

## **SPRING 2018 NEWSLETTER**

### **FEDERAL CONSTITUTIONAL AND CIVIL RIGHTS LAW UPDATE**

**By Frank Valenzuela and Caroline Sileo**

#### **United States Supreme Court**

*District of Columbia v. Wesby*, \_\_ U.S. \_\_, 138 S. Ct. 577 (Jan. 22, 2018)

Where police officers had probable cause to arrest partygoers, the officers are also entitled to qualified immunity from the partygoers' Fourth Amendment claims.

In 2008, police officers responded to a noise complaint at a house party. When the officers arrived, they heard loud music coming from the house and then entered the house. The officers observed party guests drinking and watching "scantily clad women with money tucked into garter belts." The partygoers claimed that a woman called "Peaches" was the host of the party, that she leased the home, and that she had received permission from the owner. One partygoer called Peaches on the phone for an officer because Peaches was not present. Peaches confirmed that she had permission from the owner; however, when an officer called the owner, the owner claimed that the lease had not been executed and that he had not given permission for the party. The officers subsequently arrested the partygoers. Eventually, the charges were dropped.

Sixteen of the arrested partygoers sued the officers and the District of Columbia for false arrest under the Fourth Amendment and D.C. law. The district court ruled in favor of the partygoers, and the U.S. Court of Appeals for the D.C. Circuit affirmed, holding both that the officers did not have probable cause for entry and were not entitled to immunity from liability. The court reasoned (1) that the partygoers entered lawfully because the partygoers believed in good faith that the owner had given Peaches permission for the party and (2) that the officers were not entitled to immunity because it was unreasonable for them to believe that they were not violating the partygoers' clearly established Fourth Amendment rights against false arrest.

The Supreme Court reversed, holding that (1) the officers had probable cause to arrest the partygoers, and (2) the officers were entitled to qualified immunity.

With regard to probable cause, the Court held that the court of appeals erred in analyzing individual factors rather than the totality of the circumstances at the party scene. The Court examined the factors, including the dirty and near vacant conditions of the house, the fact that the partygoers fled the police when they entered, their inconsistent explanations for the party, and the fact that only two of the partygoers named Peaches as the tenant who allegedly gave them permission to enter the home, which give rise to the inference that the partygoers knew they did not have permission to be in the home. As a result, the Court held that these factors could have reasonably led the officers to believe that there was a substantial chance of criminal activity.

With regard to the officers' entitlement to qualified immunity, the Court determined that the officers were protected from suit unless their actions were clearly unlawful at the time of

arrest. The Court held that given that they could have reasonably but mistakenly thought that they had probable cause to make the arrests at the time, their actions were not clearly unlawful. As a result, the officers were entitled to qualified immunity.

***Murphy v. Smith*, No. 16-1067, \_\_ U.S. \_\_, 2018 WL 987346 (Feb. 21, 2018)**

In a prisoner's civil rights case under 42 U.S.C. § 1997e(d), an award of attorney's fees must be first satisfied from not more than 25% of the prisoner's judgment.

A correctional officer hit an inmate, fractured his eye socket, and failed to provide the inmate proper medical treatment. The inmate filed suit under 42 U.S.C. § 1983 and state law theories. After the trial, the jury returned a verdict in his favor and awarded him damages for some of his claims under state law, and the district court awarded him attorney fees under 42 U.S.C. § 1988. Two of the defendants appealed the judgment. The defendants argued that the Illinois doctrine of sovereign immunity bars the state-law claims and that the Prison Litigation Reform Act requires that 25 percent of the damages awarded be used to pay the attorney fee award.

The Seventh Circuit affirmed the district court's holding that state officials or employees are not entitled to sovereign immunity against state-law claims where the officials or employees violated statutory or constitutional law. Here, the inmate successfully alleged and proved these statutory and constitutional violations. The Seventh Circuit reversed on the attorney fee award; however, finding that the 42 U.S.C. § 1997e(d) requires that the attorney fee award must first be satisfied from up to 25 percent of the damage award and that the district court does not have discretion to reduce that maximum percentage.

The United States Supreme Court affirmed the Seventh Circuit's ruling "not to exceed 25 percent" as used in 42 U.S.C. § 1997e(d)(2) with respect to the award of attorney's fees in a civil rights suit, means that the district court must use as much of the judgment as necessary to satisfy the fee award without exceeding the 25% limit. The language of the provision, including the words "shall" and use of the infinitive phrase "to satisfy the amount of attorney's fees awarded" indicated the mandatory, rather than discretionary, nature of the provision's command to the district court. The majority also found that the statutory scheme, including Congress's intent in enacting a new and different law for prisoner rights suits, as well as the surrounding provisions, supported this reading of the statute.

