situated to Lee. Bickham committed a number of moving violations, including failure to halt his train at a train signal—a violation very similar to Lee's final offense. Bickham was fired for this failure, but he was shown leniency by his superiors and reinstated with KCS. Because Bickham is an acceptable comparator, the Fifth Circuit held that Lee did establish a *prima facie* case of Title VII racial discrimination. Thus, this claim alone was remanded for further proceedings.

***Gross v. FBL Financial Services, Inc.*, 557 U. S. 2343 (2009)**

In this case coming out of the Eighth Circuit, the Supreme Court held that plaintiffs alleging age discrimination under the ADEA cannot prevail if they only establish that age was a motivating factor in the employer's decision; rather, the ADEA requires a preponderance of the evidence that "but for" the plaintiff's age, the employer would not have taken the adverse employment action.

Gross was a 54 year old employee with 33 years experience at FBL when he was reassigned to a new position and many of his former job responsibilities were reassigned to a newly-created position, which was given to Kneeskern, who had previously been supervised by Gross and who was then in her early forties. Gross considered the reassignment a demotion, even though he and Kneeskern received equal compensation, due to the reallocation of his former job duties, and he filed suit under the ADEA. At trial, Gross introduced evidence suggesting that his reassignment was based at least in part on his age, and FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills. Gross prevailed and was awarded damages.

FBL appealed, arguing that the district court incorrectly instructed the jury and did not apply the correct "mixed motives" standard set forth in *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989). The Eighth Circuit agreed, finding that Gross needed to present "[d]irect evidence . . . sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." That is, evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision." Only then, the Court of Appeals held, should the burden shift to the employer "to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor." The Eighth Circuit thus concluded that the jury instructions were flawed because they allowed the burden to shift to FBL upon a presentation of a preponderance of any category of evidence showing that age was a motivating factor—not just "direct evidence" related to FBL's alleged consideration of age.

The Supreme Court vacated the Eighth Circuit opinion, holding that the actual question presented to it—whether a plaintiff must present "direct evidence" of age discrimination in order to obtain a "mixed motive" jury instruction—was irrelevant, as the burden of persuasion would ***never*** shift to the employer defending a mixed motive discrimination claim under the ADEA, notwithstanding *Price Waterhouse*. While a Title VII plaintiff can shift the burden of persuasion to an employer, neither Supreme Court ADEA jurisprudence nor the language of the statute support a mixed motive burden-shifting framework for ADEA claims. While Congress could have amended the ADEA when it amended Title VII to allow for such claims, it did not do so. Accordingly, the ADEA states only that it is unlawful for an employer to discriminate against any individual "because of such individual's age." Construing that phrase, the Supreme Court held that "because of" means that the factor was ***the*** reason for the employer's action, and thus an ADEA plaintiff must prove that age was the "but for" cause of the adverse

employment action. The burden of persuasion remains at all time on the plaintiff.

The Supreme Court all but invited Congress to amend the ADEA by strictly interpreting the plain text of the statute in order to deny this discrimination plaintiff the ability to more easily prove his case, much like it did in 2007 with *Ledbetter v. Goodyear*, 127 S.Ct. 162, which prompted immediate Congressional revision of Title VII to rewrite its statute of limitations. Finally, Texas practitioners should be cautioned that while Texas law regarding age discrimination typically conforms to federal law, the Texas Labor Code permits the "mixed motive" method for proving employer liability for age discrimination. *See* Tex. Labor Code § 21.125(a).

***Forest Grove School District v. T.A.*, 557 U.S. 2484 (2009)**

In this case, the Supreme Court found that IDEA permits reimbursement for the cost of special education services after a school district fails to provide a free and appropriate public education and the private school placement is appropriate, regardless of whether the child previously received special education or related services through the public school. Specifically, the parents of T.A. asked for a due process hearing to determine eligibility for special education services after a private therapist determined that the child was disabled and after T.A.'s parents unilaterally placed him in a private school setting. The school district concluded that T.A. was ineligible for services under IDEA and declined to offer him an individualized education program (IEP).

A hearing officer determined that the school district did not provide a free and appropriate public education as required by IDEA and that placement in the private-school was appropriate. He ordered the school district to reimburse the parents for the private school tuition. The District Court set aside the award of the hearing officer, but the Ninth Circuit reversed, concluding that the 1997 amendments to IDEA did not diminish the authority of courts to grant private school reimbursement as "appropriate" relief. The Supreme Court agreed.

While parents proceed at their own risk by placing their child in a private school setting without giving notice to the school district, the IDEA amendments of 1997 do not categorically prohibit reimbursement for private-education costs if a child has not "previously received special education and related services under the authority of a public agency." The Court observed: "When a court or hearing officer concludes that a school district failed to provide a [free and appropriate public education] and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted." While the opinion does clarify that the IDEA provides the opportunity for relief when a school district denies a child access to special education services, the ruling appears to be specific to the facts of the case and the district's outright denial of special education services to this student.

***Ricci v. DeStefano*, 557 U.S. 2658 (2009)**

In this closely-watched reverse discrimination case, the Supreme Court held in a 5-4 vote that the City of New Haven's invalidation of management promotion examinations violated Title VII.

The City administered written and oral examinations to 118 candidates for promotion to Lieutenant and Captain. The passage rate for black candidates was roughly half that of the corresponding rate for white candidates, and none of the black candidates scored high enough to be considered for the positions. Stating they feared a lawsuit over the test's disparate impact on a protected minority, City officials did not validate the test results.

Seventeen white firemen and one Hispanic fireman who took the test and would have qualified for consideration for the

promotions sued the City, contending they were discriminated against on the basis of their race. At the District Court, the City prevailed on summary judgment, which was affirmed by a three judge panel of the Second Circuit, including Judge Sotomayor. An eight sentence per curiam opinion from the panel adopted the trial court's opinion in its entirety, and rehearing *en banc* by the Second Circuit was denied.

