

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET



*Leadership is a behavior, not a position*

**U.S. SUPREME COURT  
2010 – 2011 TERM**



John W. Bizzack, Ph.D.  
*Commissioner*





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## Advanced Individual Training and Leadership Branch

**J.R. Brown, Branch Manager**  
859-622-6591

[JamesR.Brown@ky.gov](mailto:JamesR.Brown@ky.gov)

### Legal Training Section

**Main Number**  
**General E-Mail Address**

859-622-3801  
[docjt.legal@ky.gov](mailto:docjt.legal@ky.gov)

**Gerald Ross, Section Supervisor**  
859-622-2214

[Gerald.Ross@ky.gov](mailto:Gerald.Ross@ky.gov)

**Carissa Brown, Administrative Specialist**  
859-622-3801

[Carissa.Brown@ky.gov](mailto:Carissa.Brown@ky.gov)

**Kelley Calk, Staff Attorney**  
859-622-8551

[Kelley.Calk@ky.gov](mailto:Kelley.Calk@ky.gov)

**Thomas Fitzgerald, Staff Attorney**  
859-622-8550

[Tom.Fitzgerald@ky.gov](mailto:Tom.Fitzgerald@ky.gov)

**Shawn Herron, Staff Attorney**  
859-622-8064

[Shawn.Herron@ky.gov](mailto:Shawn.Herron@ky.gov)

**Kevin McBride, Staff Attorney**  
859-622-8549

[Kevin.McBride@ky.gov](mailto:Kevin.McBride@ky.gov)

**Michael Schwendeman, Staff Attorney**  
859-622-8133

[Mike.Schwendeman@ky.gov](mailto:Mike.Schwendeman@ky.gov)

### **NOTE:**

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In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to [docjt.legal@ky.gov](mailto:docjt.legal@ky.gov). The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

UNITED STATES SUPREME COURT OPINIONS  
2010-11 TERM

**42 U.S.C. §1983 - INJUNCTIVE RELIEF**

LOS ANGELES COUNTY v. HUMPHRIES, 131 S.Ct. 447 (2010)  
Decided November 30, 2010

**FACTS:** Craig and Wendy Humphries were reported to Los Angeles authorities for child abuse and subsequently investigated. Both were exonerated. However, under California law, their names were included in the Child Abuse Central Index, to remain for 10 years. Although a statute indicated that an unfounded report could be removed, there was no procedure to review whether a “previously filed report is unfounded, or for allowing individuals to challenge their inclusion in the Index.”

The Humphries filed suit against various parties, including the Los Angeles County Sheriff’s Office (apparently responsible in part for the index) under 42 U.S.C. §1983, seeking damages, an injunction and a “declaration that the defendants had deprived them of their constitutional rights by failing to create a procedural mechanism through which one could contest inclusion on the Index.” The trial court granted summary judgment to California, but upon appeal, the Ninth Circuit Court of Appeals disagreed, ruling that the 14<sup>th</sup> Amendment required notice and some form of hearing to give the subjects the opportunity to be removed from the Index. It also held that the Humphries were the “prevailing parties” and were thus entitled to attorney’s fees under 42 U.S.C. §1988. It partitioned the fees between the various government defendants.

Los Angeles County denied any liability and argued that “in respect to the county, the plaintiffs were not prevailing parties.” It noted that under Monell, a municipal entity could only be liable under §1983 “if a municipal ‘*policy or custom*’ caused the plaintiff to be deprived of a federal right.”<sup>1</sup> The Ninth Circuit found that it wasn’t clear on the record if the county’s failure to create its own process to allow individuals to challenge the listing was enough to trigger liability. It also found it unnecessary to review the decision, finding that Monell was not implicated when the claim is for prospective relief - the declaratory judgment.

**ISSUE:** Does Monell’s policy or custom requirement apply to claims for prospective (injunctive) relief?

**HOLDING:** Yes

**ISSUE:** In Monell, the court concluded that a “municipality could not be held liable under §1983 solely because it employed a tortfeasor.” It focused on the language in §1983 that addresses how a “person” might face liability, finding that it could not easily read the statute to allow for vicarious liability simply on the basis of an “employer-employee relationship.” The Court ruled that a “municipality could only be held liable under §1983 for its own violations of federal law” - noting that might include the unconstitutional implementation or execution of a “policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers” or

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<sup>1</sup> Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978).

"deprivations visited pursuant to government 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, in other words, did permit a municipality to be held liable "when execution of a government's *policy or custom* ... inflicts the injury."

The Court found nothing in §1983 that would suggest that the "causation requirement contained in the statute should change with the form of relief sought." In fact, Monell specifically states that "local governing bodies" can be sued for "monetary, *declaratory, or injunctive relief*" when appropriate. The Court found that to hold otherwise "would undermine Monell's logic."

The Court concluded that "Monell's 'policy or custom' requirement applies in §1983 cases irrespective of whether the relief sought is monetary or prospective." It reversed the Ninth Circuit's decision and remanded the case for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-350.pdf>

## TRIAL PROCEDURE / EVIDENCE - EXPERT TESTIMONY

Harrington (Warden) v. Richter, 131 S.Ct. 770 (2011)  
Decided January 19, 2011

**FACTS:** Richter was charged in California for Johnson's murder, as well as burglary, attempted murder and robbery. In opening statements, the defense attorney "stressed deficiencies in the investigation, including the absence of forensic support for the prosecution's version of events." As a result, the "prosecution took steps to adjust to the counterattack now disclosed" by having a detective testify as "an expert in blood pattern evidence." A serologist also testified about the source of a particular blood pool. Defense counsel cross-examined the witnesses, making several points but did not introduce any forensic evidence on its own.

Richter was convicted. His conviction was affirmed through the state court system and he then took a federal habeas petition. Specific to this summary, he argued that "his counsel was deficient for failing to present expert testimony" on the blood forensics. The District Court denied his petition but the Ninth Circuit Court of Appeals reversed that decision and granted it, finding that his trial counsel was deficient. The Government petitioned the U.S. Supreme Court, which granted certiorari.

**ISSUE:** Is the failure to present certain forensic evidence of ineffective assistance of counsel?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court reviewed the standard for an ineffective assistance of counsel claim under Strickland v. Washington.<sup>2</sup> To be sufficiently deficient, the attorney's representation "must have fallen 'below an objective standard of reasonableness" - but there is also a strong presumption that the counsel was adequate. "The question is whether counsel made errors so

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<sup>2</sup> 466 U.S. 668 (1984).

fundamental that counsel was not functioning as the counsel guaranteed by the Sixth Amendment.” The standard is whether “but for the counsel’s unprofessional errors, the results of the proceeding would have been different.” The standard was not “whether it deviated from best practices or most common custom.”

The Court concluded that “a competent attorney could elect a strategy that did not require using blood evidence experts” since “counsel is entitled to balance limited resources in accord with effective trial tactics and strategies.” The Court noted that “it was far from evident at the time of trial that the blood source was central to Richter’s case.” Although their strategy did not work out as hoped, it was not an unreasonable or unprofessional strategy, viewed objectively.

The decision of the Ninth Circuit Court of Appeals was reversed.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-587.pdf>

## EMPLOYMENT - BACKGROUND CHECK

NASA v. Nelson, 131 S.Ct. 746 (2011)

Decided January 19, 2011

**FACTS:** The petitioners (28) are all employees of the California Institute of Technology (Cal Tech) but working under contract for the Jet Propulsion Laboratory (owned by NASA). Many had worked for JPL for years and had undergone the customary employee background check through the university when hired, but as a result of changes in federal law (HSPD-12) were required in 2004 to undergo the same background check as federal employees in equivalent level positions. (The requirement was made part of the contract between NASA and Cal Tech.) Shortly before the deadline to have the employee paperwork submitted, the petitioners filed suit. They focused on two parts of the questionnaire, a group of questions which asks the employee about use of illegal drugs and requires disclosure of drug treatment or counseling and another section, which is sent to references, asking open-ended question about the employee’s suitability for the position.

The District Court refused to enter an injunction stopping the use of the questions, but the Ninth Circuit Court of Appeals reversed that decision, finding both to be “not narrowly tailored to meet the Government’s interests in verifying contractors’ identities and ensuring JPL’s security.” NASA petitioned the U.S. Supreme Court for review and it granted certiorari.

