SAMPLE BRIEF FORMATS

THE LANGUAGE IN THE SAMPLES, I.E. THE REQUESTS FOR ORAL ARGUMENT, THE STATEMENTS OF JURISDICTION, FORWARDING LETTERS, ETC., MAY NOT APPLY TO YOUR CASE. YOU WILL HAVE TO TAILOR YOUR BRIEFS TO THE SPECIFICS OF YOUR CASE AND USE YOUR OWN LANGUAGE. THESE FORMATS ARE ONLY AN ORGANIZATIONAL AND ILLUSTRATIVE GUIDE, NOT A FORM TO BE SUBMITTED IN EACH CASE.

These formats are designed to assist you in preparing your briefs, but you must closely read Fed. R. App. P. 28 and 32, and 5th Cir. R. 28 and 32 to ensure your brief is correctly prepared. We also provide a brief filing checklist on our website assist you further. Please note, these are samples of the electronic version of the documents. Paper copies must have the required covers with the proper color and binding. We hope this information is of help to you.

Important notice regarding citations to the record on appeal to comply with the recent amendment to Fifth Circuit Rule 28.2.2.

Parties are directed to use the new ROA citation format in Fifth Circuit Rule 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the format "YY-NNNNN.###." In single record cases, the party will use the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###.)

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to Fifth Circuit Rule 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to the pages in the EROA cited by parties. The court intended the new citation format for use **only** with records using the new EROA pagination format, but the Clerk's Office failed to explain this limitation in earlier announcements

Sample Appellant's Civil Brief

Sample Appellants Civil Record Excerpts

Sample Appellee's Civil Brief

Sample Civil Reply Brief

Sample Amicus Brief

Sample Appellants Criminal Brief

Sample Anders Criminal Brief

Sample Reply Criminal Brief

SAMPLE REHEARING FORMATS

Sample Panel Rehearing

Sample En Banc Rehearing

CASE NO. 13-30972
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

RESA LATIOLAIS, Plaintiff-Appellant

VERSUS

DONALD CRAVINS, SR.; CITY OF OPELOUSAS; CLAUDETTE GALLOW, surviving spouse of Roylis Gallow, Defendant-Appellees

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ORIGINAL BRIEF OF PLAINTIFF-APPELLANT, RESA LATIOLAIS, FROM THE SEPTEMBER 24, 2013 JUDGMENT IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF LOUISIANA, LAFAYETTE-OPELOUSAS DIVISION, CIVIL ACTION NO. 6:09-CV-00018, THE HONORABLE RICHARD T. HAIK PRESIDING

A CIVIL PROCEEDING

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I. CERTIFICATE OF INTERESTED PERSONS
CASE NO. 13-30972

(1) No. 13-30972, Resa Latiolais v. Bradley Griffith, et al.,
USDC No. 6:09-CV-18

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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II. STATEMENT REGARDING ORAL ARGUMENT

The conspiracy forming the basis of this lawsuit is factually intensive, and Plaintiff respectfully suggests that the Court would benefit from hearing counsel explain certain details that may shed further light upon the evidence presented at trial. Tone, inflection, and other information gleaned from having heard the witnesses testify are lost in the cold record, and some further elucidation beyond that contained in the written briefs would benefit the Court in these proceedings. Plaintiff seeks a reversal of the trial court based upon the application of the facts in this case to the law in addition to legal errors committed by the trial court, and it is an understanding of the nuances in the facts of this matter that oral argument would benefit.

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IV. TABLE OF AUTHORITIES

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V. JURISDICTIONAL STATEMENT

A. District Court's Jurisdiction

The district court had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, which grants the district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." Plaintiff's suit against the defendants was based upon 42 U.S.C.A. § 1983. United States law requires that those who deprive any person of rights and privileges protected by the Constitution of the United States provided by state law be liable in action at law, suit in equity, or other appropriate measure. 42 U.S.C.A. §1983. A private party may be liable under 42 U.S.C.A. § 1983 for conspiring with state actors to deprive a citizen of their civil rights. *Keko v. Hingle*, 318 F.3d 639 C.A.5 (La.) 2003; *Dennis v. Sparks*, 449 U.S. 24 (U.S., 1980.)

In the instant matter, Plaintiff, Resa Latiolais ("Resa"), is a United States citizen and resident of Lafayette, Louisiana. She is the parent of a 12-year-old son, Cole Latiolais. Resa is entitled to relief sustained as a result of the conspiracy of Defendants including attorneys' fees, costs, expenses and psychological and emotional distress experienced as a result of the long endured custody battle for her child. Defendant, Bradley Griffith, is the father of Cole. Until the institution of his custody claim in October, 2005, he had never sought visitation with Cole, much less custody. Brad became enraged with Resa once she began seeing another man,

and engaged in unlawful behavior, including but not limited to, making false public accusations of child abuse, conspiring to entrap, falsely imprison, unlawfully arrest, harass and deprive her of custody of her child.

Defendant, Officer Roylis Gallow, was a police officer with the Opelousas City police department. Officer Gallow conspired with Bradley Griffith to entrap Resa Latiolais in a citation for battery and to wrongfully deprive her of custody of Cole. Defendant, Mr. Donald Cravins, Sr., was a Louisiana State Senator when he conspired with Griffith to deprive Resa of custody of Cole by attempting to influence testimony of the officer who investigated the claims of child abuse made against Resa. Specifically, Mr. Cravins personally called Officer Alex Montgomery, III, of the Lafayette Police Department and requested that he "help Brad out" at the custody trial when he testified.

Defendant, the City of Opelousas, is a Louisiana municipality which employed Officer Roylis Gallow at all relevant times. The city is liable to plaintiff under Louisiana Civil Code Article 2315 under a theory of *respondeat superior* for the tortious actions of Officer Gallow made in the course and scope of his employment.

Federal jurisdiction over pendant state claims is governed by 28 U.S.C. § 1367, which states: "[I]n any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims

that are so related to claims in the action ... that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

B. Court of Appeal's Jurisdiction

This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 1291 because the judgment below is a final judgment of the United States District Court.

C. Timeliness of Appeal

The district court judgment was executed September 5, 2013 and entered on September 6, 2013. Plaintiff filed a Motion for Partial New Trial and for Rule 59(e) Amendment of Judgment on September 6, 2013 after the Judgment was entered. The Motion was denied by the trial court by order entered on September 26, 2013. Plaintiff filed the Notice of Appeal on August 20, 2013 which, pursuant to Federal Rule of Appellate Procedure 4(a)(4)((B)(i) became effective on the date the order disposing of the Motion was entered, September 26, 2013.

D. Final Judgment

This appeal is from a final judgment that disposes of all parties' claims.

VI. STATEMENT OF ISSUES

1. Did the trial court err when it granted judgment as a matter of law in favor of Defendant, Donald Cravins, Sr.?

2. Did the trial court err when it allowed the disclosure to the jury of the fact that Plaintiff settled her claims against Bradley Griffith?

3. Did the jury err when it found that the Defendant, City of Opelousas was not vicariously liable for the actions of Defendant, Officer Roylis Gallow?

4. Did the jury err when it found that Defendant, Officer Roylis Gallow, was not acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley Griffith?

5. Did the jury err when it awarded damages of only $10,647.00?

VII. STATEMENT OF THE CASE[1]

Plaintiff filed her Complaint on January 7, 2009.[2] Plaintiff amended her Complaint on August 28, 2009 and on March 3, 2010. In the second amendment, Plaintiff added Claudette Gallow as the succession representative of Roylis Gallow.[3] Defendants, Gallow and the City of Opelousas, filed a Motion for Summary Judgment on May 17, 2010.[4] Defendant, Donald Cravins, filed a Motion to Dismiss and/or Motion for Summary Judgment on May 20, 2010.[5]

[1] Plaintiff has included the statement of facts and rulings to be reviewed in this section of the brief in accordance with the revised FRAP Rule 28 effective December 1, 2013.
[2] ROA.29.
[3] Plaintiff refers to Officer Gallow as the defendant throughout this brief.
[4] ROA.490.
[5] ROA.555.

The district court rendered its Judgment and Memorandum Ruling on March 29, 2011 denying the motions for summary judgment of appellants, Gallow and Cravins.[6] Defendants Gallow and Cravins filed separate appeals of the district court's ruling claiming they were entitled to qualified immunity among other things. This Court affirmed the trial court's ruling denying summary judgment for these defendants and affirmed the trial court's ruling that Plaintiff's claims were not prescribed.[7]

The matter proceed to trial before a jury on August 13 through 16, 2013. At the close of Plaintiff's case in chief, the trial court granted Defendant, Donald Cravins, Sr.'s, motion for judgment as a matter of law and dismissed Plaintiff's claims against him. The jury returned a verdict in favor of Plaintiff and against Defendant, Claudette Gallow as successor to Roylis Gallow, in the amount of $10,647.00. The jury did not find that the City of Opelousas was vicariously liable for the actions of Officer Gallow and did not find that Officer Gallow was acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley Griffith.[8] Plaintiff filed a Motion for Partial New Trial and for Rule 59(e) Amendment of Judgment that the district court denied.

[6] ROA.1884,1912.
[7] ROA.1926.
[8] ROA.3806.

Plaintiff appeals the judgment to the extent it dismissed Donald Cravins, Sr., found that the City of Opelousas is not vicariously liable, found that Officer Gallow was acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley Griffith, and awarded only $10,647.00 in damages. In connection with these rulings, Plaintiff argues that the district court erred when it allowed the introduction of the fact that Plaintiff settled with Bradley Griffith.

For the Court to understand the heinous nature of the conspiracy against Plaintiff which included orchestrated arrests, criminal prosecutions, coercion of Plaintiff's teenage daughter to make false allegations of abuse to the police, the removal of Plaintiff's son by OCS for bogus charges of child abuse, and much more, the facts are delineated in significant though not exhaustive detail.

On September 23, 2005, with Hurricane Rita advancing, Resa evacuated Lafayette with her four-year-old son, Cole, her sixteen-year-old daughter, Lana, and Greg Chappell ("Greg"), who at the time was a friend she knew from church. Cole's father, Defendant, Brad Griffith ("Brad") was invited to travel with them but declined. When Brad learned that Greg accompanied Resa, he became jealous and began plotting the events that have led the parties to this Court. Brad retained his attorney, Diane Sorola, on September 26, 2005, and on October 5, 2005, filed for *sole custody* of Cole with Resa to have only *supervised visitation*. Brad's

Petition was devoid of any specific facts other than a statement that Resa "has lately not made choices which are in the child's best interest and has been hurtful to the child." Brad was aware of this deficiency and concocted a scheme to create the facts he needed to take custody of Cole away from Resa.

Prior to October 5, 2005, Resa had never been involved in any civil or criminal matter nor had the police shown up at her home. Between October 5, 2005 and December 8, 2005, due to Brad's schemes, Resa was investigated for food stamp fraud, investigated by OCS on two occasions on trumped up charges, confronted by police officers on several occasions, reported for criminal damage to property, and charged with simple battery. In July 2006, she was harassed to the point of seeking court intervention, had retaliatory restraining orders taken against her, and she was arrested for aggravated assault. Brad's involvement with all of this is well documented through his cell phone records to the various confederates involved in his schemes.[9]

[9] ROA.3949-3950 (Testimony of John Broussard); ROA.4021-4026 (Testimony of Alex Montgomery); ROA.3846-3850, ROA.3870-3879 (Testimony of Resa Latiolais); Exhibits 14 (ROA.3587), 15 (ROA.3592), 20 (ROA.2413), 25 (ROA.3599), 26 (ROA.3600), 27 (ROA.3603), 28 (ROA.3608), 29 (ROA.3611), 30 (ROA.3615), 31 (ROA.3617), 32 (ROA.3620), 33 (ROA.3624), 34 (ROA.3627), 35 (ROA.3631), 36 (ROA.3635), 37 (ROA.3638), 38 (ROA.3642), 39 (ROA.3646), 40 (ROA.3648), 41 (ROA.3672), 42 (ROA.3649), 43 (ROA.3651), 44 (ROA.3652), 45 (ROA.3653), 46 (ROA.3660), 47 (ROA.3663), 48 (ROA.3665), 49 (ROA.3668), 50 (ROA.3669), 51 (ROA.3671). To reduce the number of footnotes, citations to supporting documentation often appear at the end of paragraphs rather than at the end of each sentence.

As established with cell phone records and testimony at trial, Brad began meeting with Resa's sixteen year-old daughter, Lana, each morning from October 23, 2005 through October 26, 2005, unbeknownst to Resa. During those meetings Brad told Lana that her mother did not love her, that she wanted to abort her brother, Cole, and that she was abusing Cole. To arrange the meetings, Brad spoke directly with Jessica Harbin, a fourteen year-old girl who lived with her mother, Jan Huffman, and who attended the same school as Lana. At Brad's request, Jessica called Lana to assist in the effort to turn Lana against Resa and to gather information helpful to the conspiracy. Brad's efforts resulted in Lana acting incorrigibly toward Resa to the point that on October 25, 2005 Resa ended up slapping Lana.[10]

The next day, Lana told Jan Huffman about the incident with Resa and Jan convinced her that she must report Resa for child abuse. Jan and Jessica brought Resa to see Carencro police chief, Carlos Stutes, to report child abuse. Brad met Jan, Jessica, and Lana at the Carencro police station. Chief Stutes determined that he did not have jurisdiction and called the Lafayette Parish Sheriff's Department who dispatched Deputy Dirk Campbell. Deputy Campbell was the boyfriend of

[10] ROA.3926-3933 (Testimony of Lana Latiolais); Exhibits 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, and 51. Record of Appeal page numbers for the exhibits listed in this footnote may be found at footnote 9.

