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Open Issues And Circuit Splits:

Uncertain And Evolving Legal Issues In Section 1983 Cases

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INTRODUCTION

Section 1983 claims are among the most litigated federal claims. Literally thousands of section 1983 lawsuits are filed across the country each year. In the almost 57 years since the Supreme Court issued its decision in *Monroe v. Pape*, 365 U.S. 167 (1961) ushering in the explosion of section 1983 litigation, there have been thousands of appellate court decisions interpreting section 1983 and the various constitutional claims brought under its rubric.

Yet, despite the widespread litigation of section 1983 claims, there are a surprising number of fundamental issues that have not yet been addressed by the Supreme Court, often in instances where there is a square conflict among the circuit courts. The purpose of this paper is to highlight some of those open issues and circuit splits so that section 1983 litigators will know when to push, or, more significantly preserve, certain issues for later appellate review. That the law may be clear, and adverse to your position in your circuit, does not mean that you have to give up the ship. Rather, preserving the point in the trial court may be only the first step in eventually obtaining review by the Supreme Court.

I. NOT SO CLEARLY ESTABLISHED LAW: WHAT CONSTITUTES CONTROLLING AUTHORITY FOR PURPOSES OF "CLEARLY ESTABLISHED LAW" FOR QUALIFIED IMMUNITY?

Qualified immunity is one of the most heavily litigated issues in section 1983 jurisprudence. In 2016, there were 673 appellate decisions concerning qualified immunity. Most focus on the inquiry set out in *Anderson v. Creighton*, 483 U.S. 635 (1987), i.e., whether the right the officers are alleged to have violated was "clearly established" in a particularized sense: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id*. at 640.

The open question is: What constitutes "clearly established law"? Does there have to be a Supreme Court opinion on point? How about a circuit court opinion from the circuit in which the case arose? How about a case on point from another circuit? How about a district court case from within the circuit where the case arose? How about a relevant state Supreme Court decision from the state in which the case arose? The fact

is that at one time or another, any and all of the foregoing have been cited as a basis for establishing the governing law for purposes of qualified immunity.

In *Wilson v. Layne*, 526 U.S. 603 (1999), officers violated the Fourth Amendment by bringing reporters into a home during the execution of a warrant when their presence was not in aid of execution. The Court held the officers were entitled to qualified immunity because "[p]etitioners have not brought to our attention any cases of controlling authority in *their jurisdiction* at the time of the incident that clearly established the rule on which they seek to rely, nor have they identified *a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.*" *Id*. at 617 (italics added). The Court also noted that, given the absence of a "decided body of case law,"—including a circuit split on the issue, the officers were not unreasonable in relying on their internal "ride-along" policy, which permitted third parties to accompany officers during certain procedures. *Id*. Noting that an internal policy "could not make reasonable a belief that was contrary to a decided body of case law," the Court observed that "here the state of the law as to third parties accompanying police on home entries was at best undeveloped," hence "it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." *Id*. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id*. at 618.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), the Court found that state prison officers were not entitled to qualified immunity for handcuffing a prisoner to a hitching post for extended periods of time. The majority acknowledged that no published decisions expressly held that such conduct violated the Eighth Amendment, but noted that officers need only have "fair warning" that their conduct is unlawful (the same standard for criminal statutes to avoid a challenge for vagueness). The majority noted that circuit precedent holding that handcuffing inmates to a fence could violate the Eighth Amendment and that denying prisoners water for purposes of punishment was unconstitutional, gave fair notice to the officers, as did state regulations. The court concluded that unpublished district court decisions cited by the dissent that rejected similar claims, did not indicate the law was not clearly established.

In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court held that the officers were entitled to qualified immunity for a search conducted based on consent to entry given to a confidential informant, because prior to the Tenth Circuit's decision in the case, "three Federal Courts of Appeals and two State Supreme Courts" had found such consent valid. *Id*. at 244. In fact "prior to the Tenth Circuit's decision in the present case, no court of

appeals had issued a contrary decision." *Id*. Thus, "[t]he officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on . . . [such] entries." *Id*.

In *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009), the Court found that a strip search of a middle school student for a prohibited drug violated the Fourth Amendment based on prior Supreme Court precedent, but concluded that school officials were entitled to qualified immunity because of debate about the scope of the Court's prior opinion: "We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted." *Id*. at 378-79.

In *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011), the Court found that the Attorney General was entitled to qualified immunity for invoking the material witness warrant procedure as pretext for another investigation because at the time of the events, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional"; one district court's holding to the contrary did not represent "a robust 'consensus of cases of persuasive authority'" to make law clearly established.

