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CONSTITUTIONAL AND CIVIL RIGHTS LAW UPDATE

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United States Supreme Court

White v. Pauly, No. 16-67, 137 S.Ct. 548 (Jan. 9, 2017)

Police officers are entitled to qualified immunity from claims involving section 1983 and the Fourth Amendment for using excessive force where a police officer "having arrived late at an ongoing police action and having witnessed shots being fired by one of several individuals in a house surrounded by other officers—shoots and kills an armed occupant of the house without first giving a warning."

The deceased man's brother brought suit against three police officers alleging that they used excessive force in violation of the Fourth Amendment. The plaintiff was involved in a road-rage incident, and two women called 911 to report that the plaintiff was a "'drunk driver'" who was "'swerving all crazy.'" After the encounter, the plaintiff drove to his secluded home where he lived with his brother. Subsequently, two police officers arrived at the home and began searching around outside. The plaintiff and his brother heard the police officers outside and yelled, "Who are you?" and "What do you want?" The plaintiff maintains that he and his brother never heard the two officers identify themselves as police officers and only heard the officers say that they were armed and entering the home. At that point, the plaintiff and his brother armed themselves and began shooting at the officers. Officer White, who had been radioed by the two police officers for assistance, was walking towards the home when he heard the gun shots being directed at the two police officers. The plaintiff's brother opened the front window of the home and pointed his gun in the direction of Officer White. One of the two officers shot at the brother but missed, and immediately afterwards, Officer White shot and killed the plaintiff's brother.

The district court and the Tenth Circuit denied all three defendants' motions for summary judgment on the grounds of qualified immunity. For Officer White, the Tenth Circuit held that the rule "that a reasonable officer in White's position would believe that a warning was required despite the threat of serious harm" was clearly established by the Supreme Court's case law. For the two officers, the Tenth Circuit held that reasonable officers would have understood that their actions would have caused the brothers to arm themselves, defend their home, and result in the use of deadly force. The Supreme Court reversed the Tenth Circuit's judgment against Officer White on the grounds that he did not violate clearly established law. The officer's conduct did not constitute a "run-of-the-mill Fourth Amendment violation." Furthermore, no precedent exists that held that a violation of the Fourth Amendment had occurred under similar circumstances.

Manuel v. City of Joliet, Illinois, No. 14-9496, 137 S.Ct. 911 (Mar. 21, 2017)

An individual's Fourth Amendment right to be free from unreasonable search and seizure continues through the entire legal process of a criminal case. In this case, a passenger of a car

that was pulled over for failing to signal was removed from the car, pushed, kicked, and handcuffed by a police officer. The officer found a bottle of pills in the passenger's pocket during a pat-down. The pills were tested at the scene of the arrest, and the officers falsified the results of the test to show that the pills were ecstasy. As a result of the initial test results, the passenger was arrested. A subsequent, more detailed lab test revealed that the pills were not ecstasy. After the arrest, the officers continued to rely on the false positive initial test throughout the grand jury proceedings, and the passenger was held for almost two months until the Assistant State's Attorney sought dismissal of the charges.

The passenger sued the city and various city officials, alleging malicious prosecution and other civil rights claims. His malicious prosecution claim was dismissed under *Newsome v. McCabe*, 256 F.3d 474 (7th Cir. 2001), which held that federal claims of malicious prosecution stem from the right to due process and are not a Fourth Amendment issue. Illinois provided a similar cause of action as a malicious prosecution claim under federal law; therefore, a malicious prosecution claim under federal law was unavailable to the plaintiff. On appeal, the plaintiff argued that because the police officers misrepresented evidence, *Newsome* did not foreclose a malicious prosecution claim on Fourth Amendment grounds. The Seventh Circuit affirmed the lower court's rulings as consistent with the *Newsome* precedent.

The Supreme Court reversed and remanded the case, holding that the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process, abrogating *Newsome* and *Llovet v. Chicago*, 761 F.3d 759 (7th Cir. 2014). An individual's claim that challenges pretrial detention falls within the scope of the Fourth Amendment regardless of whether legal process has begun. When legal process has begun, probable cause must support the prosecution itself. Where no probable cause exists to support the prosecution of an individual, a Fourth Amendment claim arises, which allows for a Fourteenth Amendment Due Process claim. Therefore, a detainee's Fourth Amendment claim does not become a Fourteenth Amendment Due Process claim when the requirements of the Fourth Amendment have not been satisfied. As a result, the Court held that plaintiff's Fourth Amendment claim was proper because his arrest was made without probable cause. However, the Court declined to decide whether the plaintiff's Fourth Amendment claim arose when his criminal charges were dismissed or when legal process began and instead remanded the case to the Seventh Circuit for further consideration.