Jan's daughter, Danielle. Deputy Campbell interviewed Lana and took her statement at the Carencro police station. He left Lana in Jan's care.[11]

Jan, Jessica, Lana, and Brad then drove to El Portillo, a Mexican restaurant on the North side of Lafayette. After a while, the Lafayette Parish Sheriff's office was called again regarding a second report of abuse by Lana. Deputy Campbell met Jan, Jessica, Lana, and Brad at El Portillo. This time, Lana reported that Resa abused Cole. Brad denied being present, but Deputy Campbell testified that Brad was sitting two chairs away from Lana as she made the report. Jan then brought Lana to Charisma, one of Brad's businesses, where she received free clothes, a new cell phone, some money, and a promise of the use of a limousine for her graduation.[12]

Based on Lana's second report, Deputy Campbell called the Office of Community Services ("OCS") to report child abuse, and Cole was removed from Resa's care by the police that night and given to Brad.

On October 28, 2005, Brad had Lafayette Police officer, Theresa Boatner, a friend and the lover of one of his tenants, prepare a police report of criminal damage to property alleging Resa and Greg broke his truck window. The report was submitted with a notation that the victim, Brad, did not wish to press charges

[11] ROA.4218-4221 (Testimony of Janet Huffman); ROA.4149-4162 (Testimony of Dirk Campbell).

[12] ROA.4223-4224 (Testimony of Janet Huffman); ROA.4149-4162 (Testimony of Dirk Campbell); ROA.4026 (Testimony of Alex Montgomery); ROA.3926-3933 (Testimony of Lana Latiolais).

so the District Attorney never took action. Nevertheless, Brad subpoenaed the false report from the police department to use against Resa at trial.[13]

That same day, two days after the report of "child abuse," OCS determined there had been no abuse and required Cole be returned to Resa. Lafayette Police Officer Alex Montgomery called Brad to advise that he must return Cole to Resa. Brad asked Deputy Montgomery what would happen if he refused, so Deputy Montgomery decided to send two police cars to Charisma to ensure Cole's return went smoothly. When Resa arrived at Charisma, Officer Theresa Boatner was there and, it later was determined, Brad's personal private investigator, Robert Williamson, was hiding in the parking lot taking photographs of the exchange. According to the testimony of Lafayette Police Officer Ron Robicheaux, who was there at the request of Deputy Montgomery, Brad was screaming irately in the parking lot and making quite a scene. The photographs taken by Williamson were later introduced into evidence in an effort to show that Resa had somehow orchestrated a lot of unnecessary drama during the exchange of Cole, and based upon the trial court's comments, the photos had the intended effect.[14]

On November 4, 2005, Resa filed a stay away order against Brad on behalf of Lana after learning from Lana about her contact with Brad, Jan, and Jessica. On

[13] ROA.4342-4344 (Testimony of Bradley Griffith).
[14] ROA.4344-4346 (Testimony of Bradley Griffith); ROA.4026-4027 (Testimony of Alex Montgomery); ROA.4144-4177 (Testimony of Ronald Robicheaux).

November 10, 2005, the trial court granted an injunction prohibiting Brad, or third parties acting on his behalf, from contacting Lana.[15]

Before the next plot is explained, a little history on one of the participants is needed. Cindy Hebert is Brad's girlfriend of twenty years with whom he had a daughter, Paige Griffith. Cindy was criminally prosecuted and served probation for threatening to kill Resa.[16]

On November 30, 2005, Brad was to meet Resa with Cole at McDonald's at 7:30 a.m. so Resa could take Cole to the lab at Opelousas General Hospital for a test ordered by Cole's physician. When Brad failed to show up at McDonald's, Resa began calling his cell phone but he did not answer. Brad eventually answered his cell phone and told Resa that he was at Opelousas General with Cole. Resa hurried over to Opelousas General since she had the order for the lab work and to be with Cole for the test.[17]

After arriving at the hospital, Resa still could not find Brad and Cole because while Brad kept telling her he was in the hospital, he was not. Resa noticed Officer Ricky Gallow in the hospital talking on his cell phone. Resa approached him to request his assistance. Officer Gallow followed Resa as she walked to find Brad, and when she did, Cindy Hebert was with him. Resa, already

[15]ROA.4391-4393 (Testimony of Bradley Griffith).
[16] ROA.3860 (Testimony of Resa Latiolais).
[17] ROA.3862-3867 (Testimony of Resa Latiolais).

upset about Brad's stunt, was further aggravated to see the woman who served parole for threatening to kill her there with her child. She walked over, took Cole from Brad, and turned to head to the lab. Cindy stood in her path and said "you don't deserve your son." Resa pushed past Cindy and walked to the lab. Officer Gallow called for backup, and when Resa returned from the lab, there were numerous police officers there. Resa was cited with simple battery.[18]

Through cell phone records, it was established at trial that it was Brad with whom Officer Gallow was on the phone when Resa walked up that morning.[19] As the trial court found, Brad had arranged for Gallow to be present that morning so that he could orchestrate an event in which he would have a "disinterested" police officer witness behavior on the part of Resa about which he could testify, and again it worked, at least initially. Not having the financial resources to fight the criminal charge, and not being able to prove at the time the connection between Officer Gallow and Brad, Resa pleaded *nolo contendre* to the battery charge. The incident, as relayed by Officer Gallow in his testimony in the custody trial on January 19, 2006, along with the constant charges of child abuse, were used by Dr. LeCorgne to paint Resa as having anger and impulse control problems and being a potential danger to Cole, and Brad was actually commended by the trial court for his wise decision to "stay out of the fray" during the incident.

[18] *Id*.
[19] Exhibit 71, pp. 1610 (ROA.2883), 1631 (ROA.2904).

On that same day, November 30, 2005, Brad brought Cole to a pediatrician who had never seen Cole before, Dr. Carmen Koubicek, once again claiming child abuse. Brad had been arranging this visit while Resa was looking for him at the hospital. Brad told Dr. Koubicek that a bruise on Cole's arm was caused by Greg Chappell pinching Cole and that a bruise on Cole's buttock was caused by Resa spanking Cole with a spoon. Based upon Brad's allegations, Dr. Koubiceck called OCS to report Resa.[20]

Two days later, on December 2, 2005, Brad had Carlos Stutes, the Sunset police chief, send police officers to Lana's school, pull her out of class, and ask her if she was alright. This was in direct violation of the restraining order against Brad. However, when counsel for Resa moved for Brad to be found in contempt, the trial court commented that Brad would be "insane" to use the police to violate the restraining order and therefore denied the motion to find Brad in contempt. During that hearing, the trial court admonished *both* parties for the involvement of so many third parties in this matter and stated this was the "worst start" to litigation he had seen since he started practicing law. The trial court failed to note that every single one of the third parties to which he referred were connected to Brad, not Resa.[21]

[20] ROA.4352-4354 (Testimony of Bradley Griffith).
[21] ROA.3933 (Testimony of Lana Latiolais); ROA.4396-4399 (Testimony of Bradley Griffith).

At some point between the date the OCS investigation was closed on December 20, 2005 and January 25, 2008 when the investigating officer, Detective Alex Montgomery testified, Senator Donald Cravins, Sr. called Detective Montgomery and asked him "to help Brad out" in the custody trial.[22]

On January 30, 2006 and March 20, 2006, Resa appeared in court in St. Landry Parish regarding the November 30, 2005 incident with Cindy Hebert. On both dates, Brad had telephone conversations with Officer Gallow who was present at the court proceedings to testify against Resa.[23]

On April 7, 2006, Jessica Harbin began a pattern of harassment that led to multiple hearings before various judges and ultimately to Jessica's arrest. Between April 7, 2006 and April 19, 2006, she called Resa to harass her no less than 50 times. Jessica usually called Brad before and after she called Resa.[24]

On April 20, 2006, Dr. LeCorgne issued his report on the mental health evaluations of Resa and Brad. Based upon that report, which was largely premised upon the November 30, 2005 incident at Opelousas General Hospital, on May 1, 2006 the trial court *took custody away from Resa*, gave it to Brad, and required a portion of Resa's visitation to be *supervised*.[25]

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[22] ROA.4032 (Testimony of Alex Montgomery).
[23] ROA.2891, Exhibit 71, pp. 1618-20.
[24] ROA.4108-4127 (Testimony of Kevin Stelly); Plaintiff's Exhibit 45, pp. 764-65 (ROA.3653-3654).
[25] ROA.3869-3870 (Testimony of Resa Latiolais).

On May 17, 2006, the harassment by Jessica Harbin continued. On May 18, 2006, Jessica called Resa 23 times. On July 7, 2006, Jessica was arrested for making harassing phone calls to Resa and Lana. That day Jessica's mother, Jan, was videotaped sitting in front of Resa's house honking her car horn trying to intimidate Resa. On July 17, 2006, Jan and Jessica filed for retaliatory TROs against Resa, Greg, and Lana. On July 20, 2006, Jessica was arrested again for violating the TRO secured by Resa.[26]

From July 15, 2006 through August 15, 2006, Cindy Hebert and Brad were having difficulty and Brad threw Cindy and their sixteen-year-old daughter, Paige, out of their home, and she was homeless and jobless.[27] Cindy became afraid that Brad was going to take Paige from her the way he had at that point successfully taken Cole from Resa. As a result, Cindy contacted counsel for Resa who recorded the conversation. In that conversation, Cindy detailed some of the steps Brad had taken to set Resa up, Brad's involvement with dirty cops and various public officials, and a whole laundry list of illicit activity about which she was aware.[28]

On September 26, 2006, Jessica Harbin had Resa arrested for allegedly committing aggravated assault by trying to run over Jessica with her car. Those charges were eventually dropped, but not before the request for a TRO filed by Jan

[26] ROA.4238-4241 (Testimony of Janet Huffman); ROA.4198-4200, 4203-4207 (Testimony of Jessica Harbin); ROA.4108-4127 (Testimony of Kevin Stelly).
[27] ROA.4264-4265, 4283-4284 (Testimony of Cindy Hebert). Later when she attempted to recant the statements at the custody trial, she was again financially dependent upon Brad. *Id*.
[28] ROA.4259-4260, ROA.4264, ROA.4269-4270 (Testimony of Cindy Hebert).

and Jessica was finally heard on October 20, 2006. The evidence presented was completely manufactured, but the trial court (a different judge not acquainted with the history between the parties) granted the TRO.

In mid-October 2007, Brad used Jan and Jessica in an effort to prohibit Resa from videotaping the exchanges of Cole. Brad had consistently tried to have various courts order that exchanges not be videotaped. In one effort, on September 18, 2007, Brad filed a Petition for Temporary Restraining Order, Preliminary and Permanent Injunction against Greg. In that Petition, Brad complained of the fact that Greg filmed the exchanges between Resa and Brad on August 31, 2007 and September 4, 2007. An initial hearing on the Injunction was held on October 15, 2007 and a review of the exchange between counsel before Judge Conque in that proceeding shows that the real reason Brad brought the proceeding was to have the court order that no one videotape the exchanges between Resa and Brad. Counsel for Brad wanted that court to hold that the videotaping was "stalking" so that it could be prohibited. Counsel for Resa refused to allow her client to agree to quit videotaping the exchanges.

The very next day, October 16, 2007, Brad attempted to use Jan and Jessica to require Resa to stop videotaping by having them orchestrate an encounter in which they would claim that Resa was violating the restraining order they obtained against Resa by videotaping them. Had it not been for what Resa's videotape

actually showed regarding that incident, Resa would have been arrested in front of Cole.[29]

The twelfth and last day of trial was January 28, 2008. The trial court's Reasons for Ruling were issued on March 27, 2008. In spite of continuous efforts on the part of Resa and her counsel to increase Resa's visitation after the travesty that occurred on May 1, 2006, Resa was limited to visitation with Cole on alternating weekends and one day during the off-week for nearly two years. Resa filed the instant action on January 8, 2009.

VIII. SUMMARY OF THE ARGUMENT

The evidence at trial demonstrated that Defendant, Cravins, Sr., was part of the conspiracy and that his telephone call to Officer Montgomery was made in an effort to tamper with Officer Montgomery's testimony at the custody trial. At a minimum, the jury should have been afforded the opportunity to weigh the credibility of the witnesses and render a verdict regarding whether Cravins, Sr. was acting in furtherance of the conspiracy. The evidence clearly demonstrated that Officer Gallow was acting in the course and scope of his employment, and therefore the City of Opelousas is vicariously liable for his actions. Additionally, the evidence demonstrated that Officer Gallow was acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley

[29] ROA.3876-3878 (Testimony of Resa Latiolais); ROA.4202 (Testimony of Jessica Harbin).

Griffith. Lastly, the evidence demonstrated that the jury was confused by the improper disclosure of the fact that Resa settled her claims against Griffith and therefore awarded grossly inadequate damages of only $10,647.00.

IX. ARGUMENT

A. The Trial Court Erred When It Granted Judgment as a Matter of Law in Favor of Defendant, Donald Cravins, Sr.

1. Standard of Review

This Court reviews judgments as a matter of law *de novo* and in *Flowers v. S. Reg'l Physician Servs.*, 247 F.3d 229, 235 (5th Cir. 2001), explained the standard as follows:

> "A motion for judgment as a matter of law . . . in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 830 (5th Cir. 2000) (internal quotations omitted) (alteration in original) (quoting *Jones v. Kerrville State Hosp.*, 142 F.3d 263, 265 (5th Cir. 1998)). We review de novo the district court's ruling on a motion for judgment as a matter of law, applying the same legal standard as the trial court. *See id.*; *Brown v. Bryan County, Ok.*, 219 F.3d 450, 456 (5th Cir. 2000). Therefore, "judgment as a matter of law is proper after a party has been fully heard by the jury on a given issue, and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue." *Ford*, 230 F.3d at 830 (internal quotations omitted) (quoting *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 804 (5th Cir. 1997)). Moreover, "we consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non-moving party." *Brown, 219 F.3d* at 456. Although our review is de novo, we recognize that "our standard of review with respect to a jury verdict is especially deferential." *Id.* As such, judgment as a matter of law should not be granted unless the facts and inferences point "so strongly and overwhelmingly in the movant's favor that

> reasonable jurors could not reach a contrary conclusion." *Omnitech Int'l, Inc. v. Cloraox Co.*, 11 F.3d 1316, 1322 (5th Cir. 1994).