**ISSUE:** Are questions concerning illegal drug use and open-ended questions concerning suitability valid on employment background checks?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to earlier claims concerning violations of “informational privacy.” In Whalen v. Roe<sup>3</sup>, the Court had noted that the disclosure of “private information” to the government “was an ‘unpleasant invasion of privacy’” but pointed out that the statute did carry with

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<sup>3</sup> 429 U.S. 589 (1977).

it some security provisions to protect against release of the information to uninvolved parties. The Court stated that when the government asks such questions, it does so as an employer, and that earlier cases had recognized that in that capacity, the government "has a much freer hand than it does when it brings its sovereign power to bear on citizens at large." The Court did not find their attempt to make their status as contractors, rather than employees, persuasive, as there were no practical differences between their duties and those of actual federal employees and that they had the same access to NASA facilities.

The Court found that the challenged portions of the two questionnaires to be "reasonable, employment-related inquiries that further the Government's interests in managing its internal operations." The questions about drug use were a useful way to determine if the employees are "reliable, law-abiding persons" who will properly discharge their duties. The question about treatment was a way to separate out those users who are "taking steps to address and overcome their problems" - and the process specifically protects the applicants from being reported to criminal authorities providing they answer truthfully. With respect to the open-ended question, the Court found it to be "reasonably aimed at identifying capable employees who will faithfully conduct the Government's business." The use of such questions was, it noted, pervasive in both the public and private sectors.

The Court concluded that the collection of the data, along with the protections in the process, made the process valid and that the "Government's inquiries do not violate a constitutional right to informational privacy."

**FULL TEXT OF OPINION:**      <http://www.supremecourt.gov/opinions/10pdf/09-530.pdf>

## **EMPLOYMENT - RETALIATION**

**Thompson v. North American Stainless, LP**, 131 S.Ct. 863 (2011)  
Decided January 24, 2011

**FACTS:**            Thompson and his fiancée, Regalado, worked for North American Stainless (NAS) in Kentucky. In 2003, Regalado filed against NAS on a claim of sex discrimination, through the EEOC. Three weeks later, NAS fired Thompson. He filed through the EEOC and eventually sued the NAS, claiming that he was fired in retaliation for Regalado's charge. The District Court granted summary judgment to NAS, finding that Title VII of the Civil Rights Act of 1964 does not allow for third-party retaliation claims. The Sixth Circuit Court of Appeals ultimately affirmed that decision. Thompson appealed.

**ISSUE:**            May a third party have protection against retaliation in a Title VII case?

**HOLDING:**        Yes

**DISCUSSION:** The Court found "little difficulty concluding that if the facts alleged by Thompson are true, then NAS's firing of Thompson violated Title VII."<sup>4</sup> The Court had construed the antiretaliation provision "to cover a broad range of employer conduct." The statute prohibits an

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<sup>4</sup> Burlington N. & S.F.R. Co. v. White, 548 U.S. 53 (2006).

employer from any action that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The Court found the possible firing of a fiancé to qualify as such.

The Court declined to “identify a fixed class of relationships for which third-party reprisals are unlawful.” The Court anticipated that close family members would likely always meet the standard, and that “a milder reprisal on a mere acquaintance will almost never do so, but beyond that [it] was reluctant to generalize.”

The Court then looked to whether Thompson was entitled to sue NAS, as NAS argued he lacked standing to do so. The Court applied to “zone of interests” tests which it crafted in Lujan v. National Wildlife Federation.<sup>5</sup> This test permitted suit for a plaintiff with an interest “arguably [sought] to be protected by the statutes,” but excluded those “who might technically be injured ... but whose interests are unrelated to the statutory prohibitions in Title VII.” The Court found that Thompson was not an “accidental victim” or “collateral damage” in the case, but “to the contrary, injuring him was the employer’s intended means of harming Regalado.”

The decision of the Sixth Circuit Court of Appeals was reversed and the case remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-291.pdf>

## 42 U.S.C. §1983 - QUALIFIED IMMUNITY

Ortiz v. Jordan, 131 S.Ct. 864 (2011)  
Decided January 24, 2011

**FACTS:** Jordan (a case manager) and Bright (a prison investigator), both at the Ohio Reformatory for Women, were sued by Ortiz, an inmate, under 42 U.S.C. §1983. She alleged violations of her rights under the Eighth and Fourteenth Amendments. She alleged that she was sexually assaulted twice by a corrections officer and that Jordan and Bright failed to respond and protect her. (She also alleged that she suffered retaliation by prison officials for her reporting of the incidents.) Bright and Jordan requested qualified immunity and summary judgment. This defense shields public officials if their conduct “d[id] not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>6</sup> The Court, finding that material facts were in dispute, denied the motion. The case went to trial and the jury found in favor of Ortiz against both defendants. Upon appeal, however, the Sixth Circuit Court of Appeals overturned the judgment, choosing to review the denial of the motion of summary judgment and finding that the motion should have been granted.

Ortiz appealed and the U.S. Supreme Court granted certiorari.

**ISSUE:** May a party appeal an order denying summary judgment (under qualified immunity) after a full trial on the merits?

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<sup>5</sup> 497 U.S. 871 (1990).

<sup>6</sup> Harlow v. Fitzgerald, 457 U. S. 800 (1982).

**HOLDING:** No

**DISCUSSION:** The Court agreed to review the case “to decide a threshold question on which the Circuits are split...” The Court noted that “once a case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.” The defense, of course, does not actually vanish, but “must be evaluated in light of the character and quality of the evidence received in court.” Although normally a summary judgment denial is nonappealable, when pleaded under qualified immunity the Court recognizes an exception, because qualified immunity “finally and conclusively [disposes of] the defendant’s claim of right not to stand trial.”<sup>7</sup> In Johnson v. Jones, the court had held that “immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a “purely legal issue,” illustratively, the determination of “what law was ‘clearly established’” at the time the defendant acted.”<sup>8</sup> However, they did not seek an immediate appeal when it was denied, nor did they move to overturn the verdict under a different procedural vehicle, Rule 50(b).

The decision of the Sixth Circuit was reversed and the case remanded.

The Court further noted that Jordan and Bright’s appeal was fatally flawed because they failed to renew their motion for judgment as a matter of law.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-737.pdf>

## **TRIAL PROCEDURE / EVIDENCE - CRAWFORD**

**Michigan v. Bryant**, 131 S.Ct. 1143 (2011)  
Decided February 28, 2011

**FACTS:** On April 29, 2001, at about 3:25 a.m., Detroit (MI) officers responded to a call that a man had been shot. They found Covington, “lying on the ground next to his car in a gas station parking lot.” He had a serious gunshot wound to his abdomen, “appeared to be in great pain” and he “spoke with difficulty.” Officers questioned him about what had occurred and he stated that “Rick” [Bryant] had shot him about a half hour earlier. EMS arrived. Covington was transported to the hospital but subsequently died. The officers went to Bryant’s house, where the shooting had allegedly occurred. They did not find Bryant but “did find blood and a bullet on the back porch and an apparent bullet hole in the back door.” They also found Covington’s wallet nearby.

Bryant was arrested and tried. At the trial, officers testified as to what Covington had told them (that Bryant shot him) prior to his death. Bryant was convicted of second-degree murder and related charges. He appealed through the Michigan state court system. The case was remanded back for reconsideration following the case of U.S. v. Davis, but ultimately, the conviction was affirmed. The Michigan Court of Appeals concluded that the “statements were properly admitted because they were not testimonial.” The Michigan Supreme Court, however, reversed his conviction, holding that it was clear that “the ‘primary purpose’ of the questioning was to establish

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<sup>7</sup> Mitchell v. Forsyth, 472 U. S. 511 (1985).

<sup>8</sup> 515 U.S. 304 (1995).

the facts of an event that had *already* occurred; the 'primary purpose' was not to enable police assistance to meet an ongoing emergency."<sup>9</sup> (The prosecution argued for their admission, initially, as an excited utterance, as this case predated the decision in Crawford v. Washington.<sup>10</sup>)

Michigan requested certiorari, which was granted by the U.S. Supreme Court.

**ISSUE:** Is a statement by a wounded citizen concerning the identity of the perpetrator and circumstances of the shooting testimonial?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the history of the Confrontation Clause and how it led up to the reversal of Ohio v. Roberts<sup>11</sup> by Crawford v. Washington. Davis and Hammon took further steps to "determine more precisely which police interrogations produce testimony." Davis made it clear that not all those questioned by the police are witnesses and not all "interrogations by law enforcement officers," are subject to the Confrontation Clause." In those cases, they reviewed the meaning of the term testimonial and the "concept of an ongoing emergency." The Court noted that the standard rules of hearsay, under the state and federal rules of evidence, to determine if a statement was reliable, "will be relevant." Unlike responses to domestic violence situations, this case required the court to "confront for the first time - when a potential threat extended beyond the initial victim to "the responding police and the public at large."