Writing for the five-justice majority, Justice Kennedy concluded that the City's action in refusing to validate the promotion examinations violated Title VII. In summary, the City failed to meet its standard to "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute."

Kennedy first rejected the City's arguments that it did not discriminate, rather finding that it engaged in "express, race-based decisionmaking" when it refused to certify the test results because of the race-based statistical disparity. The motivation to avoid making promotions based on an examination with a racially disparate impact does not necessarily negate discriminatory intent, as evidenced by the City's conduct. That is, good faith does not justify race-conscious conduct. Kennedy next turned to the framework of Title VII to determine that permissible justifications for disparate treatment must be based in a ***strong basis in evidence*** standard: "Once [a] process has been established and employers have made clear their selection criteria, they may not then invalidate the test results, thus upsetting an employee's legitimate expectation not to be judged on the basis of race. Doing so, absent a strong basis in evidence of an impermissible disparate impact, amounts to the sort of racial that Congress has disclaimed…and is antithetical to the notion of a workplace where individuals are guaranteed equal opportunity regardless of race."

Justice Kennedy then found that the City's justifications for its disparate-treatment discrimination did not meet the strong basis in evidence standard: "Even if respondents were motivated as a subjective matter by a desire to avoid committing disparate-impact discrimination…[t]here is no evidence—let alone the required strong basis in evidence—that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examination and qualified for promotions." A prima facie case of disparate-impact liability—here, the significant statistical disparity between white and black examinees, and nothing more—is far from a strong basis in evidence that the City would have been liable under Title VII had it certified the examination results. Two conditions for liability for disparate impact were possible: (1) the examinations were not job related and consistent with business necessity, or (2) there existed an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt. Neither condition was met, and accordingly there was no strong basis in evidence for Title VII liability. While the potential for a testing procedure consistent with Title VII existed, the rejection of the examination results based on the raw racial results caused injury to the high, and justified, expectations of the candidates who participated on the terms established by the City for the promotion process.

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

Plaintiffs, four former employees, brought Title VII of the Civil Rights Act of 1964 sexual harassment claims against defendant doctor and his medical clinics. A jury verdict was entered against defendants, with punitive damages awarded. Defendants appealed. The doctor's repeated comments, propositioning, bodily contact sufficiently supported the verdict as to three employees. But, the fourth employee's *quid pro quo* claim (her only claim) was not supported by the evidence since her reassignment, at the same salary and benefits, was not a tangible employment action. All of the claims centered on allegations of continuous sex discrimination involving the same *modus operandi*; denying separate trials under Fed. R.

Civ. P. 42(b) was not error. Evidence that the doctor harassed others was admissible as to *modus operandi* in making sexual overtures, a systemic pattern of discrimination. While some hearsay of others' harassment was admitted in error, six others testified the doctor harassed them and much of the hearsay was corroborated. Statements about the doctor's Mexican ethnicity were related to the evidence that the doctor made derogatory statements about American women, told his employees Mexican women habitually slept with their bosses, and that they were smart to do so. The instructions and the varying awards showed that the punitive damage awards were based on individual harms, not generalized harm to nonparties; a due process violation claim failed.

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

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

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

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

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

The Fifth Circuit found that the district court did not err in finding that plaintiff's breach of contract claim was barred by Tex. Bus. & Com. Code Ann. § 26.01(b)(6) because the alleged agreement was for a stated term of more than a year, and defendant did not sign any document reflecting the parties' agreement. The possibility of a terminating event occurring within one year of the agreement's making, even though considered in the agreement, was insufficient to take the agreement outside of Tex. Bus. & Com. Code Ann. § 26.01(b)(6). Further, even if plaintiff could prove that the partial-performance exception applied, he would have been entitled only to reliance damages, and

not the contract damages he sought. Finally, the district court did not err in dismissing plaintiffs quasi-contract claims for quantum meruit and unjust enrichment. Quantum meruit could not be used to enforce the terms of an unsigned draft of a contract, and plaintiff had alleged no facts showing that the salary was not the "reasonable value" for the services he rendered. Plaintiff's unjust enrichment claim was similarly meritless.

B. Americans with Disability Act (ADA)

EEOC v. Chevron Phillips, 570 F.3d 606 (5th Cir. 2009).

The EEOC filed this suit on behalf of Lorin Netterville under the ADA alleging that Chevron Phillips Chemical Corp ("CP") failed to provide reasonable accommodations for its employee's disability and discharged her because of her disability and in retaliation for requesting accommodations. Summary judgment for CP was reversed by the Fifth Circuit when the EEOC raised genuine issues of material fact as to whether (1) the employee was disabled under the ADA, (2) CP failed to accommodate her substantial limitations, and (3) CP discharged her because of her disability and because she requested accommodations.

Netterville was diagnosed with Chronic Fatigue Syndrome ("CFS") in 1987 and received treatment for her condition for about one year, at which time her symptoms disappeared. She had no further treatments in the thirteen years leading up to her employment as an administrative assistant with CP in December 2000. On a standard pre-employment questionnaire, she did not list CFS as a current or past medical condition because she believed that she no longer had the condition, if at all. In 2002, CP moved to a new office space. This move required Netterville to work overtime and perform manual labor, including packing and moving boxes. Shortly after the move, Netterville began experiencing sleep disturbances, excruciating pain, memory loss, and other symptoms, which rendered her unable to perform routine tasks necessary to care for herself.