***Moore v. Texas*, No. 15-797, 137 S.Ct. 1039 (Mar. 28, 2017)**

The use of an outdated medical definition for intellectual disability by the State of Texas violated the Eighth Amendment's prohibition against cruel and unusual punishment and Supreme Court precedent. The appeal resulted from a habeas corpus relief suit challenging a prisoner's death penalty sentence. The prisoner argued that the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), should apply to his case, and as a result, he should be exempt from execution because he was intellectually disabled. Based on this argument, the habeas court granted him relief. However, the Court of Criminal Appeals of Texas ("CCA") reversed, holding that the prisoner failed to establish by a preponderance of the evidence that he had the requisite intellectual disability for the *Atkins* precedent to apply based on Texas case law that used a 1992 definition of intellectual disability.

The Supreme Court rejected the CCA's application of medical guidance and held that the CCA applied the improper standard when it denied the prisoner's habeas relief and approved his execution. State standards for determining when a mental disability exempts a person from the death penalty cannot ignore current medical standards defining mental disability. The standard of the CCA differed from current medical standards. First, the CCA failed to consider the "standard error of measurement" for the prisoner's IQ score, which indicated his IQ was likely to fall within a range that was a level consistent with mental disability. Second, medical standards focus on a person's deficits; whereas, the CCA gave improper weight to the prisoner's perceived strengths when evaluating his ability to navigate everyday life. Third, the CCA also relied on "evidentiary factors" from Texas case law based on stereotypes about mental disability that create an unacceptable risk that mentally disabled persons will be unlawfully executed. As a result, the Court vacated and remanded the case.

***Nelson v. Colorado*, No. 15-1256, 137 S.Ct. 1249 (April 19, 2017)**

The Colorado Exoneration Act, which required exonerated individuals to prove, by clear and convincing evidence, that they were "actually innocent" in order to refund them their money, does not comport with the Due Process Clause of the Fourteenth Amendment.

Colorado, similar to most states, imposes certain monetary penalties on individuals charged or convicted of a crime. Here, two individuals were separately arrested and charged with sexual assault crimes. One of the individuals was acquitted of all charges; the second individual was acquitted of one of the two charges against him. After their acquittals, both individuals requested refunds from the state for the penalties that they had been charged. A Colorado trial court determined that it lacked jurisdiction with respect to one of the individual's case; therefore, it could not order a return of the funds to the individual. With respect to the second individual, the trial court returned the funds taken from him in connection with the one charge on which he was acquitted, but not his second charge. The Colorado Court of Appeals disagreed, holding that the state must refund the money that both individuals paid because they were acquitted of the sexual assault charges. The Colorado Supreme Court, however, reversed the decisions in both cases, holding that under Colorado's Exoneration Act, an individual may only recover monetary losses from an arrest if they can "prove, by clear and convincing evidence, that [they were] 'actually innocent.'"

The U.S. Supreme Court held that Colorado's Exoneration Act is unconstitutional under the Due Process Clause of the Fourteenth Amendment. Relying on its reasoning in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court examined three factors: (1) the private interest affected, (2) the risk of erroneous deprivation of the defendants' interests if the Act is their only remedy, and (3) what is at stake for the government. Here, both individuals clearly had an interest in the return of the money that they paid to the state upon their charges. Under the second factor, the Court noted that the Exoneration Act did not allow the defendants to be presumed innocent, a presumption to which all defendants are entitled. Lastly, the Court held that Colorado has no claim of right to the individuals' funds. As a result, the Court reversed and remanded the case.

***County of Los Angeles, California v. Mendez*, No. 16-369, 137 S.Ct. 1539 (May 30, 2017)**

The Fourth Amendment provides no basis for the Ninth Circuit's "provocation rule," which makes an officer's otherwise reasonable use of force unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation."