***Class v. United States*, No. 16-424, \_\_ U.S. \_\_, 2018 WL 987347 (Feb. 21, 2018)**

A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on a direct appeal.

Class was arrested in the District of Columbia for possession of three firearms on United States Capitol Grounds in violation of 40 U.S.C. § 5104(e). Class represented himself and pled guilty, but he then appealed to the U.S. Court of Appeals for the District of Columbia Circuit on grounds of constitutional error and statutory error. The appellate court affirmed the judgment of the district court and found the man guilty due to his guilty plea, relying on its precedent in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004); cert. denied, 544 U.S. 950

(2005). In *Delgado-Garcia*, the appellate court held that, “[u]nconditional guilty pleas that are knowing and intelligent...waive the pleading defendant[’s] claims of error on appeal, even constitutional claims.” Class argued that two exceptions to this rule applied that allow a defendant to appeal the constitutionality of his conviction. First, Class argued that his conviction was unconstitutional because he had a right to “not be haled into court at all.” Second, Class argued “that the court below lacked subject-matter jurisdiction over the case;” therefore, his conviction must be overturned. The court disagreed, holding that neither exception applied.

The Supreme Court disagreed, holding that a guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of the statute of conviction on a direct appeal because the man neither expressly nor implicitly waived his constitutional claims by pleading guilty.

### **Fifth Circuit Court of Appeals**

#### ***United States v. Wise*, 877 F.3d 209 (5th Cir. Dec. 6, 2017)**

It is not unconstitutional for police officers to question an individual in a bus where they did not brandish a weapon, did not intimidate the individual, left the aisle free for passengers to exit, used a conversational tone, and did not suggest that the individual was barred from leaving the bus.

During a criminal trial, the district court granted a criminal defendant’s motion to suppress certain evidence found when the police officers performed a bus interdiction at a bus stop. The district court suppressed all evidence obtained from the officers’ stop because it found that the officers had established an unconstitutional checkpoint stop and that the bus driver did not voluntarily consent to the bus stop.

The Fifth Circuit reversed the district court’s grant of defendant’s motion to suppress evidence that officers found in his pockets and the characterization of the bus interdiction as an unconstitutional checkpoint stop. The court held that the police did not establish an unconstitutional checkpoint by stopping a bus where (1) the police did not require the bus driver to stop at the station; (2) the driver made the scheduled stop as required by his employer; (3) the police only approached the driver after he had disembarked from the bus; (4) the police did not order him to interact with them; (5) after the police approached him, the driver could have declined to speak with the police; and (6) the police in no way restrained the driver. The court also held that defendant lacked standing to challenge whether the bus driver voluntarily consented to the search. In this case, defendant voluntarily consented to answering the officers’ questions and to the search of his luggage, and the officers did not perform an unconditional Terry pat down. As a result, the court reversed the district court’s suppression order.

#### ***Wilkerson v. University of North Texas*, 878 F.3d 147 (5th Cir. Dec. 20, 2017)**

A university employee with a temporary, non-tenurable, one-year appointment with a five-year commitment to renew at the option of a university does not have a property interest in his employment.

A university declined to renew an employment contract with a school lecturer, who had a temporary, non-tenurable, one-year appointment with a five-year commitment to renew at the option of the university. The lecturer brought suit against the university and its administrators, alleging he was deprived of his property interest in his job without due process and tortious interference with his employment contract. The university's administrators filed motion for summary judgments on the basis of qualified immunity. The district court denied their summary judgment motions, and the administrators appealed.

The Fifth Circuit reversed the district court's denial of summary judgment to the administrators of a university on their immunity defenses. The court held that the district court erred in denying the administrators qualified immunity against the Section 1983 claim because (1) plaintiff did not have a clearly established property right in a renewed contract where the contract was a one-year appointment with an optional five-year commitment and (2) the administrators did not violate any clearly established law under a reasonable administrator standard. Furthermore, state law compelled a similar result on the tortious interference claim because the administrator was entitled to governmental immunity. The administrator was entitled to governmental immunity because (1) "her conduct was within the general scope of her employment with a governmental unit," and (2) the plaintiff's tortious conduct claim could only be brought against the university. As a result, the court held that the district court should have granted immunity to the administrators.

***U.S. v. Hager*, 879 F.3d 550 (5th Cir. Jan. 5, 2018)**

Confidential business information remains a cognizable property right protected under federal wire and mail fraud laws.