2. Argument

The evidence presented at trial included testimony from Senator Cravins, Officer Montgomery, and one of the co-conspirators, Jan Huffman. Senator Cravins's testimony was directly contradicted by that of Officer Montgomery, and was inconsistent with his own statements made in the course of discovery. Plaintiff's Interrogatory No. 21 asked:

> Please state the substance of the telephone conversation you had with Deputy Alex Montgomery in connection with the investigation he performed regarding the child abuse allegations made against Resa Latiolais with Cole Griffith.

Cravins answered:

> It was Mr. Cravins' understanding that Ms. Latiolais may have used her friendships with individuals in law enforcement to unduly influence the investigation into her alleged abuse of Cole Griffith, including possible circumvention of a court order. Mr. Cravins talked with Mr. Montgomery about whether Montgomery was in charge of the investigations of the alleged abuse, and addressed Mr. Griffith's concerns that Ms. Latiolais' political and/or social connections would play a role in the outcome of that investigation.

(Plaintiff's Exhibit 100).

At trial, however, Mr. Cravins testified that his attorney prepared that response on his behalf with little consultation with him and that it was an error on the attorney's part.[30]

Additionally, Mr. Cravins denied that he asked Officer Montgomery to "help Brad out" in the custody trial.[31] He denied knowing that there was ongoing custody litigation between Brad and Resa when he called Montgomery, much less that he told Montgomery that Resa and Brad were in a custody dispute.[32] Cravins denied knowing that Montgomery was going to testify at the custody trial.[33]

Officer Montgomery claimed that he could not remember much from the conversation that he had with Senator Cravins because he was involved in a head on collision with a truck on October 2, 2012, and he readily admitted that his memory would have been better in 2008 when he originally testified about his involvement with Cravins.[34]

Referring to his 2008 testimony, Officer Montgomery testified in pertinent part:

> Q: Detective Montgomery, can you tell me what Senator Don Cravins told you when he contacted you regarding this matter?
>
> * * *

[30] ROA.3965 – 3967.
[31] ROA.3961, 3967.
[32] ROA.3959, 3962.
[33] ROA 3963, 3967.
[34] ROA 4030 – 4031.

A: He asked me if I was investigating the situation of Resa Latiolais and Brad Griffith, and I said I had investigated an allegation of Resa Latiolais.

* * *

And he asked me – he said that there was an ongoing child custody thing, whatever, between Brad and Resa and could I help out Brad if I could.

Q: And so Senator Cravins advised you – or told you there's an investigation involving Resa Latiolais and Brad Griffith, right?

A: Right.

Q: And then he advised you further there was an ongoing child custody thing, and, quote, could I help Brad out if I could, correct?

A: Correct.[35]

Moreover, Officer Montgomery specifically testified that Senator Cravins knew he was going to be called as a witness in the custody case and the criminal investigation was "totally complete."[36] Additionally, in January 2008, just prior to Officer Montgomery's testimony at trial, neither Resa nor her counsel, Ms. Felder, had any way of knowing that Senator Cravins called Officer Montgomery regarding his testimony at the custody trial. Ms. Felder knew that only because Officer Montgomery specifically told her to ask him about being contacted by someone who tried to put pressure on him to "help Brad out." During trial in the

[35] ROA.4031 – 4032.
[36] ROA. 4034.

instant matter, Officer Montgomery merely denied recalling whether he met with Ms. Felder or otherwise told her to ask that question.[37]

Yet the story that Officer Montgomery tried to sell at the trial, with the help of Senator Cravins' attorney, Charles Cravins, was that he was not angry at Senator Cravins for calling him and attempting to influence his testimony, rather he was angry at Griffith for meddling in his investigation of Resa.[38] But Officer Montgomery was clear that the call from Cravins came after he closed both investigations (the original one and the second one after he re-opened the investigation at Brad's request). There was no effort at this point to meddle in what was a closed investigation. The effort was by Cravins to influence Montgomery's testimony at the custody hearing. That is why Montgomery was angry, and he was angry at Cravins.

Montgomery testified that he spoke with Charles Cravins and then signed an affidavit that someone other than Montgomery prepared.[39] The affidavit was executed June 2, 2013, after Officer Montgomery's head on collision in 2012. It contained several false statements.

The fifth allegation in the affidavit stated that "Alex Montgomery, III was angry with Brad Griffith because of the call, because Donald Cravins, Sr. was not

[37] ROA.4045 – 4046.
[38] ROA.4036.
[39] ROA.4036 – 4037.

the first person Griffith had called and lied to regarding Montgomery's handling of the custody dispute."[40] Yet Cravins testified that he really didn't know what the dispute was about, much less that it involved custody litigation.[41] And Montgomery's testimony under cross-examination by Charles Cravins was that the conversation between he and Cravins was not about the civil custody matter at all, but rather about the criminal matter.[42] This contention was completely impeached under re-direct.[43]

The sixth allegation in the affidavit is demonstrably false. It states that "Alex Montgomery and Donald Cravins, Sr. did not discuss any specific court case, either criminal or civil."[44] Officer Montgomery testified at trial that he understood from his conversation with Senator Cravins that Cravins knew he was being called as a witness at the custody trial and Cravins asked Montgomery to "help Brad out" through his testimony at the custody trial.[45]

There were other inconsistencies between the testimony of Senator Cravins and Officer Montgomery. Senator Cravins said he really did not know Officer Montgomery personally, but Officer Montgomery said they had known each other

[40] Ex. Cravins #2, ROA.3710.
[41] ROA.3959 – 3960, 3962.
[42] ROA.4067 – 4076.
[43] ROA.4079 – 4087.
[44] Ex. Cravins #2, ROA 3710.
[45] ROA.4040 – 4043.

for years and were on a first-name basis.[46] Cravins admitted stating in his deposition that Montgomery was not one of his favorite people, but tried to explain that statement away.[47]

Additionally, one of the most prominent players in the entire conspiracy was co-conspirator, Jan Huffman. She and her daughter, Jennifer Harbin, were inexorably intertwined in nearly all of the various plots against Resa. Jan testified that she and Senator Cravins were very well acquainted and it was even Cravins who told her she should get a restraining order against Resa to protect Jessica (though she claimed at trial that Resa's name was not used during these discussion).[48]

Proof of a conspiracy may be made by direct or circumstantial evidence. *Crowe v. Lucas*, 595 F.2d 985, 993 (5th Cir. 1979) ("[C]onspirators rarely formulate their plans in ways susceptible of proof by direct evidence). See also *State of Louisiana v. Johnson*, 438 So.2d 1091, 1099 (La. 1983). Here, there was ample evidence for the jury, after weighing the credibility of the witnesses and hearing argument of counsel, to conclude that Senator Cravins was intertwined with the other co-conspirators and that he called Officer Montgomery specifically to influence Montgomery's testimony at the custody trial. In fact, the original

[46] ROA.3963, 4029.
[47] ROA.3963.
[48] ROA.4235 – 4239.

district court judge[49] stated after reviewing the summary judgment evidence presented which included the precise testimony from Officer Montgomery without the phony explanation provided at trial about Officer Montgomery being mad at Brad, not Cravins, that "Deputy Montgomery testified that he believed Cravins was a state senator when he called him and that he attempting to influence his testimony in the upcoming custody hearing."[50] Clearly if a United States District Court Judge can come to this conclusion having reviewed a portion of the exact same evidence presented at trial, then the jury could reach the same conclusion.[51]

In the prior appeal by Cravins and Gallow, this court explained:

> To prove a conspiracy under 42 U.S.C. § 1983, a plaintiff must show: (1) 'an agreement between private and public defendants to commit an illegal act,' and (2) 'an actual deprivation of constitutional rights.'[52]

Here, Resa proved an agreement between Brad Griffith, Officer Gallow, Senator Cravins, and others to commit various illegal acts and an actual deprivation of her constitutional right to the care, custody, and control of her son. As the trial court stated in rejecting Senator Cravins's claim that the telephone call that he made to Officer Montgomery was not under the color of law, "[i]t is unlikely that a

[49] Judge Tucker Melancon originally handled the case which was later re-assigned to Judge Richard Haik who presided at trial.
[50] ROA.1904.
[51] Plaintiff's Exhibit 103, ROA.2361, contains pertinent testimony from Deputy Montgomery from the custody trial reviewed by the district court for purposes of the motion for summary judgment.
[52] ROA.1939 (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994)).

telephone call by a 'private citizen' would have any impact on a local law enforcement employee such as Deputy Montgomery and that Griffith would have requested Cravins make such a call if he was an ordinary citizen."[53] The jury could have come to the very same conclusion. Additionally, this Court noted that 'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law."[54]

Moreover, this Court further noted that "[r]egardless of whether or not Cravins' actions alone actually caused a constitutional violation, liability can still be imposed on him through his alleged membership in the conspiracy."[55] Here, there was ample evidence for the jury to conclude that Cravins was indeed part of the conspiracy and therefore liable to plaintiff.

This Court must "consider all of the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to" Resa. *Flowers v. S. Reg'l Physician Servs.*, 247 F.3d 229, 235 (5th Cir. 2001)(citing *Brown v. Bryan County, Ok.*, 219 F.3d 450, 456 (5th Cir. 2000)). Further, "judgment as a matter of law should not be granted unless the facts and inferences point 'so strongly and overwhelmingly in the movant's favor that

[53] ROA 1904.
[54] ROA.1939 (citing *United States v. Classic*, 313 U.S. 299, 326 (1941)).
[55] ROA.1939 (citing *Hale v. Townley*, 45 F.3d 914, 920-21 (5th Cir. 1995).

reasonable jurors could not reach a contrary conclusion.'" *Id.* (citing *Omnitech Int'l, Inc. v. Cloraox Co.*, 11 F.3d 1316, 1322 (5th Cir. 1994)). The facts and inferences in this matter do not strongly and overwhelmingly point in Senator Cravins's favor such that reasonable jurors could not reach the conclusion that Senator Cravins was indeed part of the conspiracy against Resa. The trial court's judgment should be reversed.

B. The trial court erred when it allowed the disclosure to the jury of the fact that Plaintiff settled her claims against Bradley Griffith.

1. Standard of Review

Whether the fact that Resa settled her claim against Brad should have been disclosed to the jury is a question of law, and as such, this Court reviews the district court's decision *de novo*. *Szwak v. Earwood*, 592 F.3d 664, 668 (5th Cir. 2009).

2. Argument

Resa and Brad settled and compromised all claims that were asserted against Brad in this matter prior to trial. Nevertheless, Brad was a material witness regarding plaintiff's claims against the remaining co-conspirator defendants, and testified at the trial of this matter.

Fed. R. Evid. 408 provides as follows regarding the introduction of evidence regarding compromise offers and negotiations, to-wit:

> (a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Rule is designed to promote free and open discussion in the course of settlement negotiations with the ultimate objective of encouraging settlements, and it represents an extension of generally recognized law concerning the admissibility of settlement negotiations.[56] The overriding policy consideration associated with the inadmissibility of settlement negotiations is the extrinsic social policy of promoting the settlement of disputes and resolving conflicts, and this latter policy

56 *Weissenberger's Federal Evidence*, § 1-408 Federal Evidence Chapter 408.syn (Matthew Bender, 7th ed.).

predominates in supporting Rule 408.[57] Moreover, in any case in which compromise-related evidence is offered for any purpose not forbidden by Rule 408, Rule 403 may operate to exclude the evidence where the probative value is low and the risk of prejudice or confusion is substantial.[58]

The district court allowed the co-conspirator defendants to ask Brad whether he settled the claims against him by Resa and about the fact that he did not admit any wrongdoing.[59] Counsel for the City then used the evidence in closing arguments to argue that it was "just wrong" for the City to remain as a defendant when Griffith "is no longer in the suit."[60]

Allowing the introduction of evidence of the compromise between Brad and Resa severely undermine the policy considerations behind the exclusion of such evidence, and confused the issues upon which the jury was called upon to decide regarding the culpability of the remaining defendants in this matter. There was no exception to the rule that applied in the instant matter, such as proving bias or prejudice. As is abundantly clear from the jury's calculation of damages, the introduction of the evidence of the settlement merely confused the jury and led the jurors to believe that they should calculate only those damages directly associated

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[57] *Weissenberger's Federal Evidence*, § 1-408.2 Federal Evidence Chapter 408.syn (Matthew Bender, 7th ed.).
[58] *Weissenberger's Federal Evidence*, § 1-408.4 Federal Evidence Chapter 408.syn (Matthew Bender, 7th ed.).
[59] ROA 4006 – 4010; ROA.4451.
[60] ROA 4488.

with the incident associated with Officer Gallow's citation of Resa at Opelousas General discussed more at length *infra*.

C. The jury erred when it found that the Defendant, City of Opelousas, was not vicariously liable for the actions of Defendant, Officer Roylis Gallow?

1. Standard of Review

The question posed by this issue is a mixed one of law and fact. Plaintiff does not argue that the jury failed to get the facts right, just that they misapplied the facts to the law. As such, this Court reviews the issue *de novo*. *Szwak v. Earwood*, 592 F.3d 664, 668 (5th Cir. 2009).

2. Argument

After the matter was submitted to the jury, the district court properly noted that Officer Gallow was clearly working as a police officer at the time of the incident at Opelousas General, and therefore the City of Opelousas was vicariously liable for his actions.[61] The jury's verdict that the City of Opelousas was not vicariously liable was a clear legal error.