County sheriff's deputies shot two occupants of a wooden shack during a warrantless search of the property. As a result, the two occupants brought a § 1983 action against the county and its deputies, alleging that the deputies violated the Fourth Amendment's prohibition on warrantless searches, the knock-and-announce requirement, and prohibition on excessive force. The district court found for the plaintiffs on these allegations and held that although the deputies' use of force was reasonable under the circumstances, they were liable for the shooting under the Ninth Circuit's provocation rule. The Ninth Circuit affirmed the district court's holding that the deputies' search violated the Fourth Amendment but reversed the knock-and-announce rule because no controlling precedent exists in the Ninth Circuit on whether officers must announce themselves again at a separate residence on the same property. The Ninth Circuit further held that the deputies were liable under the provocation rule because their unjustified, warrantless search of the shed led to the shooting.

The U.S. Supreme Court held that the Fourth Amendment provides no basis for the provocation rule that is an "unwarranted and illogical expansion" of *Graham v. O'Connor*, 490 U.S. 386 (1989). In *Graham*, the Court held that "the operative question in excessive force cases is 'whether the totality of circumstances justifies a particular search or seizure,'" and that the court should pay "careful attention to the facts and circumstances of each particular case." The provocation rule has a "fundamental flaw" because it creates a separate and independent violation to "manufacture an excessive force claim where one would not otherwise exist." The court further held that the shooting in this case was not unreasonable when viewed from the deputies' perspectives at the time of the shootings. Asking the court to "look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force," "conflates distinct Fourth Amendment claims." Thus, the Court vacated the judgment and remanded the case.

Fifth Circuit Court of Appeals

***Hamilton v. Kindred*, No. 16-40611, 849 F.3d 659 (5th Cir. Jan. 12, 2017)**

A police officer who is present but does not perform a roadside body cavity search can potentially be liable in a § 1983 claims under the bystander liability theory. An officer pulled two women over for speeding and requested help from a female officer to conduct a search of the women for marijuana. The female officer conducted a body cavity search on the women while the other officer observed. As a result, the women brought §1983 actions against the police officer, asserting a claim of bystander liability for failing to prevent or stop the female officer's roadside body cavity search of them in violation of their Fourth Amendment rights. The district court denied the officer's motion for summary judgment on qualified immunity ground, and the officer appealed.

The Fifth Circuit held that the women pled plausible Fourth Amendment excessive force claims; therefore, the district court did not err in finding that their excessive force claims had not been waived. Although the women never used the words "excessive force" in their complaints, they clearly argued that they were subject to an unreasonable search and seizure in violation of the Fourth Amendment and alleged facts that support a claim for excessive force. The court further held that the women did not waive their bystander liability claims against the officer in their pleadings. Under a theory of bystander liability, an officer may be liable if the officer "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." Because the district court found that a serious dispute of material facts existed and this was an interlocutory appeal, the court held that it lacked jurisdiction to review the district court's determination regarding the bystander liability claim. As a result, the appeal was dismissed.

***Heaney v. Roberts*, No. 15-31088, 846 F.3d 795 (5th Cir. Jan. 23, 2017)**

Removing a citizen during a public comment at a council meeting may violate the speaker's First Amendment rights. The plaintiff registered to speak during the public comment portion of the meeting. The plaintiff spoke about the legality of council members accepting campaign contributions from contractors. The council's rules allowed each speaker to address the council for five minutes. The plaintiff was allowed to speak for three minutes before he was interrupted by the presiding chair of the meeting who allowed the parish attorney to speak on the issue. After the attorney spoke, the plaintiff continued addressing the council until he was interrupted again and not allowed to finish speaking for the remainder of the five minutes. The presiding chair directed an officer to remove the plaintiff from the meeting, and the officer escorted the plaintiff from the meeting. The plaintiff sued both the officer and the presiding officer, alleging a violation of his First and Fourth Amendment rights.

As for the councilman, the Fifth Circuit examined whether the councilman's actions violated the plaintiff's First Amendment right to be free from viewpoint discrimination in a limited public forum. The court noted that the plaintiff did not violate a reasonable restriction at the council meeting; therefore, the councilman's motive or intent would determine whether or not he violated the plaintiff's right. The court held that the councilman's motive or intent for restricting the plaintiff's speech is a question of fact for the jury to decide. If the councilman removed the plaintiff based on his viewpoint, he would have violated clearly established law and cannot be protected by qualified immunity. However, the evidence does not support a finding that the councilman acted with the level of evil intent or recklessness required to support a punitive damages claim. As a result, the Fifth Circuit dismissed the plaintiff's claims for punitive damages and held that it lacked jurisdiction to review the denial of the councilman's motion for summary judgment on qualified immunity grounds on the plaintiff's First Amendment claim.