In 2003, Netterville was diagnosed with a recurrence of CFS. Her doctor insisted that she take time off from work. Netterville took two weeks off, and she returned to work with instructions to her employer from her doctor as to the nature of her condition. CP began investigations as to whether Netterville would have been approved as an acceptable candidate for hiring if she had disclosed the CFS on her medical questionnaire. Eventually, she was terminated for falsifying information on the medical questionnaire. A magistrate judge determined that Netterville did not have a disability within the meaning of the ADA because no reasonable jury could conclude that her impairments substantially limited her ability to sit, stand, sleep, or care for herself. He assessed her condition as intermittent and reasonably controlled with medication. Alternatively, if Netterville did have a disability, falsifying her medical questionnaire provided a legitimate reason for termination of employment. The district court granted summary judgment in favor of CP.

After examining the record, the Fifth Circuit determined that a jury could reasonably find that CFS did cause a substantial limitation on her major life activities of caring for herself, sleeping, and thinking. The Fifth Circuit criticized the magistrate judge for misunderstanding and misapplying the ADA. The existence and severity of a disability must be assessed at the time of adverse employment action, and neither the duration and frequency of symptoms nor the ability of medication to control the symptoms is controlling as to whether a disability exists. Additionally, the Fifth Circuit found that a jury could decide that CP failed to accommodate Netterville when her supervisors rejected requests and notifications from Netterville's doctor regarding her CFS. Finally, the Fifth Circuit determined that a reasonable question of fact existed as to whether Netterville falsified her medical questionnaire, given that Netterville did not believe that she had CFS at the time she filled out the questionnaire and that the questionnaire did not directly address CFS.

***Frame v. City of Arlington*, 575 F.3d 432 (5th Cir. 2009).**

Plaintiffs are persons with disabilities who depend on motorized wheelchairs for mobility. They allege that the City of Arlington has violated the ADA and the Rehabilitation Act by failing to make the City's curbs, sidewalks, and certain parking lots ADA-compliant. The district court dismissed the claims as barred by the applicable statute of limitations. The Fifth Circuit vacated and remanded, determining that the City's curbs and sidewalks were subject to Title II of the ADA, the Plaintiffs' claims were subject to a two-year statute of limitations, and the City has the burden of proof for the accrual and expiration of any limitations period.

The Fifth Circuit's analysis of this issue began with a determination of whether Title II of the ADA authorizes Plaintiffs' claims; that is, whether the City's curbs, sidewalks, and parking lots are a service, program, or activity within the meaning of Title II. The Court decided this issue in the affirmative in light of legislative intent along with other circuits' broad interpretation of the plain meaning of the statute. The curbs, sidewalks, and parking lots are subject to Title II, and Plaintiffs here have standing to bring such a claim.

The next issue before the Court was to determine the point at which the limitations period began to run. The district court ruled that the claims accrued and the statute began to run on the date the City completed any noncompliant construction or alteration, rather than on the date Plaintiffs encountered a noncompliant barrier. Alternatively, Plaintiffs argued that the statute of limitations does not apply because they sought only injunctive relief. The Fifth Circuit declined to accept either of Plaintiffs' arguments. The two-year statue of limitations did apply here nor did the continuing violations doctrine.

The Fifth Circuit ultimately determined that the statute of limitations begins to run upon completion of a noncompliant construction or alteration. The district court, however, falsely determined that it was Plaintiffs' burden to show that their claim was within the statute of limitations. The Fifth Circuit remanded the case in order for the City to prove its affirmative defense that the limitations period had expired with respect to each of Plaintiffs' claims. The Court refused to apply the discovery rule to this situation because to do so would forever deny the City a definite limitations period. Justice Prado, in dissent, criticized the majority, arguing that the limitations period should begin to run when a plaintiff suffers an injury under the Act. In this case, the injury occurred when the person with a disability actually encounters a noncompliant sidewalk or curb. Without an injury, Justice Prado explains, a plaintiff has no standing to bring a claim in court.

IV. SECTION 1983

Collier v. Montgomery, *569 F.3d 214* (5th Cir. 2009).

Collier claimed multiple violations of his constitutional rights surrounding a routine traffic stop. Officer Harris initiated a traffic stop on the belief that Collier was not wearing his seat belt as required by Louisiana law. Collier attempted to grab the pen Harris was using to write up a ticket, and, after a struggle between the two men, Harris arrested Collier. Collier claimed that Harris and other officers used excessive force and violated his Fourth, Fifth, and Eighth Amendment rights. The district court denied summary judgment to the officers, holding that qualified immunity did not protect the officers. The Fifth Circuit reversed and rendered judgment in favor of the officers.

According to the Fifth Circuit, Harris did not violate Collier's Fourth Amendment rights because Collier's admitted failure to wear the shoulder strap of his seat belt gave Harris probable cause to arrest Collier. The Court also found that Harris did not violate Collier's Fourth Amendment right against unreasonable seizure where the arrest video clearly shows Collier resisting arrest. Under the circumstances, the Court determined, Harris' use of force was not unreasonable. Collier also claimed a Fifth Amendment violation based on statements allegedly used against him in court. The Fifth

Circuit determined that the violation did not exist because the statements introduced in the criminal trial were not offered in an incriminating manner.

Finally, the Fifth Circuit rejected Collier's claim of an Eighth Amendment violation—cruel and unusual treatment. Collier complained of chest pains as soon as Harris put Collier into the back seat of the patrol car. Harris immediately called paramedics to the scene. Collier refused treatment by the EMTs and later refused treatment at an emergency medical center. Collier's claims stem mostly from the fact that Harris refused to contact Collier's established cardiologist. The Court noted that the officer's actions neither rose to the level of knowledge of a substantial risk of serious harm to a pretrial detainee nor did Harris respond with deliberate indifference to that risk. Harris's two attempts at providing medical care were sufficient here to preclude a violation of the Eighth Amendment.

