

SUMMER 2012 NEWSLETTER

CIVIL RIGHTS LAW UPDATE

By Joshua Skinner

United States Supreme Court

- ***United States v. Alvarez*, No. 11-210, 2012 U.S. LEXIS 4879 (June 28, 2012)**

The Stolen Valor Act, which imposes a criminal penalty on individuals who falsely claim to be recipients of a military medal awarded by Congress, is unconstitutional under the First Amendment because the statute restricts speech protected by the First Amendment and the government can achieve its legitimate objectives in less restrictive ways.

Alvarez repeatedly, falsely, and without deriving any financial benefit therefrom, claimed to be a recipient of the Congressional Medal of Honor. He was charged with violation of the Stolen Valor Act, which makes such claims a criminal violation. Alvarez challenged the Act, claiming that it violated his First Amendment rights.

In a splintered decision, a majority of the Court held that the Stolen Valor Act, as currently written, violates the First Amendment. The four-person plurality would have applied strict scrutiny to the Act, while Justice Breyer, joined by Justice Kagan, would have applied some form of intermediate scrutiny, holding that since the Act restricts speech, the government should be required to achieve its legitimate objectives (avoiding devaluing of the honor associated with Congressional medals, etc.) in some less restrictive manner. Prior case law had indicated that false statements were not, in general, entitled to any First Amendment protection. Both in the plurality opinion and in the opinion by Justice Breyer, the Court rejected the claim that the First Amendment does not apply to false statements. While the Court acknowledged that certain types of false statements can be regulated more fully (e.g., perjury), false statements are generally entitled to some First Amendment protection.

- ***Filarsky v. Delia*, No. 10-1018, 132 S. Ct. 1657 (April 17, 2012)**

Private individuals who are temporarily retained by the government to carry out the government's work generally are entitled to assert qualified immunity from suit under Section 1983.

Filarsky, an experienced employment attorney, was hired by the City of Rialto, California, to conduct an investigation into whether Delia, an employee of the City, was fraudulently taking medical leave. As part of the investigation, Filarsky prepared an order for Delia's supervisor ordering Delia to produce certain materials that Delia claimed were in his home. Delia complied with the order under protest, and subsequently filed suit against all City officials who were involved, claiming that the order violated his Fourth Amendment rights. The district court granted summary judgment based on qualified immunity. On appeal, the Ninth Circuit affirmed as to all of the individual defendants except Filarsky. The Ninth Circuit held that Filarsky, a private attorney, was not entitled to assert the defense of qualified immunity, despite the fact that Delia's claim against Filarsky was based on the

Fourth Amendment and 42 U.S.C. § 1983.

The Court held that those individuals whose conduct is “fairly attributable to the state” can be sued as a state actor under Section 1983 and, consequently, also generally are entitled to seek qualified immunity on equal footing with individuals who are employed on a full-time or permanent basis by the government. The Court distinguished, and perhaps limited, its decisions in *Wyatt v. Cole*, 504 U.S. 158 (1992), and *Richardson v. McKnight*, 521 U.S. 399 (1997), both of which denied the defense of qualified immunity to private individuals who were sued under Section 1983.

- ***Messerschmidt v. Millender*, No. 10-704, 132 S. Ct. 1235 (February 22, 2012)**

Police officers are generally entitled to qualified immunity as to the execution of an invalid search and seizure warrant if the warrant was approved by a neutral magistrate.

Following a domestic assault with a sawed-off shotgun by a known gang member, Sheriff’s deputies, including Messerschmidt, sought a warrant to search the Millender residence, where the suspect was believed to reside. The warrant was approved by a magistrate and authorized the deputies to search for and seize all firearms in the residence, as well as any indicia of gang membership. The deputies executed the warrant, but the only firearm found belonged to Augusta Millender – a woman in her seventies. The Millenders filed suit against the County and various individuals, alleging that the search warrant was invalid under the Fourth Amendment. The suit sought damages from the deputies.

The Court held that that the police officers were entitled to qualified immunity because, ordinarily, a police officer cannot be expected to question a magistrate’s probable-cause determination because it is the magistrate’s responsibility to determine whether the officer’s allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment.