As for the officer, the Fifth Circuit held that the officer was entitled to qualified immunity for his conduct in removing a citizen from a parish council meeting and in responding to a councilman's direct order to remove the citizen following the argumentative exchange between the citizen and the councilman. The officer was serving as a sergeant-at-arms for the council, and as such, the officer was responsible for responding to requests by the council to address disruptions, and no such officer would have believed that such conduct was objectively

unreasonable in light of clearly established law. Therefore, the court affirmed the dismissal of the plaintiff's claims against the officer.

***Davidson v. Stafford*, No. 16-20217, 848 F.3d 384 (5th Cir. Feb. 7, 2017)**

Police officers are not entitled to qualified immunity for arresting an anti-abortion protestor during a protest at an abortion clinic. Police arrested an anti-abortion protestor while he was protesting outside a Planned Parenthood office. The anti-abortion protestor and a Planned Parenthood employee gave differing accounts to police of how the protestor was protesting. The protestor said he was merely talking to people in cars who stopped to speak with him, but the employee told police that the protestor was delaying clients from entering the office. After the police ordered the protestor to move under Texas Penal Code § 42.04 for obstructing a highway or other passage, they arrested the protestor under Texas Penal Code § 38.02 for failure to identify himself. As a result, the anti-abortion protestor filed a § 1983 claim against the arresting officers, police chief, and the city for violating his First and Fourth Amendment rights.

The trial court dismissed the case, holding that the officers had qualified immunity and the city had no municipal liability. However, the Fifth Circuit found that the police officer had no probable cause to make an arrest. The court further held that the officer had no reason to make an arrest under § 42.04, and therefore, the incident never triggered § 38.02, under which a suspect must identify himself to police only when lawfully arrested. Furthermore, the court held that the officers should have given greater weight to the protestor's First Amendment right to protest.

***Childers v. Iglesias*, No. 16-10442, 848 F.3d 412 (5th Cir. Feb. 9, 2017)**

This case involves a challenge to an alleged false arrest under 42 U.S.C § 1983 where the Fifth Circuit dismissed all of the claims against the arresting officers because a reasonable officer in the deputies' position could have believed that there was a fair possibility that the arrestee violated a Texas statute prohibiting interference with a police officer's official duties.

The arrestee owned a ranch and was at the gate preparing to leave after he had attempted to evict an individual who he asserts was living on the ranch. Two deputies, who had been called to the scene, arrived and ordered the arrestee to move his truck which was blocking the gate so they could access the property. The arrestee alleges that he was attempting to finish his conversation with the deputies, but the deputies arrested him for interfering with an officer's duties. The charges were eventually dropped. The arrestee sued the two deputies for false arrest and violating his First Amendment right to freedom of speech. The trial court granted the deputies' motion to dismiss on qualified immunity grounds. The arrestee appealed.

The arrestee argued that the deputies lacked probable cause to arrest him and that he did not interfere with the deputies' official duties because his interference consisted of speech only, which is a complete defense to a conviction under the statute according to *Carney v. State*, 31 S.W.3d 392 (Tex. App.—Austin 2000, no pet.). However, the arrestee was not simply using his speech with the deputies, but rather blocked the deputies' access to the property with his truck. As a result, the Fifth Circuit affirmed the trial court's dismissal of the suit because probable cause existed to arrest the arrestee for violating the Texas statute. The court further explained

that even if the arrestee's truck was not blocking the deputies' entry to the property and used only speech to interfere with the deputies, the deputy's instruction was made within the scope of his official duties because the deputies was trying to access the ranch through the gate. As a result, the motion to dismiss was properly granted.

***Alderson v. Concordia Parish Correctional Facility*, No. 15-30610, 848 F.3d 415 (5th Cir. Feb. 9, 2017)**

This case involves a pretrial detainee's suit against a state correctional facility and several of its employees. The plaintiff, a pretrial detainee, alleged that he was brutally attacked in the Concordia Parish Correctional Facility. After he raised concerns about his safety and medical condition, he was sent to lockdown in a cell with convicted inmates due to a misclassification by the facility employees. After the attack, the pretrial detainee was not taken to the hospital until a considerable amount of time had passed and was not given his prescription medicine for over ten days. As a result, the pretrial detainee brought a 42 U.S.C. § 1983 against the Concordia Parish Correctional Facility and several of its department heads and employees.