***Pasco v. Knoblauch,* 566 F.3d 572 (5th Cir. 2009).**

Pasco's survivors brought this § 1983 case against Officer Knoblauch. Pasco led Knoblauch on a high speed chase after failing to submit to the officer's traffic stop. Knoblauch caught up with Pasco, hitting the back tire of Pasco's motorcycle with his patrol car. Pasco's motorcycle went off the road into a ravine; Pasco later died of injuries sustained in that accident. While this case was in progress, the Supreme Court decided *Scott v. Harris*, 550 U.S. 372 (2007), which established a rule for § 1983 actions against police officers involved a high-speed chase. In light of this decision, Knoblauch raised the defense of qualified immunity. The district court denied summary judgment, finding that Knoblauch waived his qualified immunity defense by failing to raise it in a timely fashion. The district court also held that Knoblauch violated the Fourth Amendment when he ended the chase by bumping Pasco from behind. The Fifth Circuit Court reversed the district court's judgment on both issues.

The Fifth Circuit concluded that it did have standing to review the issue of qualified immunity, even though the interlocutory appeal was of an order denying summary judgment. The district court (in Northern District of Mississippi) based its decision on an issue of law, not of fact; therefore the review here is appropriate. The district court seemed to take the view that qualified immunity, even if it existed, would be irrelevant because of the officer's violation of the Fourth Amendment. The Fifth Circuit ruled that the affirmative defense was not waived because the record indicates that although Knoblauch filed his affirmative defense after his initial responsive pleading, the law was unsettled at the time of his first pleading, and Pasco was not prejudiced by Knoblauch's late declaration.

Qualified immunity applied to protect Knoblauch from suit only if the officer's conduct was not a clear violation of established law. The Fifth Circuit determined that the facts here indicated that Knoblauch should not lose qualified immunity, contrary to the district court's judgment. In analyzing Knoblauch's actions in light of the requirement of Fourth Amendment, the Court considered whether Knoblauch's actions were objectively reasonable. The test used in *Scott* is a balance of the nature and quality of the intrusion on Pasco's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. The Fifth Circuit determined that Knoblauch's actions were reasonable where Pasco was driving erratically at 90 mph on a two lane road, and the officer suspected Pasco was intoxicated. Therefore, qualified immunity protected Knoblauch from suit.

Justice Garwood's dissent focused on the lack of specific facts surrounding the incident, making it impossible to determine whether qualified immunity is truly appropriate here as a matter of law. Garwood points out that Knoblauch received an order from his supervisor to discontinue pursuit, but Knoblauch's immediate reaction to this order is unclear from the record. Knoblauch claims to have slowed down and that he did not see Pasco's motorcycle

go off the road. Finally, there is no evidence to suggest that Knoblauch intentionally struck Pasco's vehicle in order to prevent Pasco from endangering others. Therefore, Garwood reasoned, the comparison to *Scott* was unwarranted.

***Goodman v. Harris County,* 571 F.3d 388 (5th Cir. 2009).**

In a § 1983 action alleging excessive force by Defendant police officer in shooting a suspect, judgment for Plaintiff was affirmed where a reasonable jury could conclude that Defendant's use of force was not reasonable under the circumstances known to him at the time of the incident.

This action arose from an incident that resulted in the fatal shooting of Michael Goodman by Deputy Constable Terry Ashabranner. Ashabranner attempted to stop Goodman in a rural area of Harris County. The facts of the incident are in dispute, but at some point, Ashabranner released his dog Nero in an attempt to apprehend Goodman. Ashabranner claims that he saw Goodman trying to drown Nero in standing roadside water and that Goodman reached for a shiny object in his pant's pocket when Ashabranner tried to rescue the dog. Ashabranner then shot Goodman at close range, killing him. This action was brought by Goodman's estate against Harris County and Ashabranner's supervisor.

Plaintiff asserted that Harris County used deliberate indifference in formulating policies and training programs for its deputy constables in the use of deadly force and that supervisor Hickman negligently supervised and trained Ashabranner. Further, Plaintiff claimed Ashabranner used excessive force against Michael. The district court granted summary judgment or dismissed all claims except for the § 1983 excessive use of force claim against Ashabranner. The jury returned a verdict for Plaintiff awarding a total of $5 million. Ashabranner appealed from the jury verdict. In addition, Plaintiff appealed from the grant of summary judgment, arguing that Harris County and Hickman are liable under the Texas Tort Claims Act (TTCA), Hickman was not entitled to qualified immunity for failing to train and supervise Ashabranner, and Harris County is liable for its deliberate indifference to the need for training.

The Fifth Circuit determined that the district court's dismissal of claims under the TTCA was proper because suits against individual state employees are not cognizable under the TTCA, and failure to train or supervise is not a proper cause of action under the TTCA. The Fifth Circuit affirmed summary judgment on the § 1983 claim, stating that Plaintiff failed to show deliberate indifference on the part of Hickman regarding the training program. The court found it unnecessary to analyze Hickman's defense of qualified immunity. Plaintiff's § 1983 claim against Harris County also failed because she failed to point to any policy or custom that lead to her son's death or to show deliberate indifference on the part of Harris County regarding policies and training.

In considering Ashabranner's appeal of the jury verdict, the court considered whether Ashabranner's conduct was reasonable under the circumstances and whether the jury had evidence on which to base its verdict that the use of force was unreasonable. Ashabranner was the only eye witness to the incident. The jury heard evidence that, if believed, contradicted Ashabranner's account of the events leading up to Michael's death. The Fifth Circuit determined that sufficient evidence existed for the jury to find that Ashabranner acted with unreasonable force under the circumstances and that Ashabranner was not entitled to qualified immunity as his conduct was unreasonable. Accordingly, the Fifth Circuit declined to overturn the verdict.