United States Court of Appeals for the Fifth Circuit

- ***Doe v. Covington County Sch. Dist.*, 675 F.3d 849 (5th Cir. March 23, 2012) (en banc)**

Public schools do not have a constitutional duty to protect their students from harm by third-parties, even when the students are young and more vulnerable.

Jane Doe was nine-years-old and attended an elementary school in Covington County, Mississippi. According to the allegations, school officials permitted a man named Tommy Keyes to “check-out” Jane from the school on numerous occasions, despite the fact that Keyes was not included on the list of approved individuals from Jane’s parents. Keyes apparently sexually molested Jane while she was in his custody and then returned her to the school. The school did not comply with its policies regarding check-out procedures when it permitted Keyes to take Jane from the school. Jane’s father and paternal grandmother brought suit against the school district on Jane’s behalf, alleging that the school personnel had a duty to protect Jane from Keyes because Jane and the school were either in a “special relationship” under the Fourteenth Amendment or because the harm caused by Keyes resulted from a “state-created danger.”

A panel of the Fifth Circuit previously held that there was a “special relationship” between Jane and the school district and concluded that the school personnel had violated their constitutional duty to protect Jane by permitting Keyes to take her from the school. En banc, however, the Fifth Circuit reaffirmed its prior en banc decisions and rejected application of the “special relationship” theory of liability to public schools. The “special relationship” theory primarily applies to incarcerated individuals, and the Fifth Circuit has consistently refused to apply this theory to public schools. The en banc court also rejected application of the so far unrecognized “state-created danger” theory of liability.

- ***McFaul v. Valenzuela*, 684 F.3d 564 (5th Cir. June 18, 2012)**

Courts should defer to the judgment of jail officials regarding restrictions on items possessed by inmates, even if those restrictions have the effect of impinging on the religious exercise of an inmate.

McFaul, an inmate with the Texas Department of Criminal Justice (TDCJ), claims to be a Celtic Druid who practices his religion through rituals and magic involving periodic “ritual salutations to the sun” at specific times of day. McFaul claimed that he needed a medallion and prayer beads to practice his faith, but that Valenzuela, the chaplain at the prison, told him that the specific items McFaul wanted were inappropriate and that he would need to get a Wiccan star or pentagram. McFaul claims that the approved medallion is insufficient in order to protect McFaul while he practices his religion. The medallions McFaul said would be sufficient cost more than \$25, while jail policy limits the value of medallions to \$25. McFaul claims to have known of other inmates who had medallions valued at more than \$25 who were permitted to retain their medallions. When Valenzuela denied McFaul access to the requested items, McFaul brought suit, alleging violations of his religious rights under the First Amendment and various religious freedom statutes.

The Fifth Circuit affirmed the decision of the district court granting summary judgment to the defendants. Basically, the Court’s decision appears to rest on two bases: (1) the jail presented an affidavit from a jail official asserting that the limitations on the types of medallions served valid penological interests, including safety, security, and discipline because the greater control on the types of items possessed by inmates made it easier for guards to avoid the presence of dangerous items or items that could easily be used to purpose contraband. And (2) McFaul failed to present sufficient evidence about the manner in which the items requested were necessary for the practice of his faith.

- ***Jones v. Lowndes County*, 678 F.3d 344 (5th Cir. April 18, 2012)**

A plaintiff challenging a delay in arraignment after arrest of less than 48 hours bears the burden of proving that the delay was unreasonable. Beyond the 48-hour mark, the burden falls to the defense to show extraordinary circumstances.

A Lowndes County deputy sheriff arrested Clifton Jones and Jerry Nance on a Saturday evening. Saturday evening and Sunday, there were no Justice Court judges on duty. On Monday, the deputy sheriff was off work until the middle of the afternoon. By the time he arrived at work, the Justice Court judge had left for the day. Consequently, it was not until Tuesday morning that the deputy

sheriff appeared before the judge, who determined that the arrests were justified by probable cause. Jones and Nance made their first appearance before the judge on Wednesday and was released on bail. Jones and Nance were later indicted for possession of precursors to the manufacture of methamphetamine. Jones and Nance brought suit alleging that their constitutional rights were violated by being detained more than 48 hours without a determination of probable cause or an initial appearance before a judge.