The Fifth Circuit held that in a § 1983 action based on "episodic acts or omissions" in violation of the Fourteenth Amendment, a pretrial detainee must show subjective deliberate indifference by the defendants. The court held that the trial court properly dismissed the claims against the warden and supervisors because no direct intent or knowledge was pled against them by the plaintiff. The court also held that the trial court properly dismissed all claims for misclassification because the plaintiff did not plead that misclassification occurred due to subjective deliberate indifference.

However, the court held that the pretrial detainee properly pled a sufficient claim against the facility's lieutenant for failure to provide necessary medical care. To properly plead a claim for failure to provide necessary medical care, a plaintiff must show deliberate indifference to serious medical needs that resulted in substantial harm. Pain suffered during the delay in medical treatment can constitute substantial harm and provide a basis for an award of damages. As a result, the pretrial detainee properly pled a claim against the facility's lieutenant.

***Turner v. Driver*, No. 16-10312, 848 F.3d 678 (5th Cir. Feb. 16, 2017)**

Deciding an issue of first impression in the Fifth Circuit, the court of appeals held that the First Amendment protects the right to record the police, subject only to reasonable time, place, and manner restrictions.

Turner stood on a public crosswalk in Fort Worth across from a police station videotaping the station when he was approached by two police officers. The officers asked Turner for identification and, when he refused to provide any, handcuffed him and placed him in the back of their patrol car. Eventually, after the officer's supervisor arrived at the scene, Turner was released.

Turner sued alleging, among other claims, violation of his First Amendment rights. Prior to this case, neither the Supreme Court nor the Fifth Circuit had decided whether the First Amendment protects the right to record the police, though every other court of appeal to consider the matter held that the First Amendment protects such a right. In light of the absence of

controlling authority and the scarcity of persuasive authority, the Fifth Circuit affirmed that the officers enjoyed qualified immunity on Turner's First Amendment claim. In its opinion, the Fifth Circuit expressly indicated, however, that it considered to the right to be clearly established henceforth.

***Mabry v. Lee County*, No. 16-60231, 849 F.3d 232 (5th Cir. Feb. 21, 2017)**

A strip and cavity search of a minor pursuant to a juvenile detention center's intake procedure was reasonable. A twelve year old girl was subjected to a body cavity strip search while being detained after a fight occurred at a middle school. The mother of the child brought suit against the county, city, school district, and various public officials, alleging that they violated the Fourth Amendment.

The plaintiff argued that body cavity searches of minors detained for minor offenses were unconstitutional and that the district court erred in extending the Supreme Court's holding in *Florence v. Board of Chosen Freeholders*, 132 S.Ct. 1510 (2012), which examined the constitutionality of strip searches of adult detainees, to cover juvenile detainees. The Supreme Court in *Florence* applied a deferential test and held that "a regulation impinging on an inmate's constitutional rights must be upheld if it is reasonably related to legitimate penological interests." The Fifth Circuit affirmed the lower court's holding that *Florence* applies to juvenile detainees. Therefore, the plaintiff was required to show that the search policy of the facility was "not reasonably related to a legitimate penological interest." Ultimately, the court held that the plaintiff failed to show that the policy was not related to a legitimate penological interest; therefore, the Fifth Circuit granted summary judgment to the county.

***United Motorcoach Association, Inc. v. City of Austin*, No. 16-50115, 851 F.3d 489 (5th Cir. March 17, 2017)**

Where a federal statute permits a city to regulate charter bus transportation that is responsive to safety, the city regulations are not preempted by federal law.

An association of charter-bus companies sought to enjoin the City of Austin's regulations affecting their operations. A city ordinance required operators of charter bus services within the city to obtain a city permit. The issue in the case was whether federal law preempted the city's exercise of its regulatory authority over the intrastate operation of charter buses. The federal statute at issue was 49 U.S.C. 14501, captioned, "Federal authority over intrastate transportation." The statute provides that "[s]tates and their governmental subdivisions may not enforce rules affecting interstate or intrastate transportation by a motor carrier of passengers, with identified exceptions." The city's permit regulations fell within the language of Section 14501(a)(1)(C) because such regulations relate to "the authority to provide intrastate or interstate charter bus transportation." The Court examined whether Section 14501(a)(2) nonetheless applied to save the permit regulations from preemption.