The district court properly instructed the jury that the City of Opelousas is vicariously liable for any torts committed by Roylis Gallow if:

(1) the tort was committed while Officer Gallow was acting as a police officer; and

[61] ROA 4477.

(2) his acts or omissions were discretionary; and

(3) his acts or omissions were either (a) not reasonably related to the legitimate governmental objective for which his discretionary power exists or (b) constituted criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct. (ROA 4504). *Applewhite v. City of Baton Rouge*, 380 So.2d 119 (La.App. 1 Cir. 1979); LSA-R.S. 9:2798.1 (B)(2); *Hardy v. Bowie*, 98-2821 (La. 9/8/99), 744 So.2d 606; *Ducote v. City of Alexandria*, 95-1269 (La.App. 3 Cir. 7/17/96), 677 So.2d 1118.

Counsel for the City improperly told the jury in closing arguments that the City was not liable because (1) the City did not have control over Officer Gallow's decision-making process for his intentional acts, and (2) Officer Gallow's intentional actions were not reasonably related to the interest or objectives of the City because Officer Gallow was "acting on his own and not on behalf of the City." (ROA 4489). Unfortunately, after hearing many pages of instructions read to them by the Court, the jury quite obviously did not follow the Court's instructions and misunderstood the law of vicarious liability.

The undisputed evidence at trial established that Officer Gallow was in uniform and on duty at Opelousas General Hospital on November 30, 2005 when

the incident with Cindy Hebert occurred.[62] The undisputed evidence established that Officer Gallow called for backup while engaged in the incident.[63] The undisputed evidence established that Officer Gallow cited Ms. Latiolais and wrote a summons for her to appear in court.[64] The undisputed evidence established that Officer Gallow was present in his role as a police officer for the two hearings in Opelousas regarding the battery charge for which he cited Ms. Latiolais.[65] The undisputed evidence established that Officer Gallow appeared at the two custody hearings in his role as police officer where he provided perjured testimony.[66] The jury determined that Officer Gallow's actions were part of the broader conspiracy with Bradley Griffith to deprive Resa of the care, custody, and control of her child.

It is abundantly clear that (1) torts committed by Officer Gallow were committed while he was acting as a police officer; (2) that his actions were discretionary; and (3) that his acts were both (a) not reasonably related to the legitimate governmental objective for which his discretionary power exists and (b) constituted criminal, fraudulent, malicious, intentional, willful, outrageous, and

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[62] ROA.3863 (Testimony of Resa Latiolais); ROA.2377, Exhibit 103 (Testimony of Roylis Gallow).
[63] ROA.3864 (Testimony of Resa Latiolais); ROA.2374-2376, Exhibit 103 (Testimony of Roylis Gallow).
[64] ROA.3865 (Testimony of Resa Latiolais); ROA.2376, Exhibit 103 (Testimony of Roylis Gallow).
[65] R.3907-3908 (Testimony of Resa Latiolais); ROA.2364-2379, Exhibit 103; ROA.2380-2411, Exhibit 104 (Testimony of Roylis Gallow),
[66] R.3916 (Testimony of Resa Latiolais); ROA.2364-2379, Exhibit 103; ROA.2380-2411, Exhibit 104 (Testimony of Roylis Gallow)

flagrant misconduct. The jury's determination that the City of Opelousas is not vicariously liable for the actions of Officer Gallow was clear error and should be reversed.

D. The jury erred when it found that Defendant, Officer Roylis Gallow, was not acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley Griffith.

1. Standard of Review

The question posed by this issue is a mixed one of law and fact. Plaintiff does not argue that the jury failed to get the facts right, just that they misapplied the facts to the law. As such, this Court reviews the issue *de novo*. *Szwak v. Earwood*, 592 F.3d 664, 668 (5th Cir. 2009).

2. Argument

For the same reasons the jury erred regarding vicarious liability, the jury failed to understand that Officer Gallow was acting under the authority of state law when he entered into an agreement with Bradley Griffith to commit an illegal act to deprive plaintiff of her constitutional right to the be secure in the companionship, care, custody, and management of her child. The Fifth Circuit Pattern Jury Instruction states:

> State or local officials act "under color" of the authority of the State when they act within the limits of their lawful authority. However, they also act "under color" of the authority of the State when they act without lawful authority or beyond the bounds of their lawful authority if their acts are done while the officials are purporting or

> pretending to act in the performance of their official duties. An official acts "under color" of state *authority if he abuses or misuses a power that he possesses only because he is an official.*

(emphasis added). The district court gave the jury a very similar instruction.[67]

Here, it was clear legal error for the jury to have found that Officer Gallow was not acting under the authority of state law when he entered into the agreement with Griffith. The undisputed evidence at trial demonstrated:

(1) that Officer Gallow was in uniform and on duty at Opelousas General Hospital on November 30, 2005 when the incident with Cindy Hebert occurred;[68]

(2) that Officer Gallow called for backup while engaged in the incident;[69]

(3) that Officer Gallow cited Ms. Latiolais and wrote a summons for her to appear in court;[70]

(4) that Officer Gallow was present in his role as a police officer for the two hearings in Opelousas regarding the battery charge for which he cited Ms. Latiolais;[71]

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[67] ROA 4497.
[68] ROA.3863 (Testimony of Resa Latiolais); ROA.2377, Exhibit 103 (Testimony of Roylis Gallow).
[69] ROA.3866 (Testimony of Resa Latiolais); ROA.2374-2376, Exhibit 103 (Testimony of Roylis Gallow).
[70] ROA.3265-3266 (Testimony of Resa Latiolais); ROA.2376, Exhibit 103 (Testimony of Roylis Gallow).
[71] R.3907-3908 (Testimony of Resa Latiolais); ROA.2364-2379, Exhibit 103; ROA.2380-2411, Exhibit 104 (Testimony of Roylis Gallow).

(5) that Officer Gallow appeared at the two custody hearings in his role as police officer where he provided perjured testimony.[72]

The jury's determination that Officer Gallow was not acting under color of law was clear error and should be reversed.

E. The jury erred when it awarded damages of only $10,647.00?

1. Standard of Review

On appeal, this Court must view the evidence and reasonable inferences in the light most favorable to the jury's determination on the issue of damages and uphold the jury's verdict unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did. *Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995).

2. Argument

The jury's award of damages clearly demonstrates that the jurors did not understand the district court's instructions that they were not to deduct any amounts for the settlement by Bradley Griffith. Initially, as Resa argued above, the disclosure of the fact of the settlement unnecessarily prejudiced Resa by confusing the jury and providing them information that did not help them understand the matter in any way.

[72] R.3916 (Testimony of Resa Latiolais); ROA.2364-2379, Exhibit 103; ROA.2380-2411, Exhibit 104 (Testimony of Roylis Gallow).

The jury derived the damages figure by adding up those costs the jury members believed were related to the Opelousas General Hospital incident *alone*. The jurors added the special damages from Plaintiff's Exhibits including the legal fees for Charlie Hutchins, the attorney who represented Resa regarding the battery charges, but deducted the bills of Julie Felder, Brad Felder, and Margot Hasha.[73] The Felder legal fees and the fees associated with the court-ordered therapy were all incurred as a direct result of the conspiracy against her and totaled $69,505.14.[74] The award of damages did not compensate Resa for the damages she incurred as a result of the *entire* conspiracy. The jury obviously believed that Bradley Griffith had already paid for the damages incurred by Resa and therefore their job was merely to add the damages specifically associated with Officer Gallow's actions. Moreover, because they did not understand that the City of Opelousas would be responsible to pay those damages, they were understandably sensitive to the fact that Officer Gallow's widow, who certainly is not responsible for the actions of her deceased husband, would be responsible for the payment of the judgment. The confusion on the part of the jury as to the proper calculation of damages caused them to render a judgment for which there is a legally insufficient evidentiary basis.

[73] The jury's total is miscalculated by $361.57, and it is unclear what makes up this slight difference.

[74] Plaintiff's Exhibit 91, ROA.2325; Plaintiff's Exhibit 92, ROA.2328, Plaintiff's Exhibit 93, ROA.2329; ROA.3887-3888 (Testimony of Resa Latiolais).

Resa requested that the trial court grant a new trial on the issue of damages alone. "A federal trial court may in its discretion set aside a jury verdict and order a new trial if the amount of the verdict is excessive or inadequate." *Pagan v. Shoney's Inc.*, 931 F.2d 334, 336 (5th Cir. 1991) (citing *Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 986 (5th Cir. 1989); *Lucas v. American Mfg. Co.*, 630 F.2d 291, 293 (5th Cir. 1980). A new trial should be granted if the verdict is against the great weight of the evidence. *Id*. (citing *Jones*, *supra* at 986) (citing *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 – 63 (5th Cir. 1980); *Herrmann v. Nicor Marine, Inc.*, 664 F.Supp. 241, 245 (E.D. La. 1985)).

In *Brun-Jacobo v. Pan American World Airways, Inc.*, 847 F.2d 242 (5th Cir. 1988), the children of deceased parents brought an action for loss of companionship with their parents and received an award that was considered by the trial court to be less than other awards made to the families of the victims. The trial court granted a new trial on the grounds that the award was low due to the bias of the jurors because the children were Uruguayan. This Court reversed holding there was no evidence of bias and the award was within an acceptable range of similar awards in Louisiana cases for these types of damages. Nevertheless the this Court recognized that had there been evidence of bias or that the award was inadequate, the trial court would have properly granted a new trial.

Here, there is no question that that the jury was confused regarding the proper determination of damages. The jury found that Bradley Griffith conspired with the various members of the conspiracy to deprive her of her constitutional rights. The jury found that he and his co-conspirators also conspired and committed various state law torts against Resa. The jury found that Officer Gallow was involved in the conspiracy to deprive Ms. Latiolais of custody of her child and that this was a violation of her constitutional rights. The jury also found that Officer Gallow was involved in the conspiracy to commit various state law torts against Ms. Latiolais. The jury was instructed that they should not deduct any amount from the damage award due to the settlement of Bradley Griffith. However, it is clear that the jury awarded only the actual out-of-pocket expenses Ms. Latiolais incurred resulting from the actions of Officer Gallow alone. This undoubtedly resulted from the jury's confusion following the disclosure of the fact that Bradley Griffith settled with Ms. Latiolais.

Moreover, it is error, as a matter of law, for a jury to award special damages and then fail to award damages for pain and suffering. In *Farnsworth v. Basin Marine, Inc.*, 1999 U.S. District LEXIS 1016, *7 (E.D. La. 1999), the court noted that the "Fifth Circuit has consistently held that a new trial should be granted if a jury awards damages for past wages lost and past medical expenses, but not for pain, suffering, or mental anguish." The Eastern District Court cited *Yarbrough v.*

Sturm, Ruger & Co., 964 F.2d 376, 379 (5th Cir. 1992)("it was 'inconceivable' that jury [sic] could find liability and then award damages for past wages lost and past medical expenses but not for pain, suffering or mental anguish"); *Pagan, supra,* at 337 ("jury's award of 'none' as damages for pain and suffering not an exercise of discretion as to amount but refusal of an award, new trial granted on damages only); and *Davis v. Becker & Associates*, 608 F.2d 621, 623 (5th Cir. 1979)(reversed and remanded for new trial on damages because it could not be jury's finding of '0' for pain and suffering).

The same is true here. The evidence was clear that Ms. Latiolais suffered significant emotional and psychological pain and distress. Plaintiff, Ms. Margot Hasha, and Ms. Juanita Menard all testified at length about the suffering and trauma that Ms. Latiolais suffered as a result of the conspiracy against her.[75] It is impossible that a person who endured the persecution, including arrests, prosecutions, imprisonment, etc. not to mention the loss of custody of her son, did not suffer extensive general damages. The jury failed to make this award due to confusion.

It is also clear that this was not a compromise verdict. There is no suggestion that the jury was ambivalent about liability. There is the possibility that the jury was concerned for Mrs. Gallow, particularly given their misunderstanding

[75] ROA.3896-3898 (Testimony of Resa Latiolais); ROA.4165-4176 (Testimony of Juanita Menard); ROA.4129-4133 (Testimony of Margot Hasha).

of the law regarding vicarious liability, but there is no suggestion they did not clearly find that Officer Gallow was indeed part of the conspiracy against Ms. Latiolais.

For these reasons, Ms. Latiolais respectfully argues that there is no legally sufficient evidentiary basis for a reasonable jury to find that her damages totaled $10,647.00 and the judgment should be reversed and the case remanded for a new trial.

X. CONCLUSION AND PRAYER FOR RELIEF

The evidence at trial demonstrated that Defendant, Cravins, Sr., was part of the conspiracy and that his telephone call to Officer Montgomery was made in an effort to tamper with Officer Montgomery's testimony at the custody trial. The evidence clearly demonstrated that Officer Gallow was acting in the course and scope of his employment, and therefore the City of Opelousas is vicariously liable for his actions. Additionally, the evidence demonstrated that Officer Gallow was acting under the authority of state law when he entered into the agreement with his co-conspirator, Bradley Griffith. Lastly, the evidence demonstrated that the jury was confused by the improper disclosure of the fact that Resa settled her claims against Griffith and therefore awarded damages of only $10,647.00, a figure that is not supported by the evidence.