The Court continued: "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the "primary purpose of the interrogation." The Court agreed that the "existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than "prov[ing] past events potentially relevant to later criminal prosecution." The Court equated the logic to that "justifying the excited utterance exception in hearsay law." The Court continued, noting that "statements "relating to startling event or condition made while the declarant was under the stress of excitement caused by the event or condition are considered reliable because the declarant, in the exciting, presumably cannot form a falsehood."<sup>12</sup> The Court concluded that Michigan "employed an unduly narrow understanding of 'ongoing emergency' that Davis does not require." The Court disagreed that Davis "defined the outer bounds" of the phrase, and that the Michigan courts "failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry." Davis and Hammon, both domestic violence cases, "have a narrower zone of potential victims than cases involving threats to public safety." Further, "an assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue." In addition, the duration and scope of an emergency may depend in part on the type of weapon employed." In this case, the serious injuries incurred by the victim provided "important context for

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<sup>9</sup> Davis v. Washington, Hammon v. Indiana, 547 U.S. 813 (2006).

<sup>10</sup> 541 U. S. 36, (2004).

<sup>11</sup> 448 U.S. 56 (1965).

<sup>12</sup> Idaho v. Wright, 497 U. S. 805 (1990).

first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.”

The Court also noted that an interrogation to determine the need for emergency aid can “evolve into testimonial statements.” It is the responsibility of the trial court to determine when that occurs and prevent the testimonial statements from being admitted. The Court noted that “whether an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the ‘primary purpose’ of an interrogation.” The formality or informality of the encounter is also a factor, but again, not a definitive one. In this case, the questioning “occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion.” The Court stated that “Davis requires a combined inquiry that accounts for both the declarant and the interrogator.”<sup>11</sup> In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers.”

The Court continued:

The combined approach also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession.

Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim’s injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution.<sup>12</sup> Taking into account a victim’s injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim’s physical state. As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public.

The Court then looked to the facts of the case at bar. Because the case was tried prior to the Crawford decision, the record, as developed, did not necessarily answer certain questions. However, the Court noted that the officers agreed on the information they learned, but “not on the order in which they learned it or on whether Covington’s statements were in response to general or detailed questions.” “The police did not know, and Covington did not tell them, whether the threat was limited to him.” The Court agreed that “an emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim.” The Court noted that neither

Covington nor the police knew where Bryant was, and stated that "at bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington. The Court found it unnecessary to determine when the emergency ended because all of Covington's statements were made at the outset of the interaction. "the ultimate inquiry is whether the "primary purpose of the interrogation [was] to enable police assistance to meet [the] ongoing emergency." The questions asked were what were needed to assess what was going on to the address the potential risk. - in other words, "they solicited the information necessary to enable them "to meet an ongoing emergency.'"

The Court concluded that Covington's statements were not testimonial hearsay and that the Confrontation Clause did not bar their admission at trial. The Michigan Supreme Court decision was vacated and the matter remanded for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-150.pdf>

## FIRST AMENDMENT

Snyder v. Phelps, 131 S.Ct.1207 (2011)

Decided March 2, 2011

**FACTS:** On March 10, 2006, members of the Westboro Baptist Church (WBC) picketed near the site of the funeral of Lance Corporal Matthew Snyder, in Westminster Maryland. They had "notified the authorities in advance"... and "complied with police instructions in staging their demonstration." "The picketing took place within a 10- by 25-foot plot of public land adjacent to a public street, behind a temporary fence." They did not enter the church property nor did they go to the cemetery. "They did not yell or use profanity, and there was no violence associated with the picketing," although the signs contained a number of offensive statements.<sup>13</sup>

Although the funeral procession passed close by (within 200-300 feet), Snyder's father (the plaintiff) testified that he could see only the tops of the sign and did not know "what was written on the signs until later that night, while watching a news broadcast covering the event."

Snyder sued Phelps (the pastor of the WBC), the WBC and Phelps' daughters in federal court (under diversity jurisdiction) on Maryland state tort law claims, including defamation and intentional infliction of emotional distress. WBC requested summary judgment, arguing that the "church's speech was insulated from liability by the First Amendment." The WBC was granted summary judgment on two of the five claims but the case went to trial on the remaining three claims. A jury found in favor of Snyder and returned a judgment totaling \$10.9 million in damages. Phelps and the WBC appealed and the District Court reduced the judgment to \$2.1 million, but left the verdict intact otherwise.

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<sup>13</sup> They stated, for instance: "God Hates the USA/Thank God for 9/11," "America is Doomed," "Don't Pray for the USA," "Thank God for IEDs," "Thank God for Dead Soldiers," "Pope in Hell," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You."

Phelps / WBC appealed to the Fourth Circuit, continuing to argue that the First Amendment insulated them from judgment. The Fourth Circuit concluded that the WBC's "statements were entitled to First Amendment protection, because those statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric." Snyder requested certiorari from the U.S. Supreme Court, which was granted.

**ISSUE:** Does the First Amendment allow peaceful picketing at a funeral, when the picketing does not directly interfere with the funeral?

**HOLDING:** Yes

**DISCUSSION:** The Court began by noting that "whether the First Amendment prohibits holding Westboro liable for its speech in this case turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."<sup>14</sup> The First Amendment is based upon the "principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>15</sup> Speech that concerns "public affairs is more than self-expression; it is the essence of self-government."<sup>16</sup> It "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."<sup>17</sup> That protection does not extend to "matters of purely private significance."<sup>18</sup> Although the "boundaries of the public concern test are not well defined"<sup>19</sup> in recent years, the Court has "articulated some guiding principles, principles that accord broad protection to speech to ensure that courts themselves do not become inadvertent censors." Speech is public when it can be "fairly considered as relating to any matter of political, social, or other concern to the community."<sup>20</sup> The "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."<sup>21</sup>

The Court discussed the issue at length, noting that the decision as to "whether speech is of public or private concern" requires it look at the "content, form and context" of the speech. Under a First Amendment analysis, the Court is obliged to "make an independent examination of the whole record" in order to make sure "the judgment does not constitute a forbidden intrusion on the field of free expression."<sup>22</sup>

The Court agreed that the "content" of the signs related to "broad issues of interest to society at large" although it agreed that the "messages may fall short of refined social or political commentary." With respect to the context, at a funeral, the court agreed that the location "cannot by itself transform the nature" of the WBC's speech, as the signs were "displayed on public land next to a public street." The Court found nothing to lead it to believe that WBC was contriving to mount a personal attack on the Snyders as it had been engaging in similar actions long before "it

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<sup>14</sup> Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U. S. 749 (1985) (quoting First Nat. Bank of Boston v. Bellotti, 435 U. S. 765 (1978)).

<sup>15</sup> New York Times Co. v. Sullivan, 376 U. S. 254 (1964).

<sup>16</sup> Garrison v. Louisiana, 379 U. S. 64 (1964).

<sup>17</sup> Connick v. Myers, 461 U. S. 138 (1983).

<sup>18</sup> Hustler Magazine, Inc. v. Falwell, 485 U. S. 46 (1988).

<sup>19</sup> San Diego v. Roe, 543 U. S. 77 (2004).

<sup>20</sup> Connick, *supra*.

<sup>21</sup> Rankin v. McPherson, 483 U.S. 378 (1987)

<sup>22</sup> Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485 (1984)

became aware of Matthew Snyder," and appeared to represent the WBC's honest beliefs. Despite the hurtful result, the WBC "conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street." The Court noted that such places are the "archetype of a traditional public forum" - for "[t]ime out of mind" as places "used for public assembly and debate."<sup>23</sup> However, the Court agreed that the choice of where and when such speech is allowed is "subject to reasonable time, place, or manner restrictions."<sup>24</sup> Prior cases had "identified a few limited situations where the location of targeted picketing can be regulated."