The Fifth Circuit did not rule on whether the delay that occurred in Lowndes County constituted “extraordinary circumstances” justifying the delay beyond 48 hours of Jones’ and Nance’s arraignment. Rather, the court held that the individual officer was entitled to qualified immunity because the law remains unclear in this area and the County is entitled to dismissal because Jones and Nance did not establish that the alleged constitutional violation was caused by a policy, custom or practice of the County.

See also Brown v. Sudduth, 675 F.3d 472 (5th Cir. March 16, 2012), which upheld a jury finding that a delay beyond 48 hours was justified by extraordinary circumstances including specific state statutes restricting the circumstances in which the most easily available judge (the municipal judge) could conduct the initial appearance and determination of probable cause.

- ***Edmonds v. Oktibbeha County*, 675 F.3d 911 (5th Cir. March 26, 2012)**

Determining whether a confession was voluntarily given is viewed under the totality of the circumstances. Although a thirteen-year-old’s separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weigh against voluntariness, they are not dispositive.

Edmonds, a thirteen-year-old boy, confessed to the murder of his brother-in-law in order to please his sister, who had committed the murder and asked Edmonds to take the blame for her. However, Edmonds denied any knowledge of the murder when questioned by police so long as his mother was present, but confessed when she was removed from the room. After Edmonds was acquitted, he and his mother brought suit alleging that the deputies had coerced his confession in violation of the Fifth Amendment.

The Fifth Circuit held the evidence demonstrated that the reason Edmonds confessed to the murder was in order to protect his sister, not because of coercive tactics by the police. There was no indication that the police were aware of the sister’s plan. Rather, Edmonds went into the interrogation with the intention of confessing to the murder. The presence of Edmonds’ mother did hinder his willingness to confess to the murder, but that was a matter of her presence hindering *his* intention, not hindering the allegedly coercive influence of the police.

- ***Waganfeald v. Gusman*, 674 F.3d 475 (5th Cir. March 12, 2012)**

Pre-trial detainees do not have a clearly established right under the Sixth Amendment to use their cell phones if the land lines at the jail are disrupted.

Kunkel and Waganfeald were arrested for public intoxication in New Orleans on the eve of

Hurricane Katrina. Around the same time they arrived at the jail, jail officials discovered that due to volume overload from outside the jail, the phone lines were inoperable. The phones remained inoperable until after the hurricane. Kunkel's and Waganfeald's cell phones were confiscated on their arrival for safety reasons. Consequently, when the hurricane arrived, caused widespread chaos and resulted in three days in which Kunkel and Waganfeald were locked in their cells, alone, without food and water, in poor cell conditions, and believing that they had been abandoned by the jail officials, they were unable to call for assistance because they lacked any working phone.

They brought suit, alleging a violation of their rights under the Sixth Amendment. The Fifth Circuit held that the jail officials were entitled to qualified immunity because there was no clearly established law indicating that the jail officials should have made Kunkel's and Waganfeald's cell phones available to them merely because the jail phones were inoperable.

- ***Bishop v. Arcuri*, 674 F.3d 456 (5th Cir. March 9, 2012)**

The disposable nature of a controlled substance, together with the general prevalence of evidence destruction in drug cases and the general dangerousness of drug cases, is not sufficient to justify a no-knock entry under the Fourth Amendment. Officers who execute such no-knock warrants are not entitled to qualified immunity because the law is sufficiently clearly established.

Detective Arcuri obtained a search warrant for methamphetamine at a residence where an informant told Arcuri that such drugs were being "cooked" and that the informant had purchased some of the drugs from a man there named "Randy." There was no history of criminal activity associated with the property or its known residents and the identity of "Randy" was uncertain. Arcuri decided to execute the warrant without knocking. This decision was approved by Arcuri's supervising sergeant, William Hunt. Arcuri and other officers conducted the no-knock search, but found no evidence of illegal drugs or of "Randy." The residents of the home, who were cooperative throughout, filed suit alleging that the search had violated their Fourth Amendment rights. The district court held that the search was reasonable and granted summary judgment to the defendants. The plaintiffs appealed.

Despite the fact that the district court held that the no-knock search was reasonable, the Fifth Circuit held that Arcuri's decision to execute the warrant without knocking violated the Fourth Amendment and that the legal principles were sufficiently clearly established such that Arcuri is not entitled to qualified immunity.