***Delancey v. City of Austin,* 570 F.3d 590 (5th Cir. 2009).**

Plaintiffs Curtis and Marian Delancey owned a parcel of land on which they operated an automobile salvage yard business and wrecker service business. Plaintiffs sold the property to the City of Austin for $600,000 plus relocation benefits. Plaintiffs then moved their

wrecker business to a newly-purchased parcel of land, but this new property was unsuitable for the salvage business. Two hundred fifty non-operational vehicles still remained on the property nine months after the City acquired the property from the Delanceys. In answer to the City's notice to vacate the property, the Delanceys filed suit seeking monetary damages under the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("URA"), 42 U.S.C. § 4601, *et seq*., on the grounds that the City had not fulfilled its obligation to provide relocation assistance under the URA. The district court granted summary judgment in favor of the City, and the Fifth Circuit affirmed.

The Fifth Circuit, following *Gonzaga University v. Doe*, 536 U.S. 273 (2002), held that the URA does not provide a private right of action for monetary damages. Although the text of the URA does not contain an express right of action, Plaintiffs argued that the statue provides an implied right of action. The Fifth Circuit rejected Plaintiff's argument, explaining that in Gonzaga, the Supreme Court established that Congress must use clear and unambiguous language to establish an implied right of action and such rights must be phrased in terms of the persons benefitted. Here, the statute does not contain any indication of an implied right, and the statute is directed towards the head of any displacing agency. Therefore, the URA displays no evidence of an implied, private right of action for money damages.

The Fifth Circuit noted early in its analysis that a cause of action does not inherently arise where a statute has been violated and a person was harmed as a result of the violation; rather, the right of action must be found in the statute. Additionally, the Fifth Circuit denied Plaintiffs' claim under 42 U.S.C. § 1983, noting that this claim must fail as a matter of law because Plaintiffs could not establish that the particular employee named as a defendant was a policymaker for the City.

***Safford Unified School District v. Redding*, 557 U.S. 2633 (2009)**

Redding, an eighth grader at Safford Middle School, was searched by school officials on the basis of a tip by another student that Ms. Redding might have ibuprofen on her person in violation of school policy. The search included Redding stripping down to her underwear and pulling it away from her body, partially exposing her breasts and pelvic area. Redding subsequently filed suit against the School District and the school officials responsible for the search, alleging it violated her Fourth Amendment right to be free from unreasonable search and seizure.

The District Court granted the defendants' motion for summary judgment and dismissed the case. On the initial appeal, the Ninth Circuit affirmed. However, on rehearing *en banc*, the Court of Appeals held that Redding's Fourth Amendment right was violated, reasoning that the strip search was not justified nor was the scope of intrusion reasonably related to the circumstances.

Two questions were addressed by the Supreme Court: (1) Does the Fourth Amendment prohibit school officials from strip-searching students suspected of possessing drugs in violation of school policy? and (2) Are school officials individually liable for damages in a lawsuit filed under 42 U.S.C § 1983?

Justice Souter, writing for the majority, held that Redding's Fourth Amendment rights were violated when school officials searched her underwear for non-prescription painkillers. The Court reiterated that, based on a reasonable suspicion, search measures used by school officials to discover contraband must be "reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The facts of this case (including an uncorroborated tip from a fellow student) did not provide school officials with sufficient suspicion to warrant extending the search to Redding's underwear. Despite finding that the search was unreasonable, the Supreme Court

held that the named school administrators were not personally liable because "clearly established law [did] not show that the search violated the Fourth Amendment." The Court reasoned that lower court decisions were fractured enough to have warranted doubt about the scope of a student's Fourth Amendment right.

Justice Stevens (joined by Justice Ginsburg) wrote separately, concurring in part and dissenting in part, and agreed that the strip search was unconstitutional, but disagreed that the school administrators retained immunity. Stevens stated: "It does not require a constitutional scholar to conclude that a nude search of a 13-year old child is an invasion of constitutional rights of some magnitude." Justice Ginsburg also wrote a separate concurrence, largely agreeing with Justice Stevens' point of dissent. Justice Thomas concurred in the judgment in part and dissented in part, agreeing with the majority that the school administrators were qualifiedly immune to prosecution. However, Thomas argued that the judiciary should not meddle with decisions that school administrators make in the interest of keeping their schools safe.

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

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

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

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

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

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

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

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

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

The decedent, Tamez, was a pretrial detainee when a nurse told detectives that the decedent had dilated pupils and needed to be medically cleared before the county jail would incarcerate him. Tamez was taken back to the city jail and was eventually taken to the hospital to obtain a medical clearance. He died from acute cocaine intoxication when a bag of cocaine that he swallowed before his arrest burst in his intestines. Tamez never advised any of his jailers that he had taken drugs, that he felt ill, that he needed any medical treatment, or that he was injured. The decedent's family asserted that the defendants violated his Fourteenth Amendment right not to have his serious medical needs met with deliberate indifference. The district court granted summary judgment to the defendants.

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

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

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

The detainee's extensive independent evidence included a comprehensive evaluative report commissioned by the county, a Department of Justice (DOJ) report, and affidavits from jail employees and its medical contractor attesting to the accuracy of the report. A de facto policy of failing properly to treat inmates with chronic illness was reasonably inferred. The detainee showed that serious injury and death were the inevitable results of the jail's gross inattention to the needs of inmates with chronic illness. In the absence of any legitimate penological or administrative goal, it was

punishment. An official intent to punish could be presumed since the detainee attacked the general conditions and practices of pretrial confinement. Express intent to punish was not required. The instructions allowed the jury to infer intent to punish only for knowingly subjecting a detainee to inhumane conditions of confinement or abusive practices. The jail's clinical pharmacist testified that administration of medication was so inadequate that his surveys showed half or more of inmates did not receive their prescriptions. The Fifth Circuit affirmed.