Plaintiff, Resa Latiolais, prays that this Court reverse the district court's granting of Defendant, Donald Cravins, Sr.'s, Motion for Judgment as a Matter of Law and remand the case for a new trial on the issue of Donald Cravins, Sr.'s liability. Plaintiff further prays that this Court reverse the jury's finding that Officer Gallow was not acting under color of law and that the City of Opelousas was not vicariously liable for his actions and remand the case for a new trial on those issues. Plaintiff further prays that this Court reverse the damage award and remand that issue for a new trial. Lastly, Plaintiff requests the Court affirm the jury's findings in the following regards: (1) that the actions complained of violated her constitutional right to be secure in the companionship, care, custody, and management of her child; (2) that Bradley Griffith and Roylis Gallow entered into an agreement to commit an illegal act to deprive plaintiff of her constitutional right to be secure in the companionship, care, custody, and management of her child; (3) that, as to the state law conspiracy claims, Bradley Griffith entered into an agreement with Roylis Gallow to commit an illegal or tortious act; and (4) that Plaintiff sustained damages resulting from the aforesaid agreement entered into between Bradley Griffith and Roylis Gallow.

Respectfully submitted,

JULIE KOREN VAUGHN FELDER, APLC

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and

HUVAL, VEAZEY, FELDER,
& RENEGAR, LLC

By: s/ Bradford H. Felder

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ATTORNEYS FOR
PLAINTIFF/APPELLANT,
RESA LATIOLAIS

XI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below through the court's electronic filing system as follows:

James D. "Buddy" Caldwell
Louisiana Attorney General
Frank Trosclair, Jr.
Charles T. Cravins
Special Assistant Attorneys General
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Opelousas, LA 70571-1149
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Attorney for Defendant/Appellant,
Donald Cravins, Sr.

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Phone: (337) 948-4504
Attorney for Defendant/Appellant
Claudette Gallow, heir to and
representative of Succession of Roylis
Gallow

Desiree Williams-Auzenne
Allen & Gooch
P.O. Box 81129
Lafayette, LA 70598-1129
Phone: (337) 291-1000
Attorney for Defendant, City of
Opelousas

Lafayette, Louisiana, this 23rd day of December, 2013.

s/ Bradford H. Felder
BRADFORD H. FELDER

XII. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[x] this brief contains 9,642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

[ ] this brief uses a monospaced typeface and contains _____ lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman font, *or*

[ ] this brief has been prepared in a monospaced typeface using _____ with _____.

s/ Bradford H. Felder
BRADFORD H. FELDER
Attorney for Plaintiff/Appellee,
Resa Latiolais
Dated: 12/23/13

United States Court of Appeals

for the

Fifth Circuit

Case No. 13-31097

WANDA ROGERS,

Plaintiff-Appellant,

– v. –

BROMAC TITLE SERVICES, L.L.C., doing business as Platinum Title & Settlement Services, L.L.C.; TITLE RESOURCE GROUP, L.L.C.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

RECORD EXCERPTS

ALAN FISHER KANSAS, ESQ.
Attorney for Plaintiff-Appellant
1801 Carol Sue Avenue
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alan@alankansaslaw.com

TABLE OF CONTENTS

TAB 1

APPEAL,CLOSED,PROTO

U. S. District Court
Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 2:12-cv-02493-HGB-JCW
Internal Use Only

Rogers v. Bromac Title Services, LLC et al
Assigned to: Judge Helen G. Berrigan
Referred to: Magistrate Judge Joseph C. Wilkinson, Jr
Cause: 28:1875 Juror Protection Act

Date Filed: 10/12/2012
Date Terminated: 09/26/2013
Jury Demand: Plaintiff
Nature of Suit: 790 Labor: Other
Jurisdiction: Federal Question

Plaintiff

Wanda Rogers

represented by **Alan F. Kansas**
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1801 Carol Sue Ave.
Terrytown, LA 70056
504-210-1150
Email: alan@alankansaslaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Bromac Title Services, LLC
doing business as
Platinum Title & Settlement Services, LLC

represented by **Kim M. Boyle**
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Suite 2000
New Orleans, LA 70130-6534
504-584-9312
Fax: 504-568-9130
Email: davisb@phelps.com
ATTORNEY TO BE NOTICED

Defendant

Title Resource Group, LLC

represented by **Kim M. Boyle**
(See above for address)

LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Brandon E. Davis
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
10/12/2012	1 (p.8)	COMPLAINT with jury demand against All Defendants (Filing fee $ 350 receipt number 053L-3690209) filed by Wanda Rogers. (Attachments: # 1 (p.18) Civil Cover Sheet, # 2 Summons, # 3 Summons)(Kansas, Alan) (Entered: 10/12/2012)
10/12/2012	2	Initial Case Assignment to Judge Helen G. Berrigan and Magistrate Judge Joseph C. Wilkinson, Jr. (mmv,) (Entered: 10/12/2012)
10/15/2012	3 (p.23)	Summons Issued as to Bromac Title Services, LLC, Title Resource Group, LLC. (Attachments: # 1 Summons Title Resource Group)(plh,) (Entered: 10/15/2012)
01/04/2013	4 (p.27)	*AFFIRMATIVE DEFENSES and* ANSWER to 1 (p.8) Complaint by Bromac Title Services, LLC, Title Resource Group, LLC.(Davis, Brandon) (Entered: 01/04/2013)
01/04/2013	5 (p.37)	Statement of Corporate Disclosure by Bromac Title Services, LLC, Title Resource Group, LLC identifying Corporate Parents Realogy Holdings Corp., Title Resource Group Affiliates Holdings LLC, L & B Title LLC, Latter and Blum Holding, LLC, Title Resource Group Holdings LLC, TRG, Realogy Services Group LLC, Realogy Group LLC, Realogy Intermediate Holdings LLC for Bromac Title Services, LLC (Davis, Brandon) Modified on 1/7/2013 to add additional corporate parents (plh,). (Entered: 01/04/2013)
01/07/2013	6	Correction of Docket Entry by Clerk re 4 (p.27) Answer to Complaint; **Document's signature line is either incomplete or blank. All future documents must reflect either an original signature or an electronic signature of the filing attorney following the format 's/ (attorney name)'. No further action is necessary.** (plh,) (Entered: 01/07/2013)
01/07/2013	7	Correction of Docket Entry by Clerk re 5 (p.37) Statement of Corporate Disclosure; **Filing attorney did not enter Latter and Blum Holding, LLC, Title Resou rce Group Holdings LLC, TRG, Realogy Services Group LLC, Realogy Group LLC, Realogy Intermediate Holdings LLC as a corporate parent(s) at the prompt 'Search for a corporate parent or other affiliate'. Clerk took corrective action.** (plh,) (Entered: 01/07/2013)
01/10/2013	8 (p.39)	NOTICE of Scheduling Conference set for 1/24/2013 10:30 AM before courtroom deputy by telephone, by Clerk.(kac,) (Entered: 01/10/2013)
01/24/2013	9 (p.41)	SCHEDULING ORDER: Telephone Status Conference set for 8/29/2013 09:15 AM before Judge Helen G. Berrigan. Final Pretrial Conference set for 10/3/2013 09:00 AM before Judge Helen G. Berrigan. Jury Trial set for 10/21/2013 10:00 AM before Judge Helen G. Berrigan. Signed by Clerk for Judge Helen G. Berrigan on 01/24/2013. (Attachments: # 1 Pretrial Notice Form)(kac,) (Entered: 01/24/2013)

05/23/2013	10 (p.53)	**ATTORNEY REFILED, SEE RECORD DOC 11** EXPARTE/CONSENT Joint MOTION for Protective Order by Bromac Title Services, LLC, Title Resource Group, LLC. Motion(s) referred to Joseph C. Wilkinson, Jr. (Attachments: # 1 Proposed Order)(Davis, Brandon) Modified on 5/24/2013 (plh,). (Entered: 05/23/2013)
05/23/2013	11 (p.66)	EXPARTE/CONSENT Joint MOTION for Protective Order by Bromac Title Services, LLC, Title Resource Group, LLC, Wanda Rogers. Motion(s) referred to Joseph C. Wilkinson, Jr. (Attachments: # 1 Proposed Order)(Davis, Brandon) Modified filer on 5/24/2013 (plh,). (Entered: 05/23/2013)
05/24/2013	12	Correction of Docket Entry by Clerk re 10 (p.53) Joint MOTION for Protective Order ; **This is a duplicate filing of document 11 and will be noted as such. No further action is necessary.** (plh,) (Entered: 05/24/2013)
05/24/2013	13	Correction of Docket Entry by Clerk re 11 (p.66) Joint MOTION for Protective Order ; **Filing attorney did not select Wanda Rogers as a filer(s). Clerk added filer(s).** (plh,) (Entered: 05/24/2013)
05/28/2013	14 (p.79)	AGREED PROTECTIVE ORDER. Signed by Magistrate Judge Joseph C. Wilkinson, Jr on 5/28/13.(tbl) (Entered: 05/28/2013)
08/05/2013	15 (p.90)	Exhibit List by Bromac Title Services, LLC, Title Resource Group, LLC. (Boyle, Kim) (Entered: 08/05/2013)
08/05/2013	16 (p.102)	**ATTORNEY REFILED; SEE RECORD DOC #17** Witness List by Bromac Title Services, LLC, Title Resource Group, LLC. (Boyle, Kim) Modified on 8/6/2013 (plh,). (Entered: 08/05/2013)
08/05/2013	17 (p.106)	Witness List by Bromac Title Services, LLC, Title Resource Group, LLC. (Boyle, Kim) (Entered: 08/05/2013)
08/05/2013	18 (p.110)	Exhibit List by Wanda Rogers. (Kansas, Alan) (Entered: 08/05/2013)
08/05/2013	19 (p.116)	Witness List by Wanda Rogers. (Kansas, Alan) (Entered: 08/05/2013)
08/06/2013	20	Correction of Docket Entry by Clerk re 16 (p.102) Witness List; **This is a duplicate filing of document 17 and will be noted as such. No further action is necessary.** (plh,) (Entered: 08/06/2013)
08/06/2013	21	Correction of Docket Entry by Clerk re 18 (p.110) Exhibit List; **Caption is incomplete. All future filings must include case number, Judge and Magistrate in the Caption.** (plh,) (Entered: 08/06/2013)
08/13/2013	22 (p.119)	MOTION for Summary Judgment by Bromac Title Services, LLC, Title Resource Group, LLC. Motion set for 8/28/2013 09:30 AM before Judge Helen G. Berrigan. (Attachments: # 1 (p.121) Statement of Contested/Uncontested Facts, # 2 (p.128) Memorandum in Support, # 3 (p.153) Exhibit 1, # 4 (p.159) Exhibit 2, # 5 (p.160) Exhibit 3, # 6 (p.161) Exhibit 4, # 7 (p.162) Exhibit 5, # 8 (p.163) Exhibit 6, # 9 (p.164) Exhibit 7, # 10 (p.165) Exhibit 8, # 11 (p.166) Exhibit 9, # 12 (p.167) Exhibit 10, # 13 (p.168) Exhibit 11, # 14 (p.169) Exhibit 12, # 15 (p.170) Exhibit 13, # 16 (p.171) Exhibit 14, # 17 (p.172) Exhibit 15, # 18 (p.174) Exhibit 16, # 19 (p.175) Exhibit 17, # 20 (p.176) Exhibit 18, # 21 (p.177) Exhibit 19, # 22 (p.178) Exhibit 20, # 23 Exhibit 21, # 24 Exhibit 22, # 25 Exhibit 23, # 26 Exhibit 24, # 27 Exhibit 25, # 28 Exhibit 26, # 29 Exhibit 27, # 30 Exhibit 28, # 31 Exhibit 29, # 32 Exhibit 30, # 33 Exhibit 31, # 34

		Notice of Submission)(Davis, Brandon) (Entered: 08/13/2013)
08/13/2013	23 (p.278)	**DEFICIENT** MOTION to Compel by Wanda Rogers. Motion(s) referred to Joseph C. Wilkinson, Jr. Motion set for 8/28/2013 11:00 AM before Magistrate Judge Joseph C. Wilkinson Jr.. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1 through 6, # 3 Notice of Submission, # 4 Request for Oral Argument)(Kansas, Alan) Modified on 8/14/2013 (plh,). (Entered: 08/13/2013)
08/13/2013	24 (p.358)	MOTION for Partial Summary Judgment by Wanda Rogers. Motion set for 8/28/2013 09:30 AM before Judge Helen G. Berrigan. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1 & 2, # 3 Notice of Submission, # 4 Request for Oral Argument)(Kansas, Alan) (Additional attachment(s) added on 8/23/2013: # 5 Sealed exhibits) (plh,). (Entered: 08/13/2013)
08/13/2013	25 (p.392)	Request/Statement of Oral Argument by Wanda Rogers regarding 24 (p.358) MOTION for Partial Summary Judgment . (plh,) (Entered: 08/14/2013)
08/14/2013		NOTICE OF DEFICIENT DOCUMENT: re 23 (p.278) Motion to Compel. **Reason(s) of deficiency: Certificate stating matter cannot be amicably resolved not provided; ALSO, when refiling, the Request for Oral Argument must be filed as a separate document and not an attachment to the Motion.** For corrective information, see section(s) D09 on http://www.laed.uscourts.gov/cmecf/Deficiency/deficiency.htm **Attention: Document must be refiled in its entirety within seven(7) calendar days. Otherwise, it may be stricken by the court without further notice. Deficiency remedy due by 8/21/2013.** (plh,) (Entered: 08/14/2013)
08/14/2013	26	Correction of Docket Entry by Clerk re 24 (p.358) MOTION for Partial Summary Judgment ; **Filing attorney attached a Request/Statement for Oral Argument to this motion instead of filing it as a separate entry. Clerk took corrective action by separating the request and docketing it as a separate entry, record doc #25. All future requests for oral argument must be filed separately.** (plh,) (Entered: 08/14/2013)
08/14/2013	27 (p.393)	ORDERED that counsel for defendant provide a hard copy to the chambers of the undersigned by 4:30 p.m. on August 16, 2013 re 22 (p.119) MOTION for Summary Judgment. Signed by Judge Helen G. Berrigan on 08/14/2013.(kac,) (Entered: 08/14/2013)
08/20/2013	28 (p.394)	ORDERED that there WILL BE ORAL ARGUMENT on 8/28/2013 09:30 AM before the undersigned re 22 (p.119) MOTION for Summary Judgment and 24 (p.358) MOTION for Partial Summary Judgment. Signed by Judge Helen G. Berrigan on 08/20/2013.(kac,) (Entered: 08/20/2013)
08/20/2013	29 (p.395)	RESPONSE/MEMORANDUM in Opposition filed by Bromac Title Services, LLC, Title Resource Group, LLC re 23 (p.278) MOTION to Compel . (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12)(Davis, Brandon) (Entered: 08/20/2013)
08/20/2013	30 (p.527)	RESPONSE/MEMORANDUM in Opposition filed by Bromac Title Services, LLC, Title Resource Group, LLC re 24 (p.358) MOTION for Partial Summary Judgment . (Attachments: # 1 Statement of Contested/Uncontested Facts, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14, # 16 Exhibit 15, # 17 Exhibit