The Court continued - "simply put, the church members had the right to be where they were." They were in compliance with the regulations set by local authorities. Any "distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself." The issue arose because of the content of the signs and the Court noted that the "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>25</sup> "Indeed," the Court stated, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."<sup>26</sup>

The Court quickly dismissed the argument that the funeral made Snyder a member of a captive audience, as it had applied that concept "only sparingly to protect unwilling listeners from protected speech."

The Court concluded that

Westboro believes that America is morally flawed; many Americans might feel the same about Westboro. Westboro's funeral picketing is certainly hurtful and its contribution to public discourse may be negligible. But Westboro addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech was indeed planned to coincide with Matthew Snyder's funeral, but did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.

The decision of the U.S. Court of Appeals for the Fourth Circuit was affirmed, dismissing the action.

**FULL TEXT OF OPINION:**      <http://www.supremecourt.gov/opinions/10pdf/09-751.pdf>

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<sup>23</sup> *Frisby v. Schultz*, 487 U. S. 474 (1988).

<sup>24</sup> *Clark v. Community for Creative Non-Violence*, 468 U. S. 288 (1984).

<sup>25</sup> *Texas v. Johnson*, 491 U. S. 397 (1989).

<sup>26</sup> *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995)

*NOTE: Unlike many of the situations concerning the Westboro Baptist Church around the country, in this case the WBC protestors were silent and stayed on public land. This decision does not necessarily apply to situations where the protestors might be more vocal and disturb a funeral service and might attempt, for example, to enter a cemetery.*

## TRIAL PROCEDURE / EVIDENCE - BRADY

Connick v. Thompson, 131 S.Ct. 1350 (2011)

Decided March 28, 2011

**FACTS:** Thompson was tried for attempted armed robbery and later for murder, and ultimately convicted of both. He spent 18 years in a Louisiana prison and 14 on death row for the crimes. A month before his execution, it was discovered that in the initial armed robbery trial, prosecutors had evidence that was clearly exculpatory but failed to turn it over to the defense as required under Brady v. Maryland.<sup>27</sup> (As part of the investigation, technicians had collected a section of the victim's clothing that was stained with the robber's blood, which was shown to be Type B. At the time the prosecutors believed they did not have to turn it over because they did not know Thompson's blood type, which was type O.) When this was discovered, the prosecution agreed to vacate the conviction. Upon retrial, Thompson was acquitted.

Thompson then filed suit against the District Attorney, Connick, as well as the District Attorney's Office and other parties, "alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed." He argued that their violation to disclose the evidence under Brady was a cause of action under 42 U.S.C. §1983, was caused by an "unconstitutional policy" of the office and that Connick showed "deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations."

Even prior to trial, "Connick conceded that the failure to produce the crime lab report constituted a Brady violation," leaving the only issue to be "whether the nondisclosure was caused by either a policy, practice or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors." No prosecutor could recall "any specific training session regarding Brady" before the date of the case, but it was not disputed that all the prosecutors were familiar with its general requirements. When in fact the crime lab report was discovered, having not been disclosed, there was specific disagreement in the office as to whether it should be disclosed.

The jury found no unconstitutional policy but did find a failure to train. It awarded Thompson 1.4 million dollars, plus attorney's fees. Connick appealed, arguing that there had been no pattern of similar violations that would put him on notice of the need for such training. The District Court had found that a "pattern of violations is not necessary to prove deliberate indifference when the need for training is 'so obvious.'" The Court continued, noting that the DA "knew to a moral certainty" that prosecutors would have Brady evidence in their possession and that it was "not always obvious what Brady requires, and that withholding Brady material will virtually always lead to a substantial violation of constitutional rights." The Fifth Circuit Court of Appeals affirmed the decision, holding that Thompson did not need to prove a pattern of violations to be successful. The decision noted that "attorneys, often fresh out of law school, would undoubtedly be required to

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<sup>27</sup> 373 U.S. 83 (1963).

confront Brady issues ....” Connick petitioned the U.S. Supreme Court for review and it granted certiorari.

**ISSUE:** Does imposing failure-to-train liability on a district attorney's office for a single Brady violation contravene the rigorous culpability and causation standards of Canton and Bryan County<sup>28</sup>?

**HOLDING:** Yes

**DISCUSSION:** Under the failure to train theory, Thompson “bore the burden of proving both (1) that Connick, the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the prosecutors about their Brady disclosure obligation, with respect to evidence of this type and (2) that the lack of training actually caused the Brady violation in this case.” The Court noted that a plaintiff who seeks liability on a municipal government must prove that an official municipal policy caused the injury. Such policy is created by “decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.”

In some cases, the decision not to “train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of §1983.” However, it “must amount to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’” Deliberate indifference is a “stringent standard of fault, requiring proof that the government disregarded an obvious need that carried with it an obvious consequence. It must become, in effect, the “functional equivalent of a decision by the city itself to violate the Constitution.”

A pattern of similar violations is “ordinarily necessary” to prove failure to train.<sup>29</sup> Thompson had shown that in the years prior to his conviction, the office had cases overturned four times for Brady violations. However, the Court noted that none of the cases had a fact pattern similar to that at bar, and did not deal with physical or scientific evidence. Thompson, however, was not relying on that, but instead on the “single-incident” liability hypothesized in Canton v. Harris.<sup>30</sup> Although the Canton Court did not find liability in its case, it “left open the possibility” that “in a narrow range of circumstances,” a single incident might prove actionable.

The Court, however, found that “failure to train prosecutors in their Brady obligations does not fall within the narrow range of Canton’s hypothesized single-incident liability.” Rejecting comparisons with the police action in Canton, the Court noted that “attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.” Unlike law enforcement officers who must go through training, usually after the fact, to learn their responsibilities, an attorney hired as a prosecutor has already received years of training, passed a licensing exam, and in most states, must continue to obtain training as well. Prosecutors also train on the job, in the Orleans Parish District Attorney’s Office new prosecutors were paired with and mentored by more experience prosecutors. As such, the court found that

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<sup>28</sup> Board of Comm’rs of Bryan Cty. v. Brown, 520 U. S. 397 (1997).

<sup>29</sup> Id.

<sup>30</sup> 489 U. S. 378 (1989).

"formal in-house training about how to obey the law" was not necessary, noting that "prosecutors are not only equipped with but are also ethically bound to know what Brady entails and to perform legal research when they are uncertain." Absent a specific reason to suspect a deficiency, Connick was entitled to rely on the attorneys' legal training and ethical obligations to prevent violations. The Court acknowledged that a failure to train on a "nuance" of Brady law did not equate to a total absence of training on the issue. The Court did not "assume that prosecutors will always make correct Brady decisions or that guidance regarding specific Brady questions would not assist prosecutors." Simply "showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability."

The Court concluded: "the role of a prosecutor is to see that justice is done." The Court agreed that "by their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility." However, the issue in this case is not that an error was made, was whether Connick "was deliberately indifferent to the need to train the attorneys under his authority." The Court agreed that he was not, and as such, the verdict was reversed.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-571.pdf>

## SEARCH & SEIZURE - EXIGENT CIRCUMSTANCES

Kentucky v. King, 131 S.Ct. 1849 (2011)  
Decided May 16, 2011

**FACTS:** On October 13, 2005, Lexington PD officers set up a controlled buy of crack cocaine outside an apartment building. Officer Gibbons watched the transaction from a nearby unmarked car and radioed uniformed officers to detain the suspect. He described the suspect as "moving quickly toward the breezeway of an apartment, and he urged them to 'hurry up and get there' before the suspect entered an apartment."

The officers proceeded to the area and ran into the breezeway. As they entered they heard a door close and "detected a very strong odor of burnt marijuana." At the end of the breezeway corridor, the officers found two apartment doors and they did not know which one the suspect had entered. (In fact, Officer Gibbons had radioed that the suspect was entering the apartment on the right, but the officers were already outside their cars and did not hear the transmission.) The marijuana odor appeared to be coming from the apartment on the left, so they banged on the door loudly and announced "police." As soon as they started banging, they heard people moving around and thought that other things were being moved as well. They believed drug-related evidence "was about to be destroyed." They announced that they "were going to make entry inside the apartment." Officer Cobb kicked in the door and the officers found King, King's girlfriend and a guest, all smoking marijuana. (The girlfriend was the lessor, but King essentially lived there with her and their child and Kentucky conceded that he had standing to challenge the search.) The officers did a protective sweep and saw marijuana and powder cocaine in plain view. During a subsequent search, they found "crack cocaine, cash, and drug paraphernalia." Eventually, they discovered the original suspect in the apartment on the right.