The Fifth Circuit ultimately agreed with the district court's conclusion that section 14501(c)(2)(A) may appropriately be considered in interpreting and applying section 14501(a)(2), because both subsections use identical language. Thus, the distinctions between sections 14501(a) and (c) are not persuasive to allow "safety regulatory authority" to be

construed more narrowly in the former than in the latter. Therefore, the provision of the federal statute regulating charter bus transportation that exempted states' safety regulatory authority from its preemptive force permits a city to regulate charter buses to the extent that its regulation is responsive to safety.

Even though cities only recently began regulating charter buses through permitting schemes, these ordinances were accomplishing consumer protection goals because the ordinance contained numerous safety-purpose statements and gave the city the ability to hold charter bus operators who did not comply with substantive safety provisions accountable. As a result, the City ordinance regulating charter bus operations within city was genuinely responsive to safety, and thus fell within the scope of the safety regulatory authority exception to the federal statute regulating charter bus transportation.

***American Humanist Assoc. v. McCarty*, No. 16-11220, 851 F.3d 521 (5th Cir. March 20, 2017)**

Student-led invocations before school board meetings do not violate the First Amendment's Establishment Clause. A former high school student and a humanist advocacy organization sued the school district and its individual board members, claiming that the board's policy of inviting students to deliver invocations before school boarding meetings violated the First Amendment's Establishment Clause.

The Fifth Circuit noted that there is a distinction between prayer before legislative bodies and prayer in school settings. Student-led invocations delivered before school board meetings constituted legislative prayer, rather than school prayer, for purposes of the legislative prayer exception to the Establishment Clause of the First Amendment because the school board was "a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other [legislative] tasks." Furthermore, most of the attendees at the school-board meetings were mature adults, and invocations fit within a well-established practice of opening meetings of deliberative bodies with invocations. The fact that board members often stood and bowed their heading during the student-led invocations held before the school board meetings also did not violate the Establishment Clause. The Fifth Circuit further refused to bar the board members, who are receiving a benefit from the legislative prayers, from participating in the invocation or bowing their heads during the invocations. Thus, the Fifth Circuit upheld the school district's invocation policy.

***Hanks v. Rogers*, No. 15-11295, 853 F.3d 738 (5th Cir. April 5, 2017)**

A police officer is not entitled to qualified immunity on summary judgment grounds in a §1983 action for excessive use of force when he uses force that was clearly unreasonable and excessive.

The plaintiff brought a § 1983 claim against the city and one of its police officers, alleging that the officer used excessive force against him following a traffic stop. To succeed on an excessive-force claim, a plaintiff must show "(1) injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness of which was clearly unreasonable." When the police officer stopped the plaintiff, clearly established law indicated

that the officer's alleged use of force was clearly unreasonable and excessive because the officer stopped the plaintiff for a minor traffic offense, the officer allegedly aimed his stun gun at the plaintiff's back while the plaintiff allegedly stood against his vehicle, facing away from the officer, with his empty hands displayed behind his back, and presented no immediate threat or flight risk. Furthermore, the plaintiff allegedly offered passive resistance, at most, by asking whether he was under arrest, and the officer allegedly abruptly escalated the encounter with a physical takedown only seconds after ordering the plaintiff to kneel. Thus, the officer is not entitled to qualified immunity because he used clearly unreasonable and excessive force.

***Chamberlin v. Fisher*, No. 15-70012, 855 F.3d 657 (5th Cir. April 27, 2017)**

A capital murder conviction must be set aside because prosecutors eliminated African Americans from serving on the jury on the basis of their race, even though other African Americans did in fact sit on the panel.

During a murder trial, the prosecution utilized the majority of their early peremptory strikes against the African American jurors. The prosecution only accepted two African American jurors after he had used all of his allotted number of strikes and defense counsel repeatedly objected. The Court noted that the prosecutor struck nearly twice as many black jurors as he accepted, accepted more than four times as many white jurors as he struck, exercised sixty-two percent of his strikes on black jurors making up only thirty-one percent of the qualified prospective jurors, used the most early strikes against black jurors, only later accepted two black jurors after the defense counsel's repeated objections, and the reasons for excluding two black jurors, including statements that they were "not sure" if they were emotionally capable of supporting death, also applied to a white juror. As a result, the criminal defendant was entitled to relief because the prosecution allowed the seating of a white juror who was "identical in all respects" to two black jurors who were struck, and the court upheld the defendant's *Batson* claim.