		16, # 18 Exhibit 17, # 19 Exhibit 18, # 20 Exhibit 19, # 21 Exhibit 20, # 22 Exhibit 21, # 23 Exhibit 22, # 24 Exhibit 23, # 25 Exhibit 24)(Davis, Brandon) (Entered: 08/20/2013)
08/20/2013	31 (p.636)	RESPONSE to Motion filed by Wanda Rogers re 22 (p.119) MOTION for Summary Judgment . (Attachments: # 1 Exhibit 1, # 2 Exhibit 4, # 3 Exhibit 5, # 4 Exhibit 6, # 5 Exhibit 2, # 6 Exhibit 8, # 7 Exhibit 3)(Kansas, Alan) (Additional attachment(s) added on 8/22/2013: # 8 Exhibit 7, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 13) (plh,). (Additional attachment(s) added on 8/23/2013: # 13 Sealed exhibits) (plh,). (Entered: 08/21/2013)
08/21/2013	32 (p.915)	**DOCUMENT FILED IN ERROR; EXHIBITS HAVE BEEN ATTACHED TO RECORD DOC #31** RESPONSE to Motion filed by Wanda Rogers re 22 (p.119) MOTION for Summary Judgment . (Attachments: # 1 Exhibit 7, # 2 Exhibit 9, # 3 Exhibit 10, # 4 Exhibit 13, # 5 Exhibit 11)(Kansas, Alan) Modified on 8/22/2013 (plh,). (Entered: 08/21/2013)
08/21/2013	33 (p.996)	MOTION to Compel by Wanda Rogers. Motion(s) referred to Joseph C. Wilkinson, Jr. Motion set for 8/28/2013 11:00 AM before Magistrate Judge Joseph C. Wilkinson Jr.. (Attachments: # 1 Memorandum in Support, # 2 Exhibit 1-6, # 3 Notice of Submission)(Kansas, Alan) (Entered: 08/21/2013)
08/21/2013	34 (p.1075)	Request/Statement of Oral Argument by Wanda Rogers regarding 33 (p.996) MOTION to Compel (Kansas, Alan) (Entered: 08/21/2013)
08/21/2013	35 (p.1076)	ORDER. At the request of counsel for plaintiff, Record Doc. No. 34, and pursuant to Local Rule 78.1, oral argument on plaintiff's Motion to Compel, Record Doc. No. 33, is hereby set on AUGUST 28, 2013 at 11:00 a.m. before Magistrate Judge Joseph C. Wilkinson, Jr. Signed by Magistrate Judge Joseph C. Wilkinson, Jr on 8/21/13.(tbl) (Entered: 08/21/2013)
08/22/2013	36 (p.1077)	EXPARTE/CONSENT MOTION to Seal Document , MOTION Supplement Record by Wanda Rogers. (Attachments: # 1 Proposed Order)(Kansas, Alan) (Entered: 08/22/2013)
08/22/2013	37	Correction of Docket Entry by Clerk re 32 (p.915) Response to Motion; **Document was filed in error. Main document is a duplicate to record doc #31 and exhibits have been added as attachments to record doc #31.** (plh,) (Entered: 08/22/2013)
08/22/2013	38 (p.1081)	ORDERED that oral argument re 22 (p.119) MOTION for Summary Judgment and 24 (p.358) MOTION for Partial Summary Judgment is CANCELED. The motions will be taken under advisement on the briefs without oral argument. Signed by Judge Helen G. Berrigan on 08/22/2013.(kac,) (Entered: 08/22/2013)
08/23/2013	39 (p.1082)	ORDER granting 36 (p.1077) Motion to File Documents Under Seal and to Supplement Record as set forth in document. Signed by Judge Helen G. Berrigan on 08/23/2013. (kac,) (Entered: 08/23/2013)
08/26/2013	40 (p.1084)	EXPARTE MOTION for Leave to File *Reply Memorandum in Support of Motion for Summary Judgment* by Bromac Title Services, LLC, Title Resource Group, LLC. (Attachments: # 1 Proposed Order, # 2 Proposed Pleading, # 3 Exhibit)(Davis, Brandon) Modified text on 8/27/2013 (plh,). (Entered: 08/26/2013)

08/27/2013	41	Correction of Docket Entry by Clerk re 40 (p.1084) MOTION for Leave to File *Reply Memorandum in Support of Motion for Summary Judgment*; **Filing attorney should have selected 'Yes' at the question 'Is this an Exparte/Consent Motion Y/N?'. Clerk modified docket text to reflect 'Exparte'.; Filing attorney did not select category 'Proposed Pleading' when attaching document for which leave to file is being requested. Clerk took corrective action.** (plh,) (Entered: 08/27/2013)
08/27/2013	42 (p.1122)	ORDER granting 40 (p.1084) Motion for Leave to File Reply Memorandum in Support of Motion for Summary Judgment. Signed by Judge Helen G. Berrigan on 08/27/2013. (kac,) (Entered: 08/27/2013)
08/27/2013	43 (p.1123)	REPLY Memo in Support filed by Bromac Title Services, LLC re 22 (p.119) MOTION for Summary Judgment. (Attachments: # 1 Exhibit)(kac,) (Entered: 08/27/2013)
08/28/2013	44 (p.1158)	EXPARTE/CONSENT MOTION for Leave to File *Response Memorandum* by Wanda Rogers. (Attachments: # 1 Proposed Order, # 2 Proposed Pleading)(Kansas, Alan) (Entered: 08/28/2013)
08/28/2013	45 (p.1167)	Minute Order. Proceedings held before Magistrate Judge Joseph C. Wilkinson, Jr: Plaintiff's Motion to Compel, Record Doc. No. 33, is GRANTED IN PART, DISMISSED AS MOOT IN PART AND DENIED IN PART as set forth herein. (tbl) (Entered: 08/28/2013)
08/29/2013	46 (p.1170)	ORDER granting 44 (p.1158) Motion for Leave to File Response to Defendants' Reply Memo. Signed by Judge Helen G. Berrigan on 08/28/2013. (kac,) (Entered: 08/29/2013)
08/29/2013	47 (p.1171)	RESPONSE to Reply Memo in Support filed by Wanda Rogers re 22 (p.119) MOTION for Summary Judgment. (kac,) (Entered: 08/29/2013)
09/04/2013	48 (p.1177)	Minute Entry for proceedings held before Magistrate Judge Joseph C. Wilkinson, Jr: At my request, a telephone conference was conducted before me concerning counsel's request to set a settlement conference. The court commends counsel for and appreciates their disclosure to me of circumstances that may or may not suggest my recusal from this matter under 28 U.S.C. 455(a). Counsel will confer with their clients and jointly advise me as soon as possible whether all parties will execute a written waiver of disqualification under 28 U.S.C. 455(e). Settlement possibilities were discussed. Counsel will also have further discussions with their clients about settlement and, if the recusal waiver discussed above is executed, they will advise me of their settlement positions, so that I may determine whether scheduling an in-person settlement conference might be beneficial. (tbl) (Entered: 09/05/2013)
09/11/2013	49 (p.1178)	EXPARTE/CONSENT MOTION to Continue *Pre-Trial Conference and Trial* by Bromac Title Services, LLC, Title Resource Group, LLC. (Attachments: # 1 Proposed Order)(Davis, Brandon) (Entered: 09/11/2013)
09/13/2013	50 (p.1182)	ORDER granting 49 (p.1178) Motion to Continue Pre-Trial Conference Date and Trial Date. Scheduling Conference set for 9/26/2013 11:00 AM before courtroom deputy by telephone. Signed by Judge Helen G. Berrigan on 09/12/2013. (kac,) (Entered: 09/13/2013)
09/20/2013	51 (p.1183)	SECTION 455(e) Waiver accepted by Magistrate Judge Joseph C. Wilkinson, Jr.(tbl) (Entered: 09/20/2013)

09/20/2013	52 (p.1184)	ORDER. In response to my order dated September 4, 2013, Record Doc. No. 48, counsel for all parties have executed a written waiver of disqualification under 28 U.S.C. 455(e) in the captioned case, which has been separately filed in the record. Therefore, this matter will remain pending before me. Having been informed of the parties' settlement positions, and considering the pending motions and the continuance of the trial, I find that the case is not currently in a posture to settle and that no in-person settlement conference will be scheduled at this time. If counsel jointly conclude at any time that a settlement conference conducted by the court would be beneficial, they may contact my office to schedule one. Signed by Magistrate Judge Joseph C. Wilkinson, Jr on 9/19/13. (tbl) (Entered: 09/20/2013)
09/23/2013	53 (p.1185)	ORDER AND REASONS granting 22 (p.119) Motion for Summary Judgment; finding as moot 24 (p.358) Motion for Partial Summary Judgment. Signed by Judge Helen G. Berrigan on 09/23/2013. (kac,) (Entered: 09/23/2013)
09/26/2013	54 (p.1192)	JUDGMENT entered in favor of Bromac Title Services, LLC, Title Resource Group, LLC against Wanda Rogers, dismissing plaintiff's complaint with prejudice. Signed by Judge Helen G. Berrigan on 09/23/2013.(kac,) (Entered: 09/26/2013)
10/21/2013	55 (p.1193)	NOTICE OF APPEAL by Wanda Rogers as to 54 (p.1192) Judgment, 53 (p.1185) Order on Motion for Summary Judgment, Order on Motion for Partial Summary Judgment. (Filing fee $ 455, receipt number 053L-4200437.) (Kansas, Alan) (Entered: 10/21/2013)
10/31/2013	56 (p.1194)	APPEAL TRANSCRIPT REQUEST by Wanda Rogers re 55 (p.1193) Notice of Appeal. Transcript is unnecessary for appeal purposes. (Kansas, Alan) Modified text on 10/31/2013 (plh,). (Entered: 10/31/2013)
10/31/2013	57 (p.1195)	BILL OF COSTS by Bromac Title Services, LLC, Title Resource Group, LLC. Matter to be submitted on 11/18/2013 before Clerk of Court. Any opposition should be filed within 14 days of the filing of this document. (Attachments: # 1 Memorandum in Support, # 2 Exhibit, # 3 Affidavit, # 4 Notice of Submission)(Boyle, Kim) (Entered: 10/31/2013)

TAB 2

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

WANDA ROGERS	*	CIVIL ACTION
	*	
PLAINTIFF	*	NO. 12-2493
	*	
V.	*	SECTION: C (2)
	*	
BROMAC TITLE SERVICES, LLC	*	
d/b/a PLATINUM TITLE &	*	Notice of Appeal
SETTLEMENT SERVICES,	*	
LLC, and TITLE RESOURCE	*	
GROUP, LLC	*	
	*	
DEFENDANTS	*	

NOTICE OF APPEAL

Notice is hereby given that Wanda Rogers, Plaintiff in the above named case, hereby appeals to the United States District Court of Appeals for the Fifth Circuit from the Order and Reasons granting summary judgment entered in this action on September 23, 2013 and the Judgment entered in this action on September 26, 2013.

Respectfully Submitted,
The Law Office of Alan Kansas, LLC
/s/ Alan Kansas
ALAN F. KANSAS, LA BAR #27725
1801 Carol Sue Ave.
Terrytown, LA 70056
(504) 210-1150
FAX (504) 617-6525

Attorney for Plaintiff, Wanda Rogers

Certificate of Service

I, Alan Kansas, certify that above Notice of Appeal was served on all parties of record via the Courts CM/ECF system on this 21st day of October, 2013.

/s/ Alan Kansas_

TAB 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WANDA ROGERS	CIVIL ACTION
VERSUS	NUMBER: 12-2493
BROMAC TITLE SERVICES, LLC d/b/a PLATINUM TITLE & SETTLEMENT SERVICES, LLC AND TITLE RESOURCE GROUP, LLC	SECTION: "C" 2

J U D G M E N T

Considering the Court's order and reasons granting defendants' motion for summary judgment, record document no. 53; accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Bromac Title Services, LLC d/b/a Platinum Title & Settlement Services, LLC and Title Resource Group, LLC and against plaintiff Wanda Rogers, dismissing plaintiff's complaint with prejudice.

New Orleans, Louisiana, this 23rd day of September 2013.

HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

RE-9

TAB 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WANDA ROGERS	**CIVIL ACTION**
VERSUS	**NO. 12-02493**
BROMAC TITLE SERVICE, LLC d/b/a PLATINUM TILE & SETTLEMENT SERVICES, LLC and TITLE RESOURCE GROUP, LLC	**SECTION "C"(5)**

ORDER AND REASONS[1]

Before the Court are two motions: (1) defendants' motion for summary judgement; Rec. Doc. 22; and (2) plaintiff's motion for partial summary judgment. Rec. Doc. 24. Both motions are opposed. Rec. Doc. 32; Rec. Doc. 30. Having considered the memoranda of counsel, the record, and the applicable law, the Court grants the defendants' motion for summary judgment and as a result declines to rule on the plaintiff's motion for partial summary judgment for the following reasons.