A criminal defendant was charged and convicted of mail fraud, wire fraud, tax fraud, and money laundering for misusing his employer's confidential information to perpetuate an unlawful scheme. The criminal defendant appealed his conviction, arguing that the mail and wire fraud statutes no longer protect confidential business information after the U.S. Supreme Court's decision in *Skilling v. United States*, 561 U.S. 358 (2010), and in the alternative, these statutes only protect a narrow category—trade secrets. The Fifth Circuit disagreed and held that the criminal defendant's conviction was upheld by *Carpenter v. United States*, 484 U.S. 19 (1987). The Court held that the information at issue qualified as confidential business information protected by the wire and mail fraud statutes. The court noted that not only was the information stored, aggregated, and analyzed by the employer, but it was also crucial for the employer's business. As a result, the confidential business information remains a cognizable property right protected by the wire and mail fraud statutes.

***Pena v. City of Rio Grande City, Texas*, 879 F.3d 613 (5th Cir. Jan. 12, 2018)**

When a case is removed from state to federal court, the court must allow the plaintiff to amend her complaint to comply with the federal pleading standard.

After a police officer observed a dispute between the juvenile and her father in the family car, the officer approached and ordered the juvenile to exit the vehicle. The officer then

threatened the juvenile that he would tase her if she did not follow his order. In response, juvenile opened the door and ran away from the car. A second officer on the scene tased the juvenile in the head and back, causing her to suffer severe burns, cuts, and broken teeth.

The juvenile sued the City of Rio Grande City, Texas, and the officers in state court for several claims, including excessive use of force in violation of the Fourth Amendment. The defendants removed the case to federal court and subsequently moved to dismiss the juvenile's complaint on the grounds that she failed to state a claim and that the City and officers were entitled to qualified immunity. The juvenile moved to amend her complaint to satisfy the federal "plausibility" standard because the juvenile's first complaint was filed in Texas state court, which maintains a liberal "fair notice" pleading standard. The district court refused to grant the juvenile leave to amend her complaint, dismissed the claims against the officers without deciding whether the officers were entitled to qualified immunity, and entered judgment on the pleadings in favor of the City. The Plaintiff appealed and argued (1) that she adequately stated claims for excessive force against the officers and for municipal liability against the City; (2) that the district court improperly denied the juvenile leave to amend her complaint; and (3) the Texas "fair notice" pleading standard should apply to removed state court complaints that have not been amended.

The Fifth Circuit held that the juvenile adequately stated claims against the officers for excessive force and that the district court erred in failing to grant the juvenile leave to amend her complaint. Most importantly, the Fifth Circuit addressed the proper pleading standards for when a case is removed from state court to federal court. The Fifth Circuit held that the federal plausibility standard applies to removed cases; however, the court also noted that "[r]emoval from a notice-pleading jurisdiction is a natural time at which justice would call for the court to permit" parties to amend their complaints. Finally, the Fifth Circuit remanded for the district court to consider whether the officers are entitled to qualified immunity. As a result, the juvenile can proceed with her lawsuit in the district court.

***Darden v. City of Fort Worth, Texas*, 880 F.3d 722 (5th Cir. Jan. 24, 2018)**

In a Section 1983 claim for excessive force and wrongful death, a trial court should not grant a motion for summary judgment because an arrestee has an underlying health condition, which contributes to his death while in police custody, when police officers' conduct also contributes to that arrestee's death.

Two police officers arrested an obese man, using a no-knock warrant. During the arrest, the officers allegedly tased him twice, choked him, and punched him. Witnesses testified that the man never made any threatening gestures and did not resist arrest. The officers claim that the man did resist arrest requiring their use of force against him. During the arrest, the man suffered a heart attack and died. The investigating physician determined that the man suffered from coronary artery disease but the force used by the officers was a contributing factor to the man's death. The man's estate filed suit against the officers, individually, and the City for excessive force and failure to adequately train under 42 U.S.C. § 1983. The officers and City filed motions for summary judgment. The district court granted their motions and dismissed the case, holding that (1) the officers had not violated clearly established law and were entitled to qualified

immunity; (2) the plaintiff failed to show that the man's death resulted only from the officers' use of force; and (3) the City cannot be held liable because the officers had not violated the man's constitutional rights.