In *Ryburn v. Huff*, 565 U.S. 469 (2012), the Court held the officers were entitled to qualified immunity for entering a residence without a warrant when, during an investigation of a shooting threat, the plaintiff abruptly terminated the interview and ran into the house in response to a question of whether there were guns in the residence. The Court emphasized that "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposite direction." *Id*. at 474.

In *Reichle v. Howards*, 566 U.S. 658, 663 (2012), the court held that secret service agents were entitled to qualified immunity for arresting the plaintiff for touching the Vice President while expressing opposition to his policies, because, at the time of the arrest, "it

was not clearly established that an arrest supported by probable cause could violate the First Amendment." The court emphasized that "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest." *Id*. at 664-65. Significantly, for the first time, the court suggested that circuit court authority might not be enough to render the law "clearly established" for purposes of qualified immunity. In addressing the Tenth Circuit authority, which had been cited as a basis for denying qualified immunity, the court noted: "Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case, the Tenth Circuit's cases do not satisfy the 'clearly established' standard here." *Id*. at 665-66.

In *Stanton v. Sims*, 134 S. Ct. 3 (2013), the court found that police officers were entitled to qualified immunity for a hot pursuit of a misdemeanor suspect into the curtilage of a residence to effect an arrest because (1) the Court had never addressed the issue of whether an officer may engage in hot pursuit entry to arrest for a misdemeanor; (2) the Ninth Circuit had not clearly addressed the issue, and district courts within the circuit indicated the law was not clearly established; (3) other circuit courts throughout the country were divided on the question; and (4) state courts where the pursuit occurred had held such pursuits were lawful.

In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the court held that the First Amendment barred a government employer from firing an employee on account of testimony the employee gave under oath and outside the scope of his ordinary job responsibility, but that individuals were entitled to qualified immunity because "[a]t the time of Lane's termination, *Eleventh Circuit precedent* did not provide clear notice that subpoenaed testimony concerning information acquired through public employment is speech of a citizen entitled to First Amendment protection. At best, Lane can demonstrate only a discrepancy in Eleventh Circuit precedent, which is insufficient to defeat the defense of qualified immunity." *Id*. at 2382-83 (italics added).

In *Carroll v. Carman*, 135 S. Ct. 348 (2014), the court found that officers were entitled to qualified immunity from a Fourth Amendment claim premised on their alleged unlawful entry into the side yard of a residence to speak with a resident at a side door because the law was not clearly established. The court once again cast doubt on the question of whether circuit court precedent in the jurisdiction where the claim arose could ever constitute clearly established law. The court noted: "*Assuming for the sake of argument* that a controlling circuit precedent could constitute clearly established federal

law in these circumstances," here, "the Third Circuit cited only a single case to support its decision that Carroll was not entitled to qualified immunity," that decision was inapposite, and "*other federal and state courts*" rejected the rule adopted by the Third Circuit. *Id*. at 350-51 (italics added). As a result, the lawfulness of the officers' conduct was not "beyond debate" and hence, he was entitled to qualified immunity. *Id*. at 352.

Most recently, in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the court again emphasized, "[w]e have not yet decided what precedence—other than our own—qualifies as controlling authority for purposes of qualified immunity." 138 S. Ct. at 591 n.8. The court held that the officer in the case before it was entitled to qualified immunity for wrongful arrest because the lower court had relied on a single decision from that court, which the Supreme Court found largely inapposite. The court emphasized that "'a body of relevant case law' is usually necessary to" clearly establish the law for purposes of qualified immunity. *Id*. at 590.

Given the varying approach the Supreme Court has taken with respect to what constitutes a body of law that is sufficiently controlling for purposes of rendering the law "clearly established," the circuit courts have taken different approaches to the issue. Not surprisingly, the Ninth Circuit takes one of the broader approaches in determining what constitutes clearly established law, noting that "for purposes of qualified immunity, a Ninth Circuit precedent is sufficient to clearly establish law within our circuit." *Perez v. City of Roseville*, __ F.3d __, 2018 WL 797453, *10 (9th Cir. 2018). The Ninth Circuit has emphasized that in "the absence of binding precedent, we look to whatever decisional law is available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." *Tekle v. United States*, 511 F.3d 839, 847 (9th Cir. 2007). Although the Ninth Circuit has held that an unpublished district court decision did not clearly establish the federal law, it has indicated that such opinions might clearly establish the law if the defendant officials repeatedly chose not to appeal unfavorable district court decisions in order to avoid adverse circuit court precedent. *See Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

The Sixth Circuit has held that a recent case from one circuit is generally not sufficient to constitute clearly established law in another circuit. *Eugene D. v. Karman*, 889 F.2d 701, 706 (6th Cir. 1989).