I. BACKGROUND

Plaintiff, Wanda Rogers, brings this suit against her former employer, Bromac Title Services, and its owner, Title Resource Group, LLC (collectively, "Bromac"). Rec. Doc. 1 at 2-3. The plaintiff alleges that her employment was terminated in violation of 28 U.S.C. §1875, the Jury System Improvement Act. *Id.* at 2. The plaintiff was selected as an alternative Grand Juror beginning on August 19, 2011, and on October 13, 2011, the plaintiff was selected to be an active member of the grand jury, which met on Fridays. Rec. Doc. 1 at 3-4. Her service as a

[1]Jennifer Watkins, a third-year student at Tulane University Law School, assisted in part of the preparation of this Order and Reasons.

Grand Juror required the plaintiff to miss work a total of eight Fridays from the time in which her service began on August 19, 2011 until the date on which she was terminated on April 20, 2012. Rec. Doc. 22-2 at 5. However, the plaintiff alleges that despite only missing work on a few occasions, the effect of her jury duty service upon her employment was much greater because she would not know until the Wednesday prior to the Friday in which she would be serving. Rec. Doc. 32 at 13.

After defendant Bromac entered into a joint venture with another company, Latter & Blum, there was an introductory sales meeting of the new personnel for the purpose of soliciting title business from Latter & Blum real estate agents. Rec. Doc. 22-2 at 2-3. Plaintiff made a speech at this meeting, and when she began her speech, she opened with a joke about unprotected sex. Rec. Doc. 22-2 at 2-3; Rec. Doc. 32 at 2-3. After this comment, plaintiff met with supervisors, including the CEO of Latter & Blum to discuss the incident. Rec. Doc. 31-2 at 15. Two days prior to her employment termination, plaintiff spoke at a sales meeting where again her former employer's clients, Latter & Blum real estate agents, were present. Rec. Doc. 1 at 6. At this meeting, plaintiff made a comment to the agents that she would always answer her phone on the weekends, unless she was drinking. *Id.* Plaintiff was terminated for unprofessional behavior two days later. Rec. Doc. 22-2 at 4. Plaintiff maintains that she was terminated because of her jury duty service. Rec. Doc. 1 at 7.

II. LAW AND ANALYSIS

A. Standard of Review for Summary Judgment

Summary judgment is proper only when the record indicates that there is not a "genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Fed.R.Civ.P.56; *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of fact exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996). When considering a motion for summary judgment, this Court "will review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. "If a moving party meets the initial burden of showing that there is no genuine issue of material fact, the burden shifts to the non-moving party to produce evidence or designate specific facts showing the existence of a genuine issue for trial." *Engstrom v. First Nat'l Bank of Eagle Lake*, 47 F.3d 1459, 1462 (5th Cir. 1995) (citing *Celotex*, 477 U.S. at 322-24). In order to satisfy its burden, the non-moving party must put forth competent evidence and cannot rely on "unsubstantiated assertions" and "conclusory allegations." *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 2994); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 871-73 (1990). The mere argued existence of a factual dispute will not defeat an otherwise properly supported motion. *See Anderson*, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50.

B. Jury Service Protection Act Claim

The Jury System Improvement Act (JSIA) states that "[n]o employer shall discharge. . . any permanent employee by reason of such employee's jury service, or the attendance or

scheduled attendance in connection with such service, in any court in the United States." 28 U.S.C. 1875(a). There is very little case law interpreting this statute, and therefore the Court may not draw on Fifth Circuit precedent. Many other district courts have relied on a similarly worded provision from the Age Discrimination in Employment Act ("ADEA") when interpreting the JSIA. *Papila v. Milrose Consultants, Inc.*, No. 09 Civ. 9257(NRB), 2011 WL 6937601, at *12 (S.D.N.Y., Dec. 29, 2011). In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343, 2350, 174 L.Ed.2d 119 (2009), the Supreme Court found that the wording "because of" in ADEA meant that the discrimination at issue in that statute must have occurred "by reason of" or "on account of" the discriminatory act at issue, and therefore to have been the "but for" cause of the adverse employment action. *See also Arnold v. Beth Abraham Health Servs.*, Inc., No. 09-7932 (DLC), 2011 WL 2416877, at *3 (S.D.N.Y. June 16, 2011) (applying the standard from *Gross* to a JSIA claim). The Court applies the same standard here. The plaintiff must prove that her jury service was the "but for" cause of her employment termination. *Gross*, 557 U.S. at 176. The Supreme Court recently expanded the "but for" causation requirement to include Title VII retaliation claims, in addition to ADEA claims. *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2534 (2013). Yet even prior to the expansion of the "but for" causation standard in *Nassar*, lower courts had been applying the "but for" causation standard set forth in *Gross* to JSIA cases because of the similar statutory language between the ADEA and the JSIA ("because of" and "by reason of"). *See Hill v. Hubbell Distribution, Inc.*, No. 1:12cv51, 2013 WL 1726562, at *6 (W.D.N.C. Apr. 19, 2013); *Hackbery v. Daubert, M.D., P.A.*, No. 11-80856, 2012 WL 1600563, at *8 (S.D. Fla. May 7, 2012).

In applying "but for" causation, the plaintiff must prove that the jury service was *the*

reason for her termination, and not merely a motivating factor in it. *Gross*, 557 U.S. at 168; *see also Williams v. District of Columbia*, 646 F. Supp. 2d 103, 109 (D.D.C. 2009) (holding that an employee's four month jury service was *a* motivating factor in her adverse employment action but not *the* motivating factor as required in a JSIA claim because the employer had a legitimate reason for the termination).

Defendants argue that they have proved that plaintiff's employment was not terminated because of her jury duty and are entitled to summary judgment because of this. Rec. Doc. 22-2. Defendants argue that plaintiff's repeated inappropriate comments were the true reason for her termination. *Id.* Defendants also point out that plaintiff herself stated to the Louisiana Workforce Commission that she believed her termination was due to the fact that her employer was seeking to reduce salary expenses. *Id.* at 10-11. Plaintiff argues that her termination was not due to her inappropriate comments because the office culture promoted these sorts of comments and she was never formally reprimanded after the first comment, although she did discuss it with supervisors. Rec. Doc. 32 at 13-14. Rogers argues that the comments made by her colleagues and supervisors about whether she could "get out of" jury duty evidence the fact that the jury duty was the only reason for her termination. *Id.* at 14.

The Court finds here that the defendant has provided undisputed evidence of a legitimate reason for the termination such that plaintiff's jury service cannot be the "but for" causation of her termination. Given the alternative reasons for plaintiff's termination, the Court is suspect that her jury service was even a motivating factor in her termination. The "Notice of Employee Separation" states the cause of Rogers' termination to be that she "made inappropriate comments in client meetings." Rec. Doc. 22, Exh. 5. Neither party disputes that Rogers made a joke about

unprotected sex at a very important client meeting, and then, after being warned about her comments, made another inappropriate comment concerning drinking. Rec. Doc. 22 at 14-15; Rec. Doc. 32 at 3 & 4. Plaintiff has not put forth any evidence to show that her behavior was acceptable in the "office culture" as she claims. Rec. Doc. 32 at 13. The Court finds that the espoused reason for plaintiff's termination is not mere pretext for terminating her because of her jury service. *Evans v. City of Houston*, 246 F.3d 344, 351 (5th Cir. 2001) (discussing pretext in the context of an adverse employment action based on alleged discrimination). Plaintiff was terminated on April 20, 2012 after her second inappropriate comment was made on April 18, 2012. Rec. Doc. 22 at 4. While her intermittent jury service was ongoing at this time, the proximal timing of her termination right after her second inappropriate comments rather than near the time when her active jury service had begun on October 13, 2011, also weighs in favor of finding that there is no merit to Rogers' claim. *Crowley v. Pinebrook, Inc.*, No. 08-3427, 2010 WL 4963004, at *3 (D. Md. Dec. 1, 2010) (finding that the proximal timing of the termination and the protected activity can help rebut an employer's evidence of a legitimate reason for the termination, but that the timing must be coupled with other evidence in order to rebut a legitimate reason for termination). The Court grants summary judgment in favor of the defendant.

Plaintiff's motion for partial summary judgment based on defendant's affirmative defenses has no merit, and in granting summary judgment in favor of the defendant, the Court declines to address plaintiff's motion for partial summary judgment. Rec. Doc. 24.

Accordingly,

IT IS ORDERED that defendant's motion for summary judgment is GRANTED. Rec.

Doc. 22.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment is MOOT. Rec. Doc. 24.

New Orleans, Louisiana, this 23rd day of September, 2013.

HELEN G. BERRIGAN
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Alan Kansas, certify that above Record Excerpts were served on December 24, 2013 upon

Kim M. Boyle &
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New Orleans, LA 70130-6534

This document was submitted via the CM/ECF Case Filing System. All counsel of record in this case are registered CM/ECF users. Filing and service were performed by direction of counsel.

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No. 13-30962

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

LEWIS E. LOVE
PLAINTIFF-APPELLANT

V.

COLONEL JODY BENDILY, Unit 1; **ASSISTANT WARDEN DENNIS GRIMES**, Unit 1; **STEVE RADER**, Unit 1; **DEPUTY WARDEN JAMES LEBLANC, DCI; SECRETARY RICHARD STALDER,** Department of Corrections,

DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA
Civil Action No. 08-506 SDD-SCR
Honorable Shelly D. Dick, District Judge, presiding

ORIGINAL BRIEF FOR DEFENDANTS-APPELLEES

Jody Bendily, Dennis Grimes, Steve Rader, James LeBlanc, and Richard Stalder

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Respectfully submitted,

JAMES D. "BUDDY" CALDWELL
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No. 13-30962

UNITED STATES COURT OF APPEALS
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DEFENDANTS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Honorable Court may evaluate possible disqualification or recusal.

1. Lewis E. Love, plaintiff *pro se*

2. James M. LeBlanc, Secretary
   Louisiana Department of Public Safety and Corrections

3. Richard Stalder, Secretary *retired*
   Louisiana Department of Public Safety and Corrections

4. Colonel Jody Bendily
   Louisiana Department of Public Safety and Corrections

5. Assistant Warden Dennis Grimes
   Louisiana Department of Public Safety and Corrections

6. Warden Steve Rader
   Louisiana Department of Public Safety and Corrections

7. James D. "Buddy" Caldwell, Attorney General for the State of Louisiana
Louisiana Department of Justice (Baton Rouge)

8. Michael Courtney Keller, Assistant Attorney General,
Louisiana Department of Justice (New Orleans)

9. Phyllis Esther Glazer, Assistant Attorney General,
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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 5th Cir. Rule 28.2.4, the defendants-appellees herein respectfully suggest that oral argument is not likely to assist this Honorable Court with adjudicating this matter. The plaintiff-appellant's lawsuit was dismissed for failure to prosecute because he did not keep the District Court informed of his address. The rules requiring *pro se* litigants to provide up-to-date contact information are well established and easy to follow. As a result of plaintiff's failure to notify the court of his new address, a court order was returned to the Court as undeliverable. The Court patiently waited approximately six-months for the plaintiff to reappear. He did not. Then, left with no apparent way to contact the plaintiff and no indication from the plaintiff that he cared to continue with this suit, the Court exercised its discretion and dismissed the case. There was no abuse of discretion. As such, the defendants-appellees decline to request oral argument and do not believe oral argument would be necessary or helpful in this appeal.

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STATEMENT OF JURISDICTION

The plaintiff-appellant, Lewis Love, filed the instant suit pro se and in forma pauperis under 42 U.S.C. §1983. The District Court had subject matter jurisdiction over the plaintiff's suit pursuant to 28 U.S.C. §1331 and §1343. The Court entered a final judgment dismissing this suit in its entirety. ROA.1500. Plaintiff filed a timely notice of appeal. ROA.1501. This Honorable Court has original appellate jurisdiction over the instant appeal pursuant to 28 U.S.C. §1291.

STANDARD OF REVIEW

The District Court dismissed this suit for failure to prosecute[1] pursuant to Fed. R. Civ. P. 41(b) because the plaintiff failed to inform the District Court of his proper mailing address, a ruling (ROA.1464) was returned undeliverable, and over six (6) months passed without word from the plaintiff on his proper address. ROA.1498.

> Rule 41(b) allows the district court to dismiss an action upon the motion of a defendant, or upon its own motion, for failure to prosecute. *Morris v. Ocean Systems,* 730 F.2d 248, 251 (5th Cir.1984); *Rogers v. Kroger Co.,* 669 F.2d 317, 319-20 (5th Cir.1982). This authority is based on the "courts' power to manage and administer their own affairs to ensure the orderly and expeditious disposition of cases." *Link v. Wabash R.R. Co.,* 370 U.S. 626, 630-31, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

[1] The plaintiff also argues that "[t]he disputed factual issues are Material under the Eighth Amendment." ROA.1508, et seq. (Point II). The District Court did not render summary judgment in favor of the defendants or otherwise rule on the merits in defendants' favor. Therefore, this issue, which was admittedly briefed "in an abundance of caution" is not on appeal and will not be briefed herein by the defendants-appellees. See ROA.1510.

Berry v. CIGNA/RSI-CIGNA, 975 F.2d 1188, 1190-91 (5th Cir. 1992) (internal footnote omitted).