The Fifth Circuit held that the trial court erred in finding that the man's estate did not establish that his death was caused solely by the use of force. Because a tortfeasor takes his victim as he finds him, the man's preexisting medical conditions increased his risk of death during a struggle, which contributed to his death. Furthermore, the court determined that a genuine factual dispute exists to determine whether the man posed an immediate safety threat to the officers. The officers entered the home with a warrant that was issued because the occupants of the home were dealing drugs, a serious but nonviolent offense, establishing probable cause. The court also notes that although the video of the arrest shows the man surrendering, the video is incomplete, and as a result, a jury may ultimately conclude that the man did not comply with the officers' commands and was resisting arrest. Therefore, the district court erred in granting the defendants' motions for summary judgment. Finally, the court held the trial court failed to analyze the claims against the City because it had already determined the officers were not liable. As a result, the court remanded the case for further proceedings.

***Winfrey v. Rogers*, 882 F.3d 187 (5th Cir. Feb. 5, 2018)**

A police officer who signs an arrest warrant affidavit that lacks probable cause will not be entitled to qualified immunity unless the officer can show that he did not act recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit.

The plaintiff was arrested and charged with murder after a botched investigation. During his criminal trial, the jury acquitted the plaintiff in fifteen minutes, but only after he served approximately sixteen months in prison. The plaintiff filed suit under 42 U.S.C. § 1983 against a County police officer who he alleges violated his Fourth Amendment rights by signing an arrest warrant affidavit that lacked probable cause, which resulted in his unlawful arrest and imprisonment. The police officer moved for summary judgment on the basis of qualified immunity, and the district court granted the police officer's motion. The plaintiff appealed.

The Fifth Circuit vacated the district court's grant of the defendant's motion for summary judgment based on qualified immunity and remanded for trial, essentially on the factual issue of whether defendant acted recklessly, knowingly, or intentionally by omitting and misrepresenting material facts in his affidavit when seeking an arrest warrant for the plaintiff. The court further determined that, even though the police officer submitted a "corrected" affidavit to the magistrate judge after his first affidavit which omitted facts, the police officer did not, under the totality of the circumstances, show probable cause to arrest the plaintiff in his "corrected" affidavit. In addition, the court rejected the defendant's independent-intermediary argument and determined that neither the grand jury indictment of the plaintiff nor the state judge who presided over the trial broke the causal chain between the police officer's faulty affidavit and the plaintiff's incarceration. The court noted that, considering that fact that this litigation continued for over seven years, the case should go to trial without delay.

***O'Donnell v. Harris County*, 882 F.3d 528 (5th Cir. Feb. 14, 2018)**

Plaintiff and others filed a class action suit against the County and its officials under 42 U.S.C. § 1983, alleging that the County's system of setting bail for indigent misdemeanor arrestees violated Texas statutory and constitutional law, as well as the equal protection and due process clauses of the Fourteenth Amendment.

After a hearing, the district court denied the County's summary judgment motion and granted plaintiff's motion for a preliminary injunction that required the implementation of new safeguards and the release of a numbers of detainees subjected to the insufficient procedures. The County appealed, seeking vacatur of the injunction.

Bail in Texas is either secured or unsecured. Secured bail requires the arrestee to post bond either out of the arrestee's pocket or from a third-party surety. By contrast, unsecured bail allows the arrestee to be released without posting bond, but if he fails to attend his court date and/or comply with any nonfinancial bail conditions, he becomes liable to the County for the bail amount. Both secured and unsecured bail may also include nonfinancial conditions to assure the detainee's attendance at future hearings.

The basic procedural framework governing the administration of bail in Harris County is set by the Texas Code of Criminal Procedure and local rules promulgated by County Judges. The Hearing Officers and County Judges are legally prohibited from mechanically applying the bail schedule to a given arrestee. Instead, the Texas Code requires officials to conduct an individualized review based on five enumerated factors, which include the defendant's ability to pay, the charge, and community safety. Furthermore, the Local Rules explicitly state the schedule is not mandatory and also authorize a similar, individualized assessment using factors which partially overlap with those listed in the Code. Hearing Officers and County Judges sometimes receive assessments by Pretrial Services, which interviews the detainees prior to hearings, calculates the detainees' flight and safety risk based on a point system, and then makes specific recommendations regarding bail.

Despite these formal requirements, the district court found that, in practice, County procedures were dictated by an unwritten custom and practice that was marred by gross inefficiencies, did not achieve any individualized assessment in setting bail, and was incompetent to do so. The district court noted that the statutorily-mandated probable cause hearing (where bail is usually set) frequently does not occur within twenty-four hours of arrest. The hearings often last seconds, and rarely more than a few minutes. Arrestees are instructed not to speak, and are not offered any opportunity to submit evidence of relative ability to post bond at the scheduled amount.