The Tenth Circuit has held that a conflict among circuit courts on an issue, while relevant to the qualified immunity inquiry, is not dispositive, because it would effectively "bind this circuit by the decisions of others." *Garcia v. Miera*, 817 F.2d 650, 658 (10th

Cir. 1987). The Fifth Circuit has similarly rejected the presence of a circuit split as dispositive of the qualified immunity issue when its own precedent establishes that the conduct in question is unlawful. *See Brady v. Fort Bend County*, 58 F.3d 173, 175-76 (5th Cir. 1995).

Given the Supreme Court's repeated admonition to the circuit courts to apply qualified immunity with rigor, both with respect to the factual similarity between the underlying case and existing precedent, and, more critically, with respect to the binding nature of existing authority, the existence of a circuit split provides a compelling basis for asserting qualified immunity. This would seem to be especially true of federal officials, who technically operate on a national basis, and whose conduct should not be subjected to different standards of liability depending upon where the underlying incident occurred. The Supreme Court in recent years seems to be heading towards a rule that in all but the most obvious of cases, a defendant will be entitled to qualified immunity virtually any time there is a circuit split, and perhaps whenever the high court itself has not yet spoken on an issue.

II. IS TRUTHFUL SWORN TESTIMONY GIVEN BY A PUBLIC EMPLOYEE AS PART OF THEIR JOB CITIZEN SPEECH OR EMPLOYER'S SPEECH UNDER *GARCETTI V. CEBALLOS,* 547 U.S. 410 (2006)?

In *Lane v. Franks*, 134 S. Ct. 2369 (2014), the Supreme Court held that truthful sworn testimony that is not a part of the employee's ordinary job responsibilities constitutes citizen speech for purposes of a First Amendment claim. In so holding, the court noted that it was specifically leaving open the issue of whether truthful sworn testimony that is given as part of a public employee's job responsibility constitutes citizen speech for purposes of a First Amendment claim, or whether it constitutes "employer" speech under *Garcetti v. Ceballos*, and thus does not give rise to a First Amendment claim. 134 S. Ct. at 2378 n.4.

III. ARE A POLICE OFFICER'S COMMENTS CONCERNING MISCONDUCT AND CORRUPTION WITHIN THE POLICE DEPARTMENT CITIZEN SPEECH FOR PURPOSES OF THE FIRST AMENDMENT, OR BECAUSE THE SPEECH CONCERNS THE REPORTING OF POTENTIAL CRIMES, JOB-RELATED SPEECH UNDER *GARCETTI*?

A common scenario that generates a fair amount of litigation is the discipline or termination of a law enforcement officer for going outside the chain of command and reporting internal misconduct or corruption to a third-party, such as a newspaper reporter, or another law enforcement agency. The officer generally brings a First Amendment retaliation claim, asserting that police corruption is a matter of public importance, and hence the speech is citizen speech for purposes of the First Amendment and discipline cannot be constitutionally imposed for the officer's actions. The public employer usually responds with the contention that as a police officer, the plaintiff was required to report crimes, whether it is excessive force by other officers or other corruption with the agency, and that failure to adhere to the chain of command and report matters internally before going to third-parties constitutes misconduct that is properly subject to discipline.

Although the United States Supreme Court has never addressed the issue directly, most circuit courts have sided with the plaintiffs in such cases, and concluded that a police officer's comments to third-parties, particularly other police agencies concerning misconduct within his or her department, constitutes protected citizen speech under the First Amendment. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1073-77 (9th Cir. 2013) (statements made to outside law enforcement agency concerning police misconduct constitutes private speech as a citizen). In *Gibson v. Kilpatrick*, 773 F.3d 661 (5th Cir. 2014), the court had initially held that a police chief could not assert a First Amendment retaliation claim after being disciplined for reporting the mayor's alleged criminal misconduct to outside police agencies because enforcing the law was one of the chief requirements of his position, but following the Supreme Court's grant of certiorari and remand in light of *Lane v. Franks*, the court ultimately held that the law as to when an officer speaks as a private citizen is not clearly established and hence defendant was entitled to qualified immunity.