King was charged with trafficking in marijuana. He moved for suppression, but the trial court denied the motion, finding the officers' actions to be appropriate. The court noted that "exigent circumstances justified the warrantless entry," because the occupants did not respond to the knocking. The trial court also addressed what the officer heard, and his reasonable belief that evidence was being destroyed. King took a conditional guilty plea and appealed. The Kentucky Court of Appeals affirmed his conviction but the Kentucky Supreme Court reversed, finding that there was a question as to whether simply hearing people moving inside was sufficient to presume that evidence was being destroyed. The Court found no evidence of bad faith, but held that "exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence."

The Commonwealth appealed<sup>31</sup> and the U.S. Supreme Court granted certiorari.

**ISSUE:** Does lawful police action impermissibly "create" exigent circumstances which precludes warrantless entry?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that the Fourth Amendment "expressly imposes two requirements." The first is that all searches and seizures must be reasonable. The second is that warrants may only issue when "probable cause is properly established and the scope of the authority search is set out with particularity."<sup>32</sup>

The Court had, however, also recognized that the presumption for a search warrant "may be overcome in some circumstances" and that the "warrant requirement is subject to certain reasonable exceptions."<sup>33</sup> The exigent circumstances exception has been "well-recognized" when the "exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."<sup>34</sup> The Court detailed the various situations that justified such searches and noted that "what is relevant here – the need 'to prevent the imminent destruction of evidence' has long been recognized as a sufficient justification for a warrantless search."

However, over the years, "lower courts have developed an exception to the exigent circumstances rule, the so-called 'police-created exigency' doctrine." In such situations, "police may not rely on the need to prevent destruction of evidence when that exigency was 'created' or 'manufactured' by the conduct of the police." Using that exception, however, requires "something more than mere proof that fear of detection by the police caused the destruction of evidence." The Court agreed that "in some sense the police always create the exigent circumstances." In "the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement." In most

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<sup>31</sup> King argued that the case was moot, and that the Supreme Court should not address it, because Kentucky had actually already dismissed the charges against him. However, the Court noted that a reversal of the Kentucky Supreme Court's decision "would reinstate the judgment of conviction and the sentence entered" by the trial court.

<sup>32</sup> *Payton v. New York*, 445 U.S. 573 (1980).

<sup>33</sup> *Brigham City v. Stuart*, 547 U.S. 398 (2006).

<sup>34</sup> *Mincey v. Arizona*, 437 U.S. 385 (1978).

cases, the evidence in question is drugs, since drugs “may be easily destroyed by flushing them down a toilet or rinsing them down a drain.” The lower courts that have addressed the issue have “not agreed on the test to be applied” in such cases, however, and noted that at least five different “tests” were in use around the country.

The Court found that the answer was “whether the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense.” The Court continued:

Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.

The Court detailed similar cases, noting that in Horton v. California, it has stated that the “essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.”<sup>35</sup>

The Court specifically rejected the “bad faith” test adopted by several courts, including Kentucky, finding it “fundamentally inconsistent with [prior] Fourth Amendment jurisprudence.” The Court had rejected a subjective approach, requiring instead only an objective analysis, because legal tests concerning reasonableness are “generally objective.” The Court also rejected the “reasonable foreseeability” test, also used by Kentucky and other jurisdictions, which held that “police may not rely on an exigency if ‘it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.’” The Court found that test “would ... introduce an unacceptable degree of unpredictability.” The Court noted that “whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them.” The Court found that approach to be simply unfeasible and “would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable based on what the officers knew at the time.”

The Court also rejected the calculus that included a decision as to whether the officers had sufficient time to get a warrant, finding that “approach [would] unjustifiably interfere[] with legitimate law enforcement strategies.” The Court detailed a number of reasons why this approach was also inappropriate. King argued that officers “impermissibly create an exigency when they ‘engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable’” and should turn on the “officers’ tone of voice and the forcefulness of their knocks.” The Court found that officers might “have a very good reason to announce their presence loudly and to knock on the door with some force.”<sup>36</sup> The Court noted that “officers are permitted – indeed, encouraged – to identify themselves to citizens, and ‘in many circumstances this is cause for assurance, not discomfort.’”<sup>37</sup>

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<sup>35</sup> 496 U.S. 128 (1990).

<sup>36</sup> U.S. v. Banks, 540 U.S. 31 (2003).

<sup>37</sup> U.S. v. Drayton, 536 U.S. 194 (2002).

The Court concluded that “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” The Court stated that “when law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.” And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupants has no obligation to open the door or to speak.”<sup>38</sup> However, “when the police knock on a door but the occupants choose not to respond or to speak, ‘the investigation will have reached a conspicuously low point,’ and the occupants ‘will have the kind of warning that even the most elaborate security system cannot provide.’” Indeed, “if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at that time.” So, an occupant who chooses “not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”

In this case, the court did not need to decide if exigent circumstances existed, since “any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency.” The Court assumed, for purposes of reaching the crux of the argument, that it did and framed the question as – “under what circumstances do police impermissibly create an exigency?”

Finally, the Court stated, “in this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment.” Officer Cobb simply banged loudly on the door and announced their presence. The evidence was contradictory that indicated that they threatened to, for example, break down the door unless it was opened. The officers did not state that they were going to come inside until the “exigency arose” – at the point that they knew that there was a strong possibility that evidence might be destroyed.

The Court held that the exigency justified the warrantless search of the apartment, reversed the decision of the Kentucky Supreme Court and remanded the case for further proceedings.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-1272.pdf>

## 42 U.S.C. §1983 - PROCEDURAL

Camreta v. Greene, Alford v. Greene, 131 S.Ct. 2020 (2011)

Decided May 26, 2011

**FACTS:** In February 2003, Nimrod Greene was arrested for the suspected sexual abuse of a young boy. The parents told investigators that they also believed Greene had molested his own 9-year-old daughter, S.G. This was reported to Camreta, of the Oregon Department of Human Services. Camreta and Deputy Alford (Deschutes County Sheriff’s Office) went to S.G.’s school and interviewed her. They did not have a warrant nor did they seek parental consent. She initially denied any abuse, but subsequently stated that she had, in fact, been abused. Greene was indicted and stood trial, but was not convicted.

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<sup>38</sup> Florida v. Royer, 460 U.S. 491 (1983).

Sarah Greene (S.G.'s mother) filed suit against Camreta and Alford on behalf of S.G., under 42 U.S.C. §1983. The District Court granted summary judgment in favor of Camreta and Alford. The 9<sup>th</sup> Circuit Court of Appeals affirmed, although it agreed that the interview violated S.G.'s right not to be seized and interrogated, absent a warrant, a court order or exigent circumstances. However, at that time, there was no clearly established law that would warn them of the illegality of their actions. The 9<sup>th</sup> Circuit explained that it chose to rule on the constitutional claim, in order to provide future guidance to those involved in child welfare cases. Camreta and Alford requested certiorari for a review of that portion of the 9<sup>th</sup> Circuit's decision. (S.G.'s mother did not appeal the issue of immunity.)

**ISSUE:** May the Court review a decision on petition of the prevailing party, when the underlying unlitigated issue (legally resolved by the decision) may have a continuing negative effect on any party of the case?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed its ability to accept a petition for certiorari under such circumstances, noting that no matter its decision, S.G.'s mother had abandoned any right to collect money from Camreta and Alford. The Court stated that to have a case remain justiciable, the party requesting the petition must show they have "suffered an injury in fact," "caused by the conduct complained of, and "have an ongoing interest in the dispute, and have a stake not only at the outset of the litigation but throughout its course."

In this case, the court agreed that the judgment, while not accompanied by any personal liability, "may have prospective effect" on Camreta and Alford, as well as any others who might take the same action, because they will now be on notice of the illegality of that action. "Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." However, in practice, the Court had generally declined to accept cases in which the prevailing party made the petition.

But the Court found such qualified immunity cases to be in a "special category" when "brought by winners." They involved "rulings that have a significant future effect on the conduct of public officials - both the prevailing parties and their co-workers - and the policies of the government units to which they belong." In addition, and perhaps more important, "they are rulings self-consciously designed to produce this effect, by establishing controlling law and preventing invocations of immunity in later cases."

The Court had long recognized that its "regular policy of avoidance [by not ruling in matters unless forced to do so] sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." In other words, if the court does not resolve the underlying claim, the public official can "persist in the challenged practice" because the law remains not clearly established.

Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with the legal requirements. Qualified immunity thus may

frustrate “the development of constitutional precedent” and the promotion of law-abiding behavior.<sup>39</sup>

In this case, the 9<sup>th</sup> Circuit followed the two-step process that in some cases is appropriate (although not required). In fact, it did so specifically to provide guidance to child welfare workers. Oregon responded by providing legal advice to agencies consistent with the 9<sup>th</sup> Circuit’s decision, to cease interviewing children in school with a warrant or otherwise authorized method. This left the public officials in an awkward situation, following a ruling in which no opportunity was given to contest, or not do so and invite litigation. However, because S.G., who is almost 18 at this point, has moved outside the 9<sup>th</sup> Circuit’s jurisdiction, the matter is moot with respect to her. The Court noted that the remedy sought, vacatur, is designed to “prevent an unreviewable decision ‘from spawning any legal consequences,’ so that no party is harmed by what we have called a ‘preliminary’ adjudication.” Vacatur “strips the decision below of its binding effect” and “clears the part for further relitigation.”<sup>40</sup>

Finally, the Court stated:

In this case, the happenstance of S.G.’s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness has frustrated his ability to challenge the Court of Appeals’ ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school. We therefore vacate the part of the Ninth Circuit’s opinion that addressed that issue, and remand for further proceedings consistent with this opinion.

The Court acknowledged, in a footnote, that this was a unique disposition to a case, but emphasized that this case had a “unique posture.” The Court did not touch the qualified immunity ruling but vacated the 9<sup>th</sup> Circuit’s ruling on the merits of the Fourth Amendment issue, because that part of the decision is moot, preventing the Court from ruling, but it does have prospective effects on Camreta.

FULL TEXT OF DECISION: <http://www.supremecourt.gov/opinions/10pdf/09-1454.pdf>

## TRIAL PROCEDURE / EVIDENCE - DNA TESTING

Skinner v. Switzer, 131 S.Ct. 1269 (2011)

Decided March 7, 2011

**FACTS:** Skinner was convicted in 1995, in Texas, for the murder of his girlfriend and her two sons. He did not deny being present in the house but claimed he was incapacitated on cocaine and alcohol, and that rendered him “physically unable to commit the brutal murders.” He identified another possible suspect. During the investigation, a number of items were collected as evidence, some of the items implicated Skinner, but fingerprints suggested another person was present. A number of the items were left untested.

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<sup>39</sup> See Pearson v. Callahan, 555 U.S. 223 (2009).

<sup>40</sup> Deakins v. Monaghan, 484 U.S. 193 (1988).

Skinner was convicted and “unsuccessfully sought state and federal postconviction relief.” He also attempted to get access to untested pieces of evidence. In 2001, Texas passed a law “allowing prisoners to gain postconviction DNA testing in limited circumstances;” it required the prisoner to “meet one of two threshold criteria.” The prisoner could show that the testing was either “not available” or “available, but not technologically capable of providing probative results” at the time of the trial. Or, in the alternative, the prisoner could show that the material was not previously tested “through no fault” of his and that “the interests of justice” required the opportunity for testing. On motion, the court would be required to find that the prisoner “would not have been convicted if exculpatory results had been obtained through DNA testing.”

Skinner filed for injunctive relief under 42 U.S.C. §1983, which was denied. The 5<sup>th</sup> Circuit Court of Appeals affirmed that decision, ruling that such an action must be brought a petition for a writ of habeas corpus and not an action under §1983. Skinner requested certiorari, which was granted.

**ISSUE:** May a prisoner use the due process clause to request testing of previously untested evidence?

**HOLDING:** Yes

**DISCUSSION:** Skinner brought his action under the 14<sup>th</sup> Amendment, arguing that the failure to release the material deprived him of his right to due process to use available state methods to challenge his conviction. The Court looked only at whether it had federal jurisdiction over Skinner’s claim and if so, whether he could bring that claim under 42 U.S.C. §1983.

The Court reviewed previous cases under both types of claim, civil rights and habeas corpus. Central to that analysis is the case of Heck v. Humphrey.<sup>41</sup> Pursuant to Heck, a case cannot be brought if any award under the decision would “necessarily imply the invalidity of” the underlying criminal conviction. In Skinner’s case, the court agreed that even if he succeeds in what he wants, DNA testing, that would not necessarily invalidate his conviction, and in fact, may simply further incriminate him. Certainly, however, his ultimate aim is to attack his conviction. Switzer (the District Attorney) argued that allowing this type of suit would result in vastly more cases, but the court found that concern unwarranted, holding that in the circuits that currently do allow such cases, that “no evidence tendered by Switzer shows any litigation flood or even rainfall.”

The decision of the 5th Circuit was reversed and the case remanded for further proceedings.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-9000.pdf>

**NOTE:** *Although this case is primarily procedural, law enforcement agencies should realize that such cases may be revived many years after the conviction. Evidence and documentation should be retained until there is no further possibility of litigation.*

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<sup>41</sup> 512 U.S. 477 (1994).

## EMPLOYMENT - USERRA

Staub v. Proctor Hospital, 131 S.Ct. 1186 (2011)

Decided March 1, 2011

**FACTS:** Staub was an employee of Proctor Hospital until he was fired in 2004. Staub was an Army reservist, required to attend drill monthly and to train full-time for several weeks a years. Mulally, his immediate supervisor, and Korenchuk, her supervisor, "were hostile to Staub's military obligations." Mulally scheduled him for additional shifts without notice to force him to "pay back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." She asked a co-worker to "help her get rid of him." Korenchuk made derogatory comments concerning the Reserves, as, among other things, a "waste of taxpayer's money." He knew Mulally was "out to get" Staub.

In January, 2004, Mulally gave Staub a disciplinary warning, invoking a company rule, but it was later shown that "the company rule invoked by Mulally did not exist" and "even if it did, Staub did not violate it." A few months later, Korenchuk accused Staub of doing something he was told not to do, and Buck, Korenchuk's supervisor, reviewed the file and fired Staub, based upon Staub's alleged failing to follow the corrective action outlined in the previous discipline plan.

Staub challenged his firing internally, claiming that the allegations in the discipline plan were fabricated and that he did not take the actions of which he was accused. Buck did not investigate but upheld the firing.

Staub sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), "claiming that his discharge was motivated by hostility to his obligations as a military reservist." He did not accuse Buck of hostility, but only Mulally and Korenchuk, claiming that "their actions influenced Buck's ultimate employment decision." At trial, a jury found in Staub's favor, holding that his "military status was a motivating factor" in his firing.

Proctor appealed, and the 7<sup>th</sup> Circuit Court of Appeals reversed, finding this to be a cat's paw case, and that Staub was seeking "to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." Since the "undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally," the Court found in favor of Proctor. Staub requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** May an employer be held liable when adverse decisions under USERRA are made by a supervisor without animus, if based primarily upon recommendations of supervisors found to have animus?

**HOLDING:** Yes

**DISCUSSION:** USERRA provides for extensive protection for active duty military and reservists. The Court noted that “when the company official who makes the decision to take an adverse employment action is personally acting out of hostility to the employee’s membership in or obligation to a uniformed service, a motivating factor obviously exists.” However, as in this case, confusion occurs when the actual termination is done by an “official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else.”

The Court noted that “so long as the agent [the supervisor] intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA.” An “exercise of judgment by the decisionmaker does not prevent the earlier agent’s action (and hence the earlier agent’s discriminatory animus) from being the proximate cause of the harm.” Proximate cause requires only a finding of “some direct relation between the injury asserted and the injurious conduct alleged.” Simply because there was an intervening decision by another party does not “automatically render the link to the supervisor’s bias ‘remote’ or ‘purely contingent.’” The Court noted that it was “common for injuries to have multiple proximate causes”<sup>42</sup> and that an “employer’s authority to reward, punish, or dismiss is often allocated among multiple agents.”

The Court noted the incongruity of Proctor’s position - stating that if a file is based upon recommendations based upon animus, but is reviewed by a supervisor without animus, it would effectively shield the employer from what was “*designed and intended* to produce the adverse action.” The Court noted that if after an investigation, the adverse action occurs “for reasons unrelated to the supervisor’s original biased action, ... then the employer will not be liable.” But if the biased report is a causal factor and is used without a true investigation into its underlying truth, the decision will be fatally tainted.