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

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

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

Separately, the Fifth Circuit also affirmed the dismissal of Bustos' §1983 claims against the police officers for violation of constitutional rights. The court noted that because the police officers were off-duty and did not rely on their official authority or on state power in connection with the alleged assault of Bustos, the officers did not act "under color of state law" as required for liability under §1983. Whether an officer is acting under the "color of state law" does not depend on his on- or off-duty status at the time of the alleged violation. Rather, the court must consider: (1) whether the officer "misuse[d] or abuse[d] his official power," and (2) if "there is a nexus between the victim, the improper conduct, and [the officer's] performance of official duties." *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991). If an officer pursues personal objectives without using his official power as a means to achieve his private aim, he has not acted under the color of state law. *Townsend v. Moya*, 291 F.3d 859, 861 (5th Cir. 2002). In this case, the alleged assault was simply an altercation between private individuals at a public club.

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

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

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

The Supreme Court, in a unanimous per curiam opinion, reversed the Court of Appeals' judgment, holding that the lower courts had

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

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

V. WARRANT ISSUES

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

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

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

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

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

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

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

TDFPS program director who determined that the boys needed to be placed in foster care.

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

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

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

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

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

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

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

Jackson and Midkiff were convicted of charges stemming from a conspiracy to manufacture and distribute methamphetamine. At the time the officers went to Jackson's residence, they had both a state search warrant and a federal arrest warrant. When the officers entered Jackson's home, they observed him

place something under the couch on which he was sitting. They quickly arrested Jackson and then conducted a sweep of the home to ensure no one else was present. They found a bag of marijuana under the couch, as well as guns and tablets used to produce methamphetamine in a locked safe, which Jackson provided the combination to. Outside the house the officers found chemicals and equipment used in the manufacturing of methamphetamine. Before trial, Jackson filed a motion to suppress the evidence discovered during the search of the home, which the district court denied.

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

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

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

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

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

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

In dissent, Justice Stevens (joined by Justice Sotomayor), after closely analyzing the facts presented, criticized the majority for "micromanaging the day-to-day business of state tribunals making fact-intensive decisions….We ought not usurp the role of the factfinder when

faced with a close question of the reasonableness of an officer's actions."

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

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

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

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

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

VI. MISCELLANEOUS CASES

***Hatten v. Quarterman*, 570 F.3d 595 (5th Cir. 2009).**

Hatten was convicted of capital murder in 1996 and sentenced to death. After a complicated procedural history, Hatten raised four issues in an application for writ of *habeas corpus*: he was deprived of an impartial jury, his appearance before a jury in shackles was prejudicial and violated due process, cause and prejudice excuse his failing to exhaust claims that were not raised before the state courts, and cumulative error fatally infected his trial. The district court denied relief to Hatten on all claims, and the Fifth Circuit affirmed.

Hatten claimed error during the guilt phase of his trial due to two separate incidents of jury bias. First, Hatten claims that one of the jurors had an undisclosed relationship with the victim's father and this same juror was subsequently biased towards the prosecution. In fact, the father of the victim recognized the juror as a man to whom he had sold drugs, but, under questioning, the victim's father insisted that the two men were not friends. The juror was then brought in for questioning and promised by the prosecutor and the judge that they would not pursue charges on any information disclosed by the juror, except where that information related to perjury or falsification of the jury questionnaire. After questioning, the trial court judge was satisfied that the juror was competent to serve. Harris insists that the juror was afraid of prosecution, despite the judge's grant of immunity. The Fifth Circuit limited its analysis to the record of the trial, excluding hearings and affidavits presented on the subject after the conclusion of Hatten's trial, and found

insufficient evidence in the record to overturn the trial court's findings.

In his second jury bias claim, Hatten contends that his appearance in court in shackles during closing arguments unfairly prejudiced the jury. The Court rejected this argument, stating that the threshold for error in this situation is relatively high, Hatten was in shackles that day due to an earlier altercation with jail personnel, the nature and visibility of the shackles to the jury was unknown, and the jurors had already heard overwhelming evidence with which to find Hatten guilty.

As to Hatten's allegation that he has unexhausted claims, such as ineffective assistance of counsel, the Fifth Circuit Court rejects these claims as inappropriate for federal review. Likewise, Hatten's claim of cumulative error is inappropriate to be raised for the first time on appeal, and was not considered by the Fifth Circuit.

***Montejo v. Louisiana,* 557 U.S. 2079 (2009)**

In this case, the Supreme Court overruled its 1986 opinion in *Michigan v. Jackson*, which held that evidence obtained through interrogation after a criminal defendant has invoked his right to counsel was inadmissible. Rejecting the *Jackson* framework as unworkable in jurisdictions that appoint counsel regardless of a defendant's request, the Court stated that the protections afforded under *Miranda*, 384 U.S. 436, *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Minnick*, 498 U.S. 146, are sufficient to protect a defendant's Sixth Amendment rights from interrogation that might elicit culpable evidence.

Montejo was arrested in connection with the murder of Ferrari. At a preliminary hearing, the court ordered the appointment of defense counsel. Later that day, police read Montejo his rights under *Miranda* and he agreed to assist in the search for the murder weapon. Before the search, Montejo wrote an explanation for his participation in the search; however, no one (including Montejo) in the search party knew about the appointment of counsel. During the excursion, Montejo wrote a letter of apology to the victim's wife at the suggestion of a detective who accompanied him. Only after the excursion did Montejo meet his court-appointed counsel. At trial, Montejo contended under these circumstances that the Sixth Amendment barred the introduction of this evidence since his attorney was not present when he wrote and submitted the letter of apology.

The Supreme Court of Louisiana held that the letter of apology Montejo wrote was valid evidence, as Montejo had waived his Sixth Amendment right to counsel. That court explained that when counsel was appointed, Montejo remained mute and did not acknowledge it; further, something beyond "mute acquiescence" is required to trigger the protections of the Sixth Amendment.