This is an area ripe for litigation, and certainly for the assertion of a qualified immunity defense. The key questions in such cases are typically whether the speech occurred inside or outside the chain of command—with outside the chain of command being an indication of citizen speech—and whether the officer's official duties included

reporting the very sort of crime at issue. For example, an internal affairs investigator might have a specific duty to report misconduct that he or she is investigating, while a police officer in another assignment might not be deemed to have a generalized duty to report misconduct. As noted, however, the highly unsettled state of the law in this area makes this a prime situation for qualified immunity.

IV. IS THE ISSUE OF WHETHER AN EMPLOYEE SPOKE AS A PUBLIC EMPLOYEE OR AS A CITIZEN UNDER *GARCETTI* A QUESTION OF LAW FOR THE COURT, OR A MIXED QUESTION OF LAW AND FACT?

Related to, and indeed complicating the open issue concerning whether a police officer speaks as a citizen or as an employee in reporting misconduct, is confusion concerning how a court even goes about making that determination. There is currently a circuit split on whether the issue of whether an employee spoke as a public employee or as a citizen is a question of law for the court, or a mixed question of fact and law with a jury ultimately determining whether the speech was within the scope of an employee's official duties. In *Posey v. Lake Pend Oreille School Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir. 2008), the Ninth Circuit held that the question of whether an employee spoke pursuant to official duties, or instead as a private citizen, was a mixed question of fact and law. The Ninth Circuit noted that both the Third and Seven Circuits had ostensibly reached the same conclusion. *Id*. at 1128 (citing *Reilly v. City of Atlantic City*, 532 F.2d 216, 227 (3d Cir. 2008); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2008)). In contrast, the First, Fifth, Sixth, Tenth, Eleventh and D.C. Circuits have held that the *Garcetti* inquiry is a question of law for the court. *See Wilburn v. Robinson*, 480 F.3d 1140, 1149 (D.C. Cir. 2007); *Charles v. Grief*, 522 F.3d 508, 513 n.17 (5th Cir. 2008); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1203 (10th Cir. 2007); *Curran v. Cousins*, 509 F.3d 36, 45 (1st Cir. 2007); *Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007); *Schuster v. Henry County, Georgia*, 281 F. App'x 868, 870 (11th Cir. 2008); *Mayhew v. Town of Smyrna, Tennessee*, 856 F.3d 456, 463-64 (6th Cir. 2017).

The Supreme Court has denied certiorari in several cases that have raised that issue in that last eight years, but it seems likely that at some point the court will have to bring clarity to the law.

V. IS THERE A CLAIM FOR MALICIOUS PROSECUTION UNDER SECTION 1983, AND IF SO, WHAT ARE ITS ELEMENTS?

In *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994), a plurality of the court held that the right to be free from prosecution without probable cause was not a substantive due process right. Although several justices suggested in separate opinions that such claims might fall within the Fourth Amendment, because the plaintiff there had not brought up a Fourth Amendment claim, the court ultimately did not resolve the issue.

In the over 20 years since *Albright*, the Supreme Court has still not addressed the issue of whether there is a constitutional claim for malicious prosecution, and if so, the scope of such a claim. In *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017), the court had granted certiorari on the issue of whether the Fourth Amendment embraced a cause of action for malicious prosecution, but ultimately did not reach the issue. In *Manuel*, the plaintiff had been arrested, prosecuted, and detained pending trial based upon falsified evidence. The Seventh Circuit had dismissed his Fourth Amendment claim based on pre-trial detention on the grounds that once process attached, the Fourth Amendment no longer applied. The Supreme Court reversed, holding that the Fourth Amendment could apply after initiation of a formal criminal process to detain a suspect, but declined to address the issue further, instead of remanding to the lower court to make a determination in the first instance.

Following *Albright*, the circuit courts were divided on the existence and scope of a malicious prosecution claim under section 1983. Several circuits have indicated that common law elements of malicious prosecution may establish a Fourth Amendment violation with respect to defendants acting under color of state law. *See, e.g.*, *Cervantes v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999); *Britton v. Maloney*, 196 F.3d 24, 28-29 (1st Cir. 1999); *Uboh v. Reno*, 141 F.3d 1000, 1003 (11th Cir. 1998); *Brooks v. City of Winston-Salem, NC*, 85 F.3d 178, 183-84 (4th Cir. 1996). The Fifth Circuit has held that notwithstanding *Albright*, that a malicious prosecution claim based on fabricated evidence would fall within the Due Process Clause. *Castellano v. Fragoza*, 352 F.3d 939, 956-59 (5th Cir. 2003) (en banc). Currently, most circuits recognize a Fourth Amendment-based claim for malicious prosecution, albeit its application may depend upon the extent to which the plaintiff is physically detained pending prosecution.[1/]

[1/] The author notes that a full discussion of the current law on malicious prosecution is the subject of another seminar program and paper, and invites the reader to consult those materials for a more extensive discussion of this complex issue.