***Alexander v. City of Round Rock*, No. 16-50839, 854 F.3d 298 (5th Cir. April 18, 2017)**

A police officer does not retaliate against an individual in violation of the First Amendment or Fifth Amendment when the individual refuses to answer an officer's questions during a *Terry* stop and is subsequently arrested, but qualified immunity can be denied on other grounds.

The plaintiff filed suit against the police officers and the city under § 1983, alleging violations of his First, Fourth, Fifth, and Fourteenth Amendment rights. When police officers pulled him over for suspicious activity, the plaintiff refused to answer any of the police officers' questions. After refusing to answer their questions, the officers arrested him for resisting a search. The district court granted the officers' motion to dismiss, holding that the plaintiff did not allege any violations of his constitutional rights and was unable to overcome the officers' qualified immunity defense.

The Fifth Circuit held that the officers were not entitled to qualified immunity because they lacked reasonable suspicion to detain the plaintiff because the officer only observed the plaintiff briefly looking around a vehicle in a parking lot, getting into a car, noticing the police

officers while continuing to get into the car, and beginning to drive away from the parking lot during day light in a low crime area. Furthermore, the court held that the officers lacked probable cause to arrest him for resisting a search under Texas law, which requires some use of force by the individual, more than simply refusing to cooperate, because the plaintiff alleged that while he was being removed from his car and handcuffed, he remained entirely passive and did not physically resist the police officers. Thus, the police officers were not entitled to qualified immunity from the plaintiff's § 1983 claim alleging violations of his Fourth Amendment rights.

The plaintiff further alleged that the officers retaliated against him for exercising his constitutional rights not to answer the police officer's questions during a *Terry* stop and to utter an expletive in public in violation of the First and Fifth Amendments. Under the Fifth Amendment, the plaintiff is protected "from being coerced into making an incriminating statement, and then having that statement used against him at trial." Because the plaintiff was never tried, his Fifth Amendment right against self-incrimination was not violated. Under the plaintiff's First Amendment claim, the plaintiff failed to prove that the officers retaliated against him for using an expletive in public because he had already been removed from the car and handcuffed when he used an expletive. Additionally, the police officers are entitled to qualified immunity from the plaintiff's retaliation claim for exercising his First Amendment right to be silent and not answer the officers' questions because at the time, "it was not clearly established that an individual has a First Amendment right to refuse to answer an officer's questions during a *Terry* stop."

Lastly, the district court found that the plaintiff did not plead his injuries with enough specificity to overcome the *de minimis* requirement of his excessive force claim under the Fourth Amendment. The Fifth Circuit noted that "the extent of injury necessary to satisfy the injury requirement is directly related to the amount of force that is constitutionally permissible under the circumstances." Therefore, so long as the plaintiff suffered some injury, even relatively insignificant and purely psychological injuries are cognizable under the Fourth Amendment when an officer uses unreasonably excessive force. The Fifth Circuit reversed the district court's dismissal of the plaintiff's excessive force claim.

***Lincoln v. Barnes*, No. 16-10327, 855 F.3d 297 (5th Cir. April 20, 2017)**

A police officer's detention of a witness at a police station without probable cause or consent for the purposes of questioning her and obtaining a statement from her violated her Fourth Amendment right to be free from unreasonable seizures. Furthermore, the police officer was not entitled to qualified immunity because that officer's conduct constituted an illegal seizure in violation of both the Fourth Amendment and clearly established law.

In this case, a police shooting occurred at a residence where officers, responding to a 911 call, shot and killed the decedent in front of his daughter. Then, the daughter was forcibly removed from the home, handcuffed, placed in the backseat of a police car, and transported to the police station for questioning. The daughter and her family filed a Section 1983 suit against the city and several officers involved in the incident, alleging the officers violated her Fourth Amendment right to be free from unreasonable seizure when they took her into custody without a warrant, probable cause, or a justifiable reason, interrogated her against her will for many hours, and refused her access to her family.

The district court affirmed the daughter's unreasonable seizure claim against the police officers, finding that the involuntary detention and interrogation of the daughter was without probable cause. On appeal, the Fifth Circuit affirmed the district court's holding that the police officers violated the daughter's Fourth Amendment rights because a demonstrative probable cause did not exist, and the daughter did not consent to be seized, transported, and subjected to prolonged interrogation. Furthermore, no exigent circumstances existed for the detention and, in fact, the daughter was not even being questioned about the unsolved crime, which triggered the SWAT team's involvement at her family's residence. Because was no probable cause or special circumstances warranted the daughter's detention, the Court affirmed the district court's judgment.