In an opinion written by Justice Scalia, the Supreme Court found that the Louisiana Supreme Court misapplied *Jackson*, but rejected the categorical *Jackson* approach as unworkable. The Court reasoned that "[w]hen a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary." The Court found that the prophylactic protections of *Miranda* and *Edwards* are sufficient to ensure that police do not compel defendants to speak without counsel or badger defendants into withdrawing their invocations of the right to counsel: "What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation—not not what happened at any preliminary hearing."

Justice Stevens (and others) dissented, arguing that while the majority correctly concluded that the Louisiana Supreme Court misapplied *Jackson*, the precedent should not have been overruled entirely. Rather, Justice Stevens criticized the majority for undervaluing the role of *stare decisis.* Justice Breyer also wrote a dissent highlighting the importance of *stare decisis*.

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

Defendant was convicted on four counts of willfully failing to file income tax returns. In his initial appearance, defendant purported to fire anyone that thought they represented him. At the next hearing, he again fired the public defender. Multiple times he stated he was the attorney in fact that he wanted to replace the public defender. Thus, the magistrate believed a *Faretta* hearing was warranted and made multiple attempts to have a *Faretta* hearing, but defendant thwarted each attempt until the day of trial when he expressly denied that he wanted to represent himself. A *Faretta* hearing is warranted if the right to counsel is to be waived, and it is used to caution the defendant about the dangers of self-representation and establishing, on the record, that the defendant makes a knowing and voluntary choice. Given his uncooperative and non-responsive nature, defendant's prior comments were unclear and equivocal. Right before sentencing, he once again wished to fire his attorney. His conduct suggested disruptive and obstructionist behavior. Each time a *Faretta* hearing was attempted, defendant was extremely uncooperative, which tended to suggest his behavior of itself could have resulted in the waiver of his right to self-representation.

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

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

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

Under the FTCA, Congress has waived sovereign immunity and has granted consent for the Government to be sued for acts committed by any employee of the Government while acting within the scope of his office or employment, which does not extend to acts of independent contractors working for the Government. *Linkous v. United States*, 142 F.3d 271, 275 (5th Cir. 1998). The power of the federal government to control the detailed physical performance of the individual is the key in determining whether an individual is an employee of the government or an independent contractor. The *Linkous* factors, drawn from the Restatement (Second) of Agency § 220, are prominent in the Fifth Circuit's analysis. These factors include extent of control which the government exercises over the agreement, whether or not the one employed is engaged in a distinct occupation or business, the kind of occupation, the skill required in the particular

occupation, who supplies the instrument and the place of work, length of time of employment, method of payment, whether or not the work is a part of the regular business of the employer, whether or not the parties believe they are creating the relation of master and servant, and whether the principal is or is not in business. Applying these factors, the Fifth Circuit held that the government's power to control the cardiologist's performance was not sufficient to create an employment relationship. The patient's claim that the government should have been judicially estopped from denying the cardiologist was an employee was properly rejected because he did not allege any affirmative misconduct by the government.

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

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

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

Justice Breyer dissented and was joined by Justices Stevens, Ginsburg, and Sotomayor. Justice Breyer would have held that the District Court provided an appropriate notice and comment period for the rule revision because the trial judge discussed the possibility of live broadcast as early as September 25, 2009, both sides made written submissions to the court as to their views on other transmissions, and the court had received 138,574 comments by January 8, 2010, all but 32 of which favored the broadcast. Justice Breyer said that the Supreme Court would normally not grant certiorari to this kind of a legal question, as questions regarding local judicial administration have traditionally been left to Circuit Judicial Councils, and Supreme Court lacks their institutional experience. He noted that he was unable to find a single previous instance of the Supreme Court intervening in procedural aspects of local judicial administration in this manner. The dissent also questioned the applicants' claim that denying a stay would lead to irreparable harm,

since none of the witnesses had asked the Supreme Court to stop the broadcast, and many of them are already well-known participants in the debate surrounding Proposition 8. Justice Breyer would have found that the respondents' interest in broadcasting the trial and keeping the public informed outweighed the respondents' concerns that the broadcast would harm the parties.

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

Following his capital murder conviction for murder of a police officer and imposition of a death sentence, Haynes brought a *habeas* challenge to his conviction based on *voir dire*, which the Supreme Court rejected in a *per curiam* opinion.

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

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

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

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

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

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

The Court acknowledged that more precise formulations of the warning are possible, and perhaps even preferable in some circumstances. In fact, the Court's opinion specifically lauded the standard FBI warnings as "exemplary" because they explicitly inform suspects of their right to an attorney's presence during questioning. But while such explicit warnings are "admirably informative," the Court ultimately concluded that they are not

constitutionally required. Law enforcement officers thus enjoy some latitude to communicate *Miranda* rights to suspects using different language, so long as the essential message of the warnings remains intact.

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

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

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

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

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

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

VII. CRIMINAL LAW

***Davis v. Tarrant County*, 565 F.3d 214 (5th Cir. 2009).**

The Fifth Circuit denied relief to criminal defense attorney Davis in his suit against Tarrant County and the criminal district judges who denied Davis's application for court appointment in felony cases. Davis claimed that the denial was due solely to a lack of personal relationships with the judges on the panel and sought relief under 42 U.S.C. § 1983. The Fifth Circuit affirmed the district court's findings that the judges were entitled to judicial immunity, that Davis failed to state a claim against Tarrant County, and that the claim for prospective declaratory relief against the judges in their official capacities was moot.

The Texas Fair Defense Act went into effect on January 1, 2002. This Act governs the procedure for the appointment of counsel in criminal cases, allowing for individual counties to create and adopt their own alternative guidelines. In 2005, Davis applied to receive appointments to criminal cases in Tarrant County as part of the rotational system ("the wheel") then in effect in Tarrant County. Davis's application was denied, and Davis was unable to obtain any explanation for the denial. In 2006, Tarrant County criminal district court judges issued the Tarrant County District Courts Felony Court-Appointed Plan, which replaced the existing guidelines under the Act. Davis did not renew his application under the new Plan. Thus, the Fifth Circuit Court held that Davis had standing only to challenge his rejection under the guidelines in effect at the time of his application. Further, even though Davis's claim against the judges in their official capacity was not barred by the Eleventh Amendment, the claim here was barred as moot because the guidelines in place at the time of Davis's application were no longer in effect.