VI. MAY AN ACQUITTED CRIMINAL DEFENDANT BRING A SECTION 1983 CLAIM AGAINST AN OFFICER WHO ALLEGEDLY INTERFERED WITH THE INTRODUCTION OF DEFENSE EVIDENCE AT TRIAL?

Related to the question of whether there is a malicious prosecution claim under section 1983 is the issue of whether an acquitted defendant, who was prosecuted with probable cause, nonetheless may have a due process claim based upon the actions of a public employee who interfered with the presentation of evidence at trial.

In *Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017), the court held that the plaintiff could assert a Sixth Amendment claim for violation of the Compulsory Process Clause against a police officer who allegedly deterred a witness from providing exonerating testimony at plaintiff's criminal trial. The court noted that even though the plaintiff was acquitted, a jury could find that the police officer's action interfered with the process of trial, and inflicted an injury that was redressable under section 1983. *Id*. at 923-27. This was consistent with the Ninth Circuit's earlier decision in *Haupt v. Dillard*, 17 F.3d 285, 287 (9th Cir. 1994) where the court had allowed a due process claim by an acquitted criminal defendant where the contention was that the prosecutor had intimidated the trial judge into changing his jury instruction. In contrast, in *Kjellsen v. Mills*, 517 F.3d 1232, 1239-40 (11th Cir. 2008), the court rejected a compulsory process case brought by an acquitted defendant, noting that under Supreme Court case law, such a violation only occurred where it materially affected the outcome of the proceedings, and given that the plaintiff had been acquitted, the alleged misconduct did not materially affect the trial.

In addition, both the Sixth and Tenth Circuits have held that section 1983 does not provide a remedy for an acquitted defendant who contends that the prosecution failed to turnover exonerating evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). *See Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988). The Seventh Circuit has noted that it is an open question in that circuit (*see Mosley v. City of Chicago*, 614 F.3d 391, 397-98 (7th Cir. 2010)), though a prior panel of that court had suggested that it is "doubtful . . . that an acquitted defendant can ever establish the requisite prejudice for a *Brady* violation." *Carvajal v. Dominguez*, 542 F.3d 561, 570 (7th Cir. 2008).

Although compulsory process claims under the Sixth Amendment are relatively rare, *Brady* claims are ubiquitous in criminal proceedings, so at some point, the issue will likely find its way to the Supreme Court.

VII. ONCE PROPERTY IS LAWFULLY SEIZED BY A PUBLIC ENTITY IN COMPLIANCE WITH THE FOURTH AMENDMENT, IS THERE A CONTINUING FOURTH AMENDMENT OBLIGATION TO JUSTIFY THE RETENTION OF THE PROPERTY?

As underscored by the Supreme Court's somewhat open-ended decision in *Manuel v. City of Joliet*, the exact parameters of a Fourth Amendment claim by an individual once process has been initiated and a defendant held pursuant to that process, is somewhat up in the air. There is a similar uncertainty about the nature and extent of any Fourth Amendment claim based upon the continued seizure of property that was initially properly seized under the Fourth Amendment.

The Seventh Circuit has held that once "an individual has been meaningfully dispossessed, the seizure of the property is complete, and once justified by probable cause, that seizure is reasonable," and the Fourth Amendment "then cannot be invoked by the dispossessed owner to regain his property." *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003); *Gonzalez v. Village of West Milwaukee*, 671 F.3d 649, 660 (7th Cir. 2012) (seizure occurred when the property was taken; the government's continued possession is not a separate Fourth Amendment violation). Four other circuits have joined the Seventh Circuit in concluding that under such circumstances, the plaintiff's remedy is not under the Fourth Amendment, but the Fifth Amendment, for violation of due process. *See Denault v. Ahern*, 857 F.3d 76, 84 (1st Cir. 2017); *Shaul v. Cherry Valley-Springfield Central School Dist.*, 363 F.3d 177, 187 (2d Cir. 2004); *Fox v. Van Oosterum*, 176 F.3d 342, 351-52 (6th Cir. 1999); *Case v. Eslinger*, 555 F.3d 1317, 1330-31 (11th Cir. 2009); *Byrd v. Stewart*, 811 F.2d 554, 554-55 (11th Cir. 1987).