The Fifth Circuit affirmed most of the district court's rulings, including its conclusion that the plaintiff established a likelihood of success on the merits of its claims that the County's policies violated procedural due process and equal protection. When examining the plaintiffs' equal protection claim, the Court concluded that (1) the County had a custom and practice of purposefully detaining misdemeanor defendants, who are indigent and unable to pay secured financial conditionals of release; and (2) the district court's application of intermediate scrutiny was proper because indigent arrestees are unable to pay secured bail, and as a result, sustained an absolute deprivation of their most basic liberty interest—freedom from incarceration. When

examining the plaintiffs' due process claim, the Fifth Circuit held that the district court's definition of the plaintiffs' liberty interest under due process was too broad, and the procedures it required to protect that interest were too onerous.

The Fifth Circuit rejected the County's *Younger* abstention argument, holding that the relief plaintiffs requested—i.e. the improvement of pretrial procedures and practice—is not properly reviewed by criminal proceedings in state court. Additionally, the Fifth Circuit rejected the County's contention that the plaintiff's complaint was actually an Eighth Amendment claim, not a Fourteenth Amendment claim, holding that regardless of the Eighth Amendment's prohibition on excessive bail, the incarceration of individuals who cannot pay bail infringes on their due process and equal protection rights.

The Fifth Circuit also held that the district court erred by concluding that the County Sheriff could be sued under Section 1983. The Sheriff is not a proper party because state statutes do not authorize the County Sheriff to avoid executing judicial orders imposing secured bail by unilaterally declaring the judge's order unconstitutional.

Finally, The Fifth Circuit held that the district court's injunction was overbroad and provided the County with a detailed list on how to provide an equitable remedy in order to insure that the County implements constitutionally-necessary procedures to engage in a case by case evaluation of each arrestee, taking into the account the various factors required by Texas law, including notice, an opportunity to be heard and submit evidence within 48 hours of arrest, and a reasoned decision by an impartial decision maker. Ultimately, the Court dismissed the Sheriff from the suit, vacated the injunction, and ordered the district court to modify its terms.

***United States v. Molina-Isidoro*, No. 17-50070, 2018 WL 110136 (5th Cir. March 1, 2018)**

A government agent's warrantless search of a woman's cellphone's applications on the border of the United States is not unconstitutional.

A woman was arrested, charged, and convicted after attempting to enter the United States with methamphetamine. Agents interviewed the woman, who did not give a consistent story. After she ended the interview, they searched a number of her applications on her cellphone. The agents did not ask for, and the woman did not provide, consent for the search. The evidence from the cellphone's applications was introduced in her criminal trial. The district court denied her motion to suppress this evidence, concluding that *Riley v. California*, 134 S. Ct. 2473 (2014) did not extend to border searches. The woman appealed her conviction, arguing that the evidence found during the warrantless search of her cellphone should be suppressed and asking the court to determine general rules concerning the application to modern technology of the government's historically broad border-search authority.

The Fifth Circuit declined the defendant's invitation to announce general rules concerning the application to modern technology of the government's historically broad border-search authority. The court held that the non-forensic search of the defendant's cell phone at the border was supported by probable cause, and thus, at a minimum, the border patrol agents had a good-faith basis for believing the search did not run afoul of the Fourth Amendment. As a result,

the court affirmed the defendant's drug-related conviction and sentence.

***Vann v. City of Southhaven, Mississippi*, No. 16-60561, 2018 WL 1147115 (5th Cir. March 5, 2018)**

Police officers are entitled to immunity when a plaintiff fails to cite any precedent that supports his contention that the police officers had notice of a constitutional violation.

An arrestee was shot by two police officers during a drug sting operation. The plaintiff sued the officers and the City under 42 U.S.C. § 1983, alleging that the police officers violated his Fourth Amendment right to be free from unreasonable seizure, excessive force, and deadly force, and that the City failed to properly train its officers and had permitted an official practice or custom that violated the constitutional rights of the public at large. The officers and City moved for summary judgment, which the district court granted.

The Fifth Circuit affirmed the district court's grant of summary judgment to the police officers and found no error in the district court's analysis and reasoning in their grant of the City's motion for summary judgment. The court noted that it was undisputed that the plaintiff was only shot after he hit one of the police officers with his car and was approaching that officer again with his car. Therefore, the officers' use of force did not violate clearly established law. The court further held that the plaintiff failed to cite any precedent that put the officer on notice that a shooting in this situation presented a constitutional violation. As a result, the court affirmed the district court's decision.