In this case, the “biased supervisor and the ultimate decisionmaker ... acted as agents of the entity that [Staub] seeks to hold liable; each of them possessed supervisory authority delegated by their employer and exercised in the interest of their employer.” The Court concluded that “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”

The decision of the 7<sup>th</sup> Circuit Court of Appeals was reversed.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-400.pdf>

## **SENTENCING - ARMED CAREER CRIMINAL ACT**

**Sykes v. U.S.**, 131 U.S. 2267 (2011)  
Decided June 9, 2011

**FACTS:** Indiana officers attempted to make a traffic stop of Sykes, but he did not stop. “A chase ensued,” in which “Sykes wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house.” He then fled on foot and was eventually apprehended with the use of a police dog. Sykes was charged with being a

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<sup>42</sup> Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

felon in having a firearm since he had, on two previous occasions, used a firearm in robberies. He was also charged with a violation of Indiana's "resisting law enforcement" law, by "vehicle flight," a Class D felony. Sykes did not dispute that offense was a felony, but argued that "it was not violent." As a result of this conviction, he received an enhancement on his federal sentence for possession of the firearm, to a minimum of 15 years, because of his third conviction for a violent felony, under the Armed Career Criminal Act.

Sykes appealed and the 7<sup>th</sup> Circuit Court of Appeals affirmed his sentence. Sykes requested certiorari, and was granted review.

**ISSUE:** May a conviction for a vehicle flight from law enforcement be considered a violent felony under federal law?

**HOLDING:** Yes

**DISCUSSION:** In such decisions, the Court looks "only to the fact of conviction and the statutory definition of the prior offense, and [does] not generally consider the particular facts disclosed by the record of conviction." The Court looked to "whether the elements of the offense are of the type that would justify" using it to enhance the offense, "without inquiring into the specific conduct of the particular offender."<sup>43</sup> Under 18 U.S.C. §924(e)(2)(B), an offense is a violent felony if it both has, as an element, "the use, attempted use, or threatened use of physical force against the person of another," or it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." The Indiana offense in question does not meet the first element, nor does it meet the specific offenses named in the second element, therefore it would only apply if it fit within the "residual provision" involving a true risk of physical injury to another.

The Court noted:

When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent - even lethal - potential for others.

The Court went on to compare the risk of vehicle flight to burglary and arson, noting that about 4% of vehicle pursuits resulted in injuries to nonsuspects. Burglaries result in about 3.2% of individuals being injured, and arson in about 3.3% of nonsuspects being injured.

The Court stated:

Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more

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<sup>43</sup> James v. U.S., 550 U.S. 192 (2007).

certain risk as a categorical matter than burglary. It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.

The Court noted that unlike burglaries, which is specifically named as an enhancing offense, "vehicle flights from an officer by definitional necessity occur when police are present, are flights in defiance of their instructions, and are effected with a vehicle that can be used in a way to cause serious potential risk of physical injury to another."

The Court agreed that Indiana's vehicle flight law was appropriately used as a violent felony to enhance Syke's federal sentence.

*NOTE: Kentucky has a statute that is very similar, in effect, to the Indiana law in question - KRS 520.095, Fleeing or evading police in the first degree. Under the court's analysis, a conviction for this offense could also be applied to a federal sentence under similar circumstances. For that reason, peace officers should be cautious about allowing this charge to be dismissed or reduced in plea bargaining, as it can only be used as an enhancement if the subject is, in fact, convicted of the offense.*

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-11311.pdf>

**JDB v. North Carolina**, 131 S.Ct. 2394, 2011  
Decided June 16, 2011

**FACTS:** J.D.B., a 13 year old, 7<sup>th</sup> grade student in Chapel Hill, North Carolina, was "removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour." This was the second time he'd been questioned with respect to two recent residential burglaries. Police also spoke to his legal guardian, his grandmother, and his aunt after the first interrogation. When they learned that one of the stolen items had been seen in J.D.B.'s possession, Investigator DiCostanzo went to the school again, talked to the school resource officer and school staff, and explained he was there to question J.D.B. He was not given Miranda warnings, given the opportunity to contact his guardian or told he was free to leave the room.

After initially denying his involvement, J.D.B. asked if he would still be in trouble if he returned the stolen items. The investigator explained it would still be going to court, but that it would be helpful if he did so. He also warned J.D.B. that he would seek a secure custody order (juvenile detention) if necessary. With that prospect, J.D.B. confessed that he and a friend did the break-ins. Only then was he told that he could refuse to answer questions and that he was free to leave. He gave a statement and the location of the stolen items. At the end of the school day, the questioning ceased and he was allowed to take the school bus home.

Juvenile petitions were filed. His public defender moved for suppression, arguing that he was interrogated in a custodial setting by law enforcement without being provided Miranda warnings. The trial court determined he was not in custody and that his statements were voluntary. He was

adjudicated delinquent. North Carolina's appellate courts affirmed the decision. J.D.B. requested certiorari and was granted review.

**ISSUE:** Is a child's age a factor in the custody analysis required under Miranda v. Arizona?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed the background of Miranda v. Arizona<sup>44</sup> and its progeny cases. The court emphasized, pursuant to Stansbury v. California<sup>45</sup> and Oregon v. Mathiason<sup>46</sup>, that "whether a subject is 'in custody' is an objective inquiry."

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogations and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.<sup>47</sup>

The test, "involves no consideration of the 'actual mindset' of the particular suspect," but does include an examination of "all the circumstances surround the interrogation."

North Carolina argued that "a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning." The Court did not agree, noting that "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go." The Court continued:

A child's age is far "more than a chronological fact." It is a fact that "generates common-sense conclusions about behavior and perception." Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

The Court stated that "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparently to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." The Court did not, however, "say that a child's age will be a determinative, or even a significant, factor in every case," particularly in cases where the juvenile is near the age of 18. The Court, however, said that "officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult."

The Court concluded:

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<sup>44</sup> 384 U.S. 436 (1966).

<sup>45</sup> 511 U.S. 318 (1994).

<sup>46</sup> 429 U.S. 492 (1977).

<sup>47</sup> Thompson v. Keohane, 516 U.S. 99 (1995). Also see Yarborough v. Alvarado, 541 U.S. 652 (2004).

To hold ... that a child's age is never relevant to whether a suspect has been taken into custody - and thus to ignore the very real differences between children and adults - would be to deny children the full scope of the procedural safeguards that Miranda guarantees to adults.

Since the trial court did not address the question of the importance of the child's age in the custody analysis, the Court reversed the North Carolina decision and remanded the case back for further proceedings.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-11121.pdf>

*NOTE: This case specifically does not address whether removing a child to another room within a school satisfies the custody prong of Miranda. Instead, it focused only on whether the age of a child was a consideration in determining the voluntariness of a statement. Law enforcement officers are strongly advised to discuss the issue with local prosecutors as to whether a child being questioned at the school would trigger Miranda.*

**Davis v. U.S., 131 S.Ct. 2419 (2011)**  
Decided June 16, 2011

**FACTS:** In April, 2007, Greenville, Alabama officers made a traffic stop that resulted in the arrest of the driver (Owens) for DUI and the passenger (Davis) for giving them a false name. The two were secured in separate cruisers and the officers searched the passenger compartment of the vehicle, finding a revolver in Davis's jacket pocket. As he was a convicted felon, he was indicted under federal law for its possession. He moved for suppression, although acknowledging that under New York v. Belton<sup>48</sup>, the search was permitted. (The issue was raised to preserve it on appeal.) He was ultimately convicted. However, during the pendency of his appeal, Arizona v. Gant<sup>49</sup> was decided. The 11th Circuit Court of Appeals agreed that under Gant's new rule, the vehicle search was a violation of Davis's constitutional rights. However, in deciding whether the violation warranted suppression, it viewed that as a separate issue "that turned on 'the potential of exclusion to deter wrongful police conduct."<sup>50</sup> Finding that penalizing the arresting officer for following what was binding precedent at the time would do nothing to deter improper conduct, the Court declined to apply the Exclusionary Rule and affirmed the conviction.

Davis requested certiorari and was granted review.

**ISSUE:** Does the Exclusionary Rule apply to vehicle search performed before Arizona v. Gant was decided?

**HOLDING:** No

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<sup>48</sup> 453 U.S. 454 (1981).

<sup>49</sup> 129 S.Ct. 1710 (2009).

<sup>50</sup> See Herring v. U.S., 556 U.S. 135 (2009).