In *Brewster v. Beck*, 859 F.3d 1194 (9th Cir. 2017), the Ninth Circuit expressly disagreed with the Seventh Circuit's decision in *Lee* in holding that the seizure of an automobile for 30 days from an unlicensed driver pursuant to a California statute violated the Fourth Amendment because there had been no determination as to the reasonableness of the 30-day period. *Id*. at 1196-97. The court rejected the contention that the statutory proceedings met due process, noting that the plaintiff had established a separate Fourth Amendment violation. The court found that although the initial seizure was lawful under the Fourth Amendment, nonetheless, the continued retention of the property failed to meet Fourth Amendment standards. *Id.*

The Supreme Court's suggestion in *Manuel* that Fourth Amendment concerns may be implicated despite the commencement of proceedings that have confirmed the initial

detention, may, coupled with the Ninth Circuit's decision in *Brewster*, lead to more frequent claims concerning detention of property incident to arrest. The nature and extent to which the Fourth Amendment applies to a property once it has been initially seized remain an open and ongoing issue for litigation.

VIII. MAY A PUBLIC EMPLOYEE BE DISCIPLINED FOR ENGAGING IN AN EXTRAMARITAL AFFAIR?

There is currently an acknowledged circuit split on whether a public employee may be disciplined for engaging in an extramarital affair. In *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017), the court concluded that the Constitution was not violated when two law enforcement officers were fired for moving in with each other's wives before finalizing a divorce from their current wives, noting that the law enforcement agency's policies were supported by a rational basis. Similarly, in *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008), the court upheld termination of an officer on the basis of an extramarital affair under a rational basis test, concluding that there is no "fundamental liberty interest 'to engage in a private act of consensual sex.'"

In contrast, in *Perez v. City of Roseville*, ___ F.3d __, 2018 WL 797453 (9th Cir. 2018), the court held that terminating the plaintiff for engaging in a consensual extramarital affair conducted off duty, violated the plaintiff's right to intimate association. *Id*. at *9-10.

IX. DOES *FARRAR V. HOBBY*, 506 U.S. 103 (1992) APPLY ONLY TO CLAIMS WHERE PLAINTIFFS HAVE OBTAINED NOMINAL DAMAGES, AND UNDER WHAT CIRCUMSTANCES MAY A COURT AWARD FULL ATTORNEY'S FEES IN THE ABSENCE OF INJUNCTIVE RELIEF BASED ONLY UPON THE IMPORTANCE OF THE CONSTITUTIONAL ISSUE VINDICATED BY THE LITIGATION?

In *Farrar v. Hobby*, 506 U.S. 103, the Supreme Court held that where a plaintiff only obtains nominal damages, in the absence of injunctive relief, an appropriate attorney fee may be no fee at all, notwithstanding the plaintiff's status as a prevailing party. Although Justice O'Connor joined the majority opinion, she filed a separate concurring opinion to more fully explain why fees should be denied in certain cases, and the circumstances in which even the award of nominal damages may give rise to a full fee claim. As a result, the circuit courts have largely viewed Justice O'Connor's concurring opinion as setting the specific guideposts for determining the appropriateness of fees in a case where the plaintiff obtains nominal, or at least fairly minuscule, damages.

Justice O'Connor opined that in evaluating the appropriateness of a fee award, courts should compare the amount of damages sought as against the amount actually obtained, whether any ancillary relief was obtained, for example, injunctive relief, and finally, whether the litigation, notwithstanding the relatively low damage award, nonetheless vindicated an important public right. *Id*. at 121-23.

One recurring open issue not resolved by *Farrar* is what constitutes a "nominal" award for purposes of awarding no attorney's fees. Some courts have noted that *Farrar* itself involved the quintessential nominal recovery, i.e., one dollar in damages, have therefore held that it is inapplicable anytime a plaintiff covers more than that amount. *See, e.g., Hescott v. City of Saginaw*, 757 F.3d 518, 525 (6th Cir. 2014) (plaintiff's recovery of $5,000 in compensatory damages does not constitute nominal damages under *Farrar*). Other circuits have held that *Farrar* may apply any time there is a wide disparity between the amount of damages sought and actually recovered. *See, e.g., Aponte v. City of Chicago*, 728 F.3d 724, 731 (7th Cir. 2013) (where plaintiff sought over $100,000 in damages but recovered only $100, *Farrar* applies);[2/] *Corder v. Brown*, 25 F.3d 833, 836-37 (9th Cir. 1994) (*Farrar* applies to reduce fee award to plaintiff who sought $1 million in damages but recovered only $24,000).