The Fifth Circuit held that the Tarrant County judges named in Davis's suit were judicially immune from liability in their individual capacity. Although there is some case law to support various judicial responsibilities as administrative acts, the Court reasoned that the inclusion of judges in the rotation is inextricably linked to the appointment of a particular attorney in a particular case, which is clearly a judicial act. Therefore, the selection process is a judicial function and must be protected by judicial immunity.

Finally, the Fifth Circuit Court upheld the district court's finding that Davis failed to state a claim against Tarrant County under 42 U.S.C. § 1983, holding that judges acting in their official capacities are not considered local government officials. Municipal liability requires proof of (1) a policymaker, (2) an official policy, and (3) a violation of constitutional rights whose "moving force" is the policy or custom. A theory of respondeat superior is insufficient for municipal liability; the policymaker must have ultimate authority under state law. Here, district court found that the judges acted on behalf of the state of Texas, not Tarrant County.

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

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

Watkins was a passenger in a tractor-trailer that was pulled over by a Deputy Sheriff on a routine traffic stop. The driver of the tractor-trailer was acting suspicious, so the trailer was searched, and six kilograms of cocaine were found in a duffle bag that was inside of an SUV in trailer. Both the driver and Watkins were mirandized and placed under arrest. Special Agent Cummings of U.S. Immigrations and Customs Enforcement conducted two interviews with Watkins, and during the second interview Watkins admitted placing the bag in the back of the SUV and knowing it contained drugs. Watkins also admitted to Agent Cummings that he had been on two previous drug runs involving marijuana.

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

Fed. R. Evid. 613 as it was offered only to show that defendant had made a prior inconsistent statement. Finally, the evidence was sufficient to sustain the conviction, especially since defendant was found with the cocaine and admitted to participating in the conspiracy.

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

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

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

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

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

The crucial fact in this case was that the judgment rendered in R.R.'s favor after the formal hearing contained the exact same relief requested by R.R. and offered by the District in its earlier settlement offer. Concerned with IDEA policy in favor of cooperative and early resolution of issues, and relying on various provisions of the IDEA allowing and requiring reduction in fee awards, the Fifth Circuit eliminated the entire attorney fee award.

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

The Fifth Circuit held that the District Court had abused its discretion in awarding attorney's fees to R.R. for work performed subsequent to the District's written settlement offer. R.R. had argued, and the District Court had held, that the District's settlement offer would not have been enforceable in state or

federal court and thus that R.R. was justified in rejecting the offer and proceeding to hearing. However, the Circuit Court held that a settlement agreement reached at the resolution meeting is enforceable in federal court and thus that R.R. did not have a good reason to reject the District's settlement offer.

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

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

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

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

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

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

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

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

The Supreme Court held that the Sixth Amendment protects a defendant's right to insist that *voir dire* remain public, with some very limited exceptions. Even if the trial court has an

overriding interest in closing the proceedings, "[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." That is, trial courts "are obligated to take every reasonable measure to accommodate public attendance at criminal trials," including *voir dire*. If the trial court does not consider all reasonable alternatives to closure, the proceedings are constitutionally infirm.

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

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

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

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

Smith had argued that African-American jurors were systematically excluded by the county's practice of first assigning jurors to local district courts, and only then filling the jury pools of the county-wide courts where Smith and other alleged felons were tried. (A large majority of the African-American residents of Kent County live in Grand Rapids, home to a single local court.) As Justice Ginsburg wrote, "Evidence that African-Americans were underrepresented on the [county-wide] Circuit Court's venires in significantly higher percentages than on the Grand Rapids District Court's could have indicated that the assignment order made a critical difference. But…Smith adduced no evidence to that effect." Justice Ginsburg indicated that "Smith's best evidence of systematic exclusion was…a decline in comparative underrepresentation, from 18 to 15.1%, after Kent County reversed the assignment order," filling the county-wide jury pools first. But even Smith's lawyer had conceded that this was not "a big change."

Smith had also argued that Kent County's practice of excusing potential jurors who alleged hardship or failed to report for jury service, its reliance on notices of jury duty mailed to addresses at least fifteen months old and its decision not to follow up on non-responses, along with the refusal of Kent County police to enforce court orders for the appearance of prospective jurors, collectively amounted to systematic exclusion because each practice was likely to have a disproportionately large impact on African-American potential jurors. Justice Ginsburg rejected these arguments, explaining that "[n]o 'clearly established' precedent of this Court supports Smith's claim that he can make out a *prima facie* case merely by pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation." She went on to note that

"furthermore, [the Court] has never 'clearly established' that jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim." Quite the opposite: "in *Duren*, the Court understood that hardship exemptions resembling those that Smith assails might well 'survive a fair cross-section challenge.'"

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

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

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

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

U.S. v. Young, 585 F.3d 199 (5th Cir. 2009)

Young appealed his conviction under 18 U.S.C. § 2250(a) "for traveling in interstate commerce and knowingly failing to update his registration information as required by the Sex Offender Registration and Notification Act (SORNA)." SORNA, which requires sex offenders to register where they reside or work, criminalizes the act of traveling in interstate commerce and knowingly failing to register. Young argued that SORNA permits *ex post facto* punishment in violation of the Constitution, which prohibits any law that imposes a punishment of an act not punishable at the time it was committed or imposes additional punishment for a prior crime.

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

Young also contended that SORNA's requirement that he register as a sex offender increased the punishment for his prior crime by causing "inconvenience and embarrassment."

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