**DISCUSSION:** The Court reviewed the history of the Exclusionary Rule and its deterrent effect on unconstitutional conduct. It noted that beginning with U.S. v. Leon<sup>51</sup> it had changed its analysis in such cases to “focus the inquiry on the ‘flagrancy of the police misconduct’ at issue.” When the police act in a good-faith and reasonable manner, the deterrence effect is minimal. At the time the search was conducted, it was done pursuant to binding judicial precedent. The Court noted that “police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield ‘meaningful’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’”

The Court continued:

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorize a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than ‘act as a reasonable officer would and should act’ under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from ‘doing his duty.’”

The Court concluded:

It is one thing for the criminal “to go free because the constable has blundered.” It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs.

The Court affirmed the decision of the 11<sup>th</sup> Circuit Court of Appeals.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-11328.pdf>

**Borough of Duryea, Pennsylvania v. Guarnieri**, 131 S.Ct. --- (2011)  
Decided June 20, 2011

**FACTS:** Guarnieri was terminated as the police chief of Duryea, Pennsylvania. He grieved the termination pursuant to the agency’s collective bargaining agreement. The arbitrator found fault on both sides and ordered the chief reinstated following a disciplinary suspension.

Upon his return, Guarnieri was given 11 specific directives from the council concerning the performance of his duties. He grieved those as well and the arbitrator “instructed the council to modify or withdraw some of the directives” on various grounds. Guarnieri sued the Borough, the council and individual members of the council under 42 U.S.C. §1983, arguing that his first grievance was protected by the “Petition Clause of the First Amendment” and that the directives were retaliation for his taking advantage of that right. During the pendency of the action, they also

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<sup>51</sup> 468 U.S. 897 (1984).

denied him overtime pay, which the Labor Cabinet ordered to be paid. He then argued that the lawsuit was also a petition and that the initial denial of his overtime was retaliation for having filed the lawsuit.

Ultimately the jury found in Guarnieri's favor and the Borough appealed, arguing that the grievances and the lawsuit "did not address matters of public concern." Although all circuits but the 3<sup>rd</sup> (where Pennsylvania is located) had held that such actions are not actionable unless they do concern matters of public concern, the 3<sup>rd</sup> Circuit Court of Appeals had held otherwise and upheld the jury's decision. The Borough requested certiorari and the U.S. Supreme Court granted review.

**ISSUE:** Is a government employee's grievance actionable under the First Amendment?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that "when a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern."<sup>52</sup> If it is not, then the speech is not automatically protected. The Court must "balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"<sup>53</sup>

The Court continued, noting that this analysis "reconciles the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission."<sup>54</sup>

The Court concluded that simply because this case was brought under the Petition Clause, there was no reason to find differently than had it been brought under the Speech Clause. Had he done so, the case would have been subjected to the "public concern test." However, in the 3<sup>rd</sup> Circuit, a "more generous rule" was applied to Petition Clause cases, in which he was protected from retaliation "so long as his petition was not a 'sham.'"

The Court continued:

Unrestrained application of the Petition Clause in the context of government employment would subject a wide range of government operations to invasive judicial superintendence. Employees may file grievances on a variety of employment matters, including working conditions, pay, discipline, promotions, leave, vacations, and terminations. Every government action in response could present a potential federal constitutional issue.

The Court agreed this would "raise serious federalism and separation-of-powers concerns." The Court noted that a "different rule for each First Amendment claims would require employers to

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<sup>52</sup> Connick v. Myers, 461 U.S. 138 (1983).

<sup>53</sup> Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty., 391 U.S. 563 (1968).

<sup>54</sup> San Diego v. Roe, 543 U.S. 77 (2004).

separate petitions from other speech in order to afford them different treatment; and that, in turn, would add to the complexity and expense of compliance with the Constitution.”

The Court concluded that “a petition that ‘involves nothing more than a complaint about a change in the employee’s own duties’ does not relate to a matter of public concern and accordingly ‘may give rise to discipline without imposing any special burden of justification on the government employer.’”<sup>55</sup> The Court stated that “the right of a public employee under the Petition Clause is a right to participate as a citizen through petitioning activity, in the democratic process” – “not a right to transform everyday employment disputes into matters for constitutional litigation in the federal courts.”

The Court vacated the decision of the 3rd Circuit Court of Appeals and remanded it for further consideration.

FULL TEXT OF OPINION: <http://www.supremecourt.gov/opinions/10pdf/09-1476.pdf>

**Bullcoming v. New Mexico**, 131 S.Ct. --- (2011)  
Decided June 23, 2011

**FACTS:** In August, 2005, Bullcoming “rear-ended a pick-up truck at an intersection in Farmington, New Mexico.” Ultimately he was arrested for DUI. Bullcoming refused a breath test, so the police got a warrant for a blood test. The blood was then sent to the New Mexico lab for testing and a forensic analyst, Caylor, determined the blood sample to be .21.

At trial, Caylor was not used as a witness because he was on unpaid leave for an undisclosed reason. The defense objected, but the Court permitted the introduction of test report under the business record exemption to the hearsay rule, through a lab technician who “neither observed nor reviewed Caylor’s analysis.” Bullcoming was convicted. The New Mexico appellate court upheld the conviction, finding the report was non-testimonial and “prepared routinely with guarantees of trustworthiness.” He appealed to the New Mexico Supreme Court. During the pendency of the appeal, the case of Melendez-Diaz v. Massachusetts<sup>56</sup> was decided. In Melendez-Diaz, the Court had agreed that such forensic analysis reports were testimonial and invoked the Confrontation Clause right. The New Mexico Supreme Court ruled that the evidence was testimonial and that such reports were “functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination.” However, it upheld the admission of the report, finding first that Caylor was a “mere scrivener” who simply copied the test results from the lab equipment readout, and second, that the person who did testify was qualified as an expert on that piece of lab equipment and was “able to serve as a surrogate for Caylor.”

Bullcoming requested review by the U.S. Supreme Court, which granted certiorari.

**ISSUE:** Is a lab report testimonial?

**HOLDING:** Yes

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<sup>55</sup> U.S. v. Treasury Employees, 513 U.S. 454 (1995).

<sup>56</sup> 129 S.Ct. 2527 (2009).

**DISCUSSION:** The Court began with a discussion of the Confrontation Clause of the Fifth Amendment. It noted that the case of Crawford v. Washington permitted the admission of “testimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”<sup>57</sup>

In this case, there was nothing on the record that indicated that Caylor was actually unavailable and Bullcoming certainly did not have an opportunity to cross-examine him. The Court agreed that the analyst who did testify was not an “adequate substitute for Caylor.”

With respect to the state’s argument that Caylor simply transcribed the information from the machine, which was the “true accuser,” the Court listed all of the ways that Caylor interacted with the machine during the process. The Court stated that the “human actions not revealed in raw, machine-produced data, are meet for cross-examination.” The Court agreed that most witnesses “testify to their observations of factual conditions or events.” In Crawford, the Court had noted that the “obvious[s] reliab[bility]’ of a testimonial statement does not dispense with the Confrontation Clause.” The substitute analyst could not “convey what Caylor knew or observed about the events his certification concerned.” Nor “could such surrogate testimony expose any lapses or lies on the certifying analyst’s part.” No opportunity was given for the defense counsel to question anyone about why Caylor was on leave, and whether it was related to “incompetence, evasiveness, or dishonesty....”

And, certainly, Melendez-Diaz left no room for argument that such reports are, in fact, testimonial. However, it also noted that since the lab was required to preserve samples, that retesting of the samples by another analyst was, in fact, an option. New Mexico, however, requires that the defendant initiate the request for retesting, which it called a “notice-and-demand procedure.” New Mexico asserted that in most cases, the test results are admitted by stipulation and rarely does defense counsel even insist on live testimony. However, the Court noted that in places where it is the regular duty of analysts to testify, “the sky has not fallen” and that “operations and staffing decisions” are made to allow the analysts to appear as needed. And, ultimately, the samples could have been retested by a different analyst, which New Mexico chose not to do. (The defense counsel learned only when trial was about to commence that Caylor would not be available, which limited their ability to request retesting of the sample.)

Bullcoming’s conviction was reversed and the case remanded for further proceedings.

**FULL TEXT OF OPINION:** <http://www.supremecourt.gov/opinions/10pdf/09-10876.pdf>

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<sup>57</sup> Michigan v. Bryant, 131 S.Ct. 45 (2011).