The greatest inconsistency with respect to applying Justice O'Connor's three factors in determining a fee award in a case with nominal damages is whether, in the absence of injunctive relief, the plaintiff has nonetheless vindicated an important constitutional right and thus is entitled to full fees. Because there is no precise definition of what constitutes vindication of an important public right, the circuit courts have been essentially free to reverse or affirm district court fee awards in highly unpredictable fashion. *Compare Frizzell v. Szabo*, 647 F.3d 698, 703 (7th Cir. 2011) (affirming award of no attorney's fees under *Farrar*, where plaintiff recovered only nominal damages on his excessive force claim arising out of tasing at a traffic stop, noting plaintiff achieved negligible success on the excessive force claim and did not serve a significant public purpose because commonsense supports avoidance of use of excessive force and there was no evidence of general law enforcement practice of excessive force in using tasers); *with Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997) (plaintiff entitled to lodestar-calculated reasonable attorney fee award despite $1.00 in nominal damages,

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[2/] But *see Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997) (plaintiff's recovery of $500 does not justify denial of all fees under *Farrar*; case must be remanded for district court to assess size of damage award in light of amount sought and noting that relatively small recovery could still justify full fees).

since he achieved "material victory" that "accomplished a public goal, namely, encouraging governments to scrupulously perform their constitutional duties"); *Morales v. City of San Rafael*, 96 F.3d 359, 364-65 (9th Cir. 1996) (assuming *Farrar* applies to any damage award greater than $1.00, full fees warranted because the "jury held both the City and the officer involved responsible for his unlawful arrest. Because it assessed damages against the defendants, the verdict established a deterrent to the City, its law enforcement officials and others who establish and implement official policies governing arrests of citizens. Thus, it served the public purpose of helping to protect Morales and persons like him from being subjected to similar unlawful treatment in the future.").

Given the widely disparate application of *Farrar*, even between panels of the same circuit, with some affirming large fee awards notwithstanding an award of only nominal damages based upon a conclusory statement that a significant public policy has been vindicated, with others reversing a fee award in a case with only nominal damages based upon the conclusion that no significant right was vindicated, it would seem that the time is ripe for the Supreme Court to revisit the issue. Given the current composition of the court, the best case would be one where there is a relatively small, if not purely nominal award of damages, and a very large attorney-fee award, without an award of injunctive relief or a finding of *Monell* liability. Such a case would give the court a chance to clarify the issue of whether *Farrar* applies only to a $1.00 nominal damages case, or to any case in which there is a disparity between the amount sought and the amount eventually recovered, and, moreover, the criteria that should be employed by a trial court in determining whether an important legal right has been vindicated notwithstanding the absence of injunctive relief or relief directly against a municipality.

X. DOES *HECK V. HUMPHREY*, 512 U.S. 477 (1994) APPLY TO CLAIMS BY PLAINTIFFS FOR WHOM HABEAS CORPUS IS NOT AVAILABLE AS A REMEDY?

In *Heck v. Humphrey*, 512 U.S. 477, the Supreme Court held that where a section 1983 claim would undermine the basis of a criminal conviction, the plaintiff cannot pursue the claim unless the underlying conviction has been vacated by direct review, or by habeas corpus. *Id*. at 486-87. In *Heck*, the plaintiff was still in custody at the time he filed his civil suit challenging the basis of his conviction, and the court analogized to the tort of malicious prosecution which required that the underlying action have terminated in the plaintiff's favor before allowing a claim to proceed. *Id*. at 484-85.

In a concurring opinion, Justice Souter, joined by Justices Blackmun, Stevens and O'Connor, noted that allowing civil suits by a prisoner in custody would be inconsistent with Congress's enactment of the habeas corpus statute as the means for providing federal review of a state conviction. *Id*. at 499-501. Justice Souter noted, however, that where habeas relief might be unavailable, say for example, where someone was simply improperly fined, it would make little sense to deny the claimant a section 1983 remedy. *Id*. at 502-03.

In *Spencer v. Kemna*, 523 U.S. 1 (1998), Justice Souter, joined by Justices O'Connor, Ginsburg and Breyer, concurred in the opinion of the court finding that a criminal defendant's petition for writ of habeas corpus was moot, because he had served the entirety of his sentence, but wrote separately to emphasize that the convicted defendant need not secure habeas relief at this juncture in order to preserve a claim for damages under section 1983. Citing his concurring opinion in *Heck*, Justice Souter explained that *Heck* would not bar a section 1983 claim by a prisoner who is no longer in custody and for whom habeas corpus relief was unavailable. *Id*. at 19-21.

The Supreme Court has expressly noted that it is an open issue whether *Heck* bars a section 1983 claim by a plaintiff for whom habeas corpus was unavailable as a remedy. *Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004). There is currently a clear circuit split on the issue. The Fourth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits have all recognized an exception to the *Heck* bar based on Justice Souter's concurring opinion in *Spencer*, and allow section 1983 claims to proceed where the plaintiff, through no fault of his or her own, was unable to seek habeas corpus relief. *See, e.g., Wilson v. Johnson*, 535 F.3d 262, 266-68 (4th Cir. 2008); *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007); *Harden v. Pataki*, 320 F.3d 1289, 1298-99 (11th Cir. 2003); *Nonnette v. Small*, 316 F.3d 872, 876-77 (9th Cir. 2002); *Carr v. O'Leary*, 167 F.3d 1124, 1127 (7th Cir. 1999); *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). In contrast, the First, Third, Fifth and Eighth Circuits have held that the *Heck* favorable termination requirement prevents a section 1983 claim for damages even when brought by plaintiffs whose release from custody has made habeas relief unavailable. *See, e.g., Figueroa v. Rivera*, 147 F.3d 77, 81 n.3 (1st Cir. 1998); *Williams v. Consovoy*, 453 F.3d 173, 177-78 (3d Cir. 2006); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007).

XI. DOES SECTION 1983 ENCOMPASS A CLAIM FOR WRONGFUL DEATH, AND IF SO, WHAT ARE ITS ELEMENTS?

Although the Supreme Court has had numerous cases before it where the use of force by police officers has resulted in the death of the plaintiffs' relative, the court has never addressed the issue of whether section 1983 provides a remedy for wrongful death, and, if so, the elements of any such claim. The court has twice granted certiorari in cases raising the issue, only to dismiss them as improvidently granted.

The circuit courts have taken different approaches with respect to recognizing a claim by a decedent's relatives under section 1983. The Fifth Circuit has held that in section 1983 actions, section 1988 allows incorporation of state law that is not inconsistent with the federal remedy. As a result, the Fifth Circuit allows section 1983 claims of wrongful death to be asserted by borrowing from state law. *See Brazier v. Cherry*, 293 F.2d 401, 407-09 (5th Cir. 1961); *Rogers v. Lancaster Police & Fire Dep't*, 819 F.3d 205, 208-09 (5th Cir. 2016).

Other circuits have allowed what amounts to wrongful death claims under section 1983 on the theory that the surviving relatives are entitled to compensation for the impairment of their right to familial association with the decedent under the Fourteenth Amendment. For example, the Ninth Circuit has held that relatives may recover for the use of deadly force against the decedent to the extent it violates the Due Process Clause of the Fourteenth Amendment, i.e., that the force was unrelated to legitimate law enforcement purpose. *Gonzalez v. City of Anaheim*, 747 F.3d 789, 797-98 (9th Cir. 2014) (en banc); *A.D. v. California Highway Patrol*, 712 F.3d 446, 453 (9th Cir. 2013) (children entitled to recover for loss of companionship and society of their mother where she was killed when police used force that "shocked the conscience" and thus violated children's liberty interest).

The Tenth Circuit has similarly recognized that parents and siblings may assert a due process claim for violation of their right to familial association, but has limited the claim to those instances in which the conduct is *intentionally* directed at the familial relationship. Thus, it has denied wrongful death recovery under section 1983 to parents and siblings in a deadly force case because the injury to the familial relationship was only incidental to the underlying conduct of the officer. *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1190 (10th Cir. 1985); *see also Estate of BIC v. Gillen*, 710 F.3d 1168, 1176 (10th Cir. 2013) (grandparents could not assert a claim against social worker for death of grandchild as a result of neglect, because there was no evidence that social

worker intended to interfere with their familial relationship with the child); *Shaw v. Stroud*, 13 F.3d 791, 804-05 (following *Trujillo*); *Harpole v. Arkansas Dept. of Human Services*, 820 F.2d 923, 928 (8th Cir. 1987); *Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986).

Given the ubiquity of deadly force cases in the federal courts, it should only be a matter of time before the United States Supreme Court is required to address the elements of such a claim, whether under the Due Process Clause or incorporation of state law under Section 1988, and determine which relatives may bring such claims—children, spouses, grandparents, siblings, etc.