When a subsequent suit would be barred by the applicable statute of limitations, the Rule 41(b) dismissal will be considered "with prejudice" regardless of any contrary statement in the Judgment of dismissal. *Collins v. LeBlanc*, 477 F. App'x 211 (5th Cir. 2012) (citing *Wallace v. Kato*, 549 U.S. 384, 387, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007); *Berry v. CIGNA/RSI–CIGNA*, 975 F.2d 1188, 1191 (5th Cir.1992)). The Judgment in this case dismissed plaintiff's suit expressly "without prejudice." ROA.1500. However, a subsequent suit would be barred by the applicable statute of limitations.

Plaintiff filed this suit under 42 U.S.C. §1983. Louisiana's one-year prescriptive period applicable to personal injury actions is applicable to suits under Section 1983. See *Jacobsen v. Osborne*, 133 F.3d 315, 319 (5th Cir. 1998). Plaintiff submitted his suit to prison authorities for filing on August 8, 2008, the date he signed the Complaint. ROA.19. As such, the date of filing is deemed to be August 8, 2008. See *Causey v. Cain*, 450 F.3d 601, 604 (5th Cir. 2006) (citing *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S.Ct. 2379, 101 L.Ed.2d 245(1988)) (a pro se prisoner's pleading is deemed "filed" at the moment it is delivered to prison authorities for forwarding to the district court.)

Generally, a suit filed in a court of competent jurisdiction and venue interrupts liberative prescription. La. C.C. art. 3462. Such an interruption of prescription would provide the plaintiff a full year to re-file this suit once the dismissal became final. See La. C.C. art. 3466. However, the dismissal of this suit under Fed. R. Civ. P. 41(b) erased any interruption of prescription that occurred when suit was filed. See *Hilbun v. Goldberg*, 823 F.2d 881, 883 (5th Cir.1987), *cert. denied*, 485 U.S. 962, 108 S.Ct. 1228, 99 L.Ed.2d 427 (1988) (discussing La. C.C. art. 3463). The incident necessarily occurred before August 8, 2008, the date suit was filed.[2] Well over one year has passed since then; and, without the benefit of an interruption of prescription, a subsequent suit would be prescribed. The Judgment dismissing this suit, therefore, should be considered "with prejudice."

A district court has limited discretion to dismiss a suit with prejudice under Rule 41(b). Review by this Honorable Court focuses on alleged abuse of that limited discretion. Specifically, this Honorable Court will examine whether, "a clear record of delay or contumacious conduct by the plaintiff exists and a lesser sanction would not better serve the interests of justice." *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir.2008).

[2] Even if the plaintiff alleged that the tort committed against him was continuous, it necessarily ended when he was released from state custody on or about October 15, 2010. See ROA.1398 (Notice of Change of Address after plaintiff was released from state custody). See also ROA.1485 (Opinion dismissing as moot claims for injunctive relief).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court properly exercised its discretion and dismissed the pro se plaintiff's suit for failure to prosecute when, for over nine months, plaintiff failed to apprise the Court of his proper mailing address?

STATEMENT OF THE CASE

The pertinent facts and procedural history of this case relate to the plaintiff's nine-month absence. Plaintiff was incarcerated at the Dixon Correctional Institute in Jackson, Louisiana, at the time he filed this lawsuit. ROA.12. He was released from custody on parole supervision. See ROA.1506. By letter dated November 7, 2010, plaintiff notified the District Court of his change of address. ROA.1398. This was the last action in the record taken by the plaintiff until he filed the notice of appeal nearly three years later. See ROA.1501.

According to the plaintiff, he was arrested again on or about June 21, 2012. ROA.1507. He claims he was "briefly incarcerated from June 21, 2012 to April 4, 2013." *Id*. During that period of over nine months, he did not notify the District Court of his address.

The plaintiff alleges his permanent address (beginning October 15, 2010), is 7324 Alberta Drive, Baton Rouge, Louisiana 70808. ROA.1506. He alleges this address was valid throughout his nine-month incarceration. Furthermore, plaintiff alleges he made arrangements with a Ms. Bessie Clark to "represent plaintiff and

handle any and all affairs to include correspondence (retaining and handling mail)." ROA.1507. There is no indication in the record that Ms. Clark is an attorney. Ms. Clark never entered an appearance on plaintiff's behalf or otherwise indicated to the Court that she would accept mail for the plaintiff. Regardless of the alleged permanency of the address and any arrangements he made regarding his mail, it is undisputed that a Ruling issued during plaintiff's incarceration was sent to the Alberta Drive address and was returned undeliverable. ROA.1484.

On November 8, 2012, the defendants filed a Motion for Leave to File a Motion to Dismiss. ROA.1442. On January 16, 2013, the Magistrate Judge issued a Ruling granting the Motion for Leave. ROA.1464. The Ruling was returned undeliverable on January 25. ROA.1484. Plaintiff did not file an opposition to defendants' motion to dismiss or otherwise appear. The Motion to Dismiss was granted in part. ROA.1485.

Following the return of the Ruling, over six months passed without any action or appearance by the plaintiff. On August 9, 2013, the District Court set a pretrial conference to be held October 24, 2013. ROA.1497. On August 12, 2013, , the District Court entered a Ruling and Judgment dismissing plaintiff's suit for failure to prosecute. ROA.1498-1500. Shortly thereafter, the plaintiff filed a notice of appeal. ROA.1501. This timely appeal follows.

SUMMARY OF THE ARGUMENT

The plaintiff failed to keep the Court informed of his mailing address. Pro se litigants are required by local rule to keep the Court up-to-date on their contact information. See MDLA LR 11.1, 41.2. These rules are clearly intended to prevent unnecessary delays caused by litigants who cannot be contacted. In this case, the record indicated the plaintiff was not receiving court notices, see ROA.1484, and so the District Court dismissed the suit rather than hold a futile scheduling conference with only defense counsel in attendance.

The plaintiff conclusorily asserts that the Court should have considered "less severe alternatives" before dismissing his suit. See ROA.1507. However, when the Court could not contact the plaintiff, it was left with no option but to dismiss the suit. That being said, the Court waited over six months for the plaintiff to reappear before entering the dismissal. The Court did not abuse its discretion by choosing dismissal over further delay.

By failing to change his address with the Court, the plaintiff effectively declined to prosecute his lawsuit. Considering the applicable local rules and the lengthy opportunity afforded to the plaintiff to appear, the dismissal of his case for failure to prosecute was proper and should be affirmed.

ARGUMENT

The plaintiff alleges the District Court abused its discretion "in view of all the facts and circumstances of this case." ROA.1507. He contends his permanent address never changed, that he was only temporarily incarcerated, that he continued to receive mail while incarcerated, and that he never lost interest in prosecuting this lawsuit. See ROA.1506-1507. None of these purported "facts and circumstances" establish that the District Court abused its discretion by dismissing this suit for failure to prosecute. The plaintiff's case was properly dismissed and for the reasons explained hereinafter, the Judgment should be affirmed.

I. PLAINTIFF ADMITTEDLY FAILED TO APPRISE THE COURT OF AN ADDRESS CHANGE FOR A PERIOD OF OVER NINE MONTHS.

The plaintiff was incarcerated for over nine (9) months, from June 21, 2012 to April 4, 2013, and did not inform the Court of his incarceration. ROA.1507. As a result, a Ruling was returned undeliverable. ROA.1484. The Court waited over six months for the plaintiff to appear and inform the Court of his proper mailing address. He did not. The case was then dismissed pursuant to Middle District of Louisiana Local Rule 41.2 for failure to prosecute. ROA.1498-1500.

II. PLAINTIFF'S FAILURE TO NOTIFY THE DISTRICT COURT OF HIS CHANGE OF MAILING ADDRESS VIOLATED LOCAL RULES AND WARRANTED DISMISSAL.

The plaintiff undeniably violated the Middle District of Louisiana Local Rules by failing to inform the Court for over nine months of his proper mailing

address. "It is well established that under Rule 41(b) of Federal Rules of Civil Procedure the district court has discretion to dismiss a suit for failure to prosecute if the plaintiff fails to comply […] with the rules of civil procedure." *Connolly v. Papachristid Shipping Ltd.*, 504 F.2d 917, 920 (5th Cir. 1974) (citing *Link v. Wabash Railway Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)). Litigants must also comply with local rules in addition to court orders and the Federal Rules of Civil Procedure. Therefore, a suit may be dismissed under Rule 41(b) for failure to prosecute if a plaintiff fails to comply with Local Rules.

Middle District of Louisiana Local Rule 41.2, which was referenced by the plaintiff in his brief at pp. 5-6 (ROA.1505-1506), states in pertinent part:

> The failure of an attorney or pro se litigant to keep the court apprised of an address change may be considered cause for dismissal for failure to prosecute when a notice is returned to a party or the court for the reason of an incorrect address and no correction is made to the address for a period of 30 days.

MDLA LR 41.2.

Additionally, Local Rule 11.1 states, "[e]ach attorney and pro se litigant has a continuing obligation to apprise [the] court of any address change." MDLA LR 11.1. Local Rule 11.1 is a corollary to Fed. R. Civ. P. 11(a) which states in pertinent part:

> Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--**or by a party personally if the party is**

> **unrepresented**. The paper must state the **signer's address**, e-mail address, and telephone number.

Fed. R. Civ. P. 11(a) (emphasis added). The plaintiff did not file any pleading, motion or other paper during his nine months of incarceration. So, he did not specifically violate Fed. R. Civ. P. 11. Nonetheless, Rule 11 establishes that a pro se litigant must keep the Court apprised of *his* mailing address throughout the litigation as every filing must state the signer's address. Local Rule 11.1 establishes the sanction for failing to adhere to Rule 11's mandate.

The Eastern District of Louisiana, when applying its version of the same Local Rules, see EDLA LR 11.1, 41.3.1, explained:

> The foregoing Rules impose an affirmative obligation on parties to keep the court apprised of their current mailing addresses and relieves court personnel of that burden. The importance of this obligation was noted by the Fifth Circuit years ago when it stated that "[i]t is incumbent upon litigants to inform the clerk of address changes, for it is manifest that communications between the clerk and the parties or their counsel will be conducted principally by mail." *Perkins v. King*, 759 F.2d 19 (5th Cir.1985)(table).

Pollard v. Gusman, CIV.A.06-3941, 2006 WL 3388491 (E.D. La. Nov. 21, 2006).

The Fifth Circuit has correspondingly explained:

> We recognize the real importance of cooperation from parties and attorneys to guarantee that litigation proceeds expeditiously on the all too crowded dockets of the district courts. We recognize further that a court has the inherent power to manage its calendar and to guarantee that errant lawyers and parties recognize that it has the

> power to impose reasonable and appropriate sanctions to ensure that its orders are complied with.

Connolly v. Papachristid Shipping Ltd., 504 F.2d 917, 920 (5th Cir. 1974).

The District Court entered a Ruling on January 16, 2013. ROA.1464. The Ruling was mailed to the plaintiff at his address of record. *Id*. It was returned undeliverable January 25, 2013. ROA.1484. Again, it is undisputed that, at the time the Order was rendered, the plaintiff was incarcerated and *not* at the address in the record. ROA.1507. The plaintiff did not change his address, file any pleading, motion, or other paper, or appear in any way for over six months after the Ruling was returned. Plaintiff's non-compliance with Local Rules 41.2 and 11.1 is unequivocal and dismissal for violating those Rules was entirely proper.

A. That plaintiff returned to the previous address of record after his incarceration and had allegedly made arrangements for receiving mail while incarcerated did not cure his failure to provide the Court with his actual address.

The plaintiff alleges his "permanent address" did not change even though he was incarcerated and not actually at that address for over nine months. ROA.1506. The plaintiff identifies his "permanent address" as 7324 Alberta Drive, Baton Rouge, Louisiana. *Id*. The fact that the plaintiff apparently returned to that address after his release from jail, see ROA 1515, does not change the fact that the Ruling issued while he was in jail was properly addressed to 7324 Alberta Drive and was returned to the Court as undeliverable. ROA.1484. Compare *Fuller v.*

Harris Cnty., 207 F. App'x 450, 451 (5th Cir. 2006) (reversing sua sponte dismissal for failure to prosecute upon finding that plaintiff "did not change his address and that the order was returned due to an inadvertent error in addressing the envelope.") The simple fact is that the plaintiff was not at his purported "permanent address" for over nine months and, as a result, mail delivered to that address was returned-to-sender undeliverable.

Plaintiff further alleges he made arrangements with Bessie Clark to "represent plaintiff and handle any and all affairs to include correspondence…" Plaintiff's brief at p. 7 (and Exhibit 4). Presumably, plaintiff intended Ms. Clark to forward him any mail he received at the Alberta Drive address. See ROA.1511-1514. Clearly, that did not occur with the Ruling at issue. ROA.1484.

Pro se litigants are responsible for conducting their own cases. See 28 U.S.C. §1654. "There is a point at which even *pro se* litigants must become responsible for the prosecution of their own cases if their claims are to warrant the court's attention." *Bookman v. Shubzda*, 945 F. Supp. 999, 1005 (N.D. Tex. 1996). It is not "unjustifiably onerous" to require a *pro se* litigant keep the Court apprised of his own mailing address. *See id.* Plaintiff's purported representation by Ms. Clark does not excuse his failure to keep the Court apprised of his mailing address.

Furthermore, no litigant may be "represented" in a federal lawsuit by anyone other than a licensed attorney.[3] See 28 U.S.C. §1654. There is no indication that Ms. Clark is an attorney. Even if she is, she did not make an appearance in court on behalf of the plaintiff or otherwise inform the Court that she would be accepting mail for the plaintiff.

The record reflects that the plaintiff is and always has represented himself in this matter. In that capacity, he is responsible for prosecuting his own suit and for ensuring the Court is able to contact him. Plaintiff failed to keep the Court apprised of his address and said failure was his alone. See ROA.1507 (speculating that the U.S. Mail Carrier may have "inadvertently […] placed [the service] in an adjacent mailbox…").

B. Plaintiff's pro se status does not excuse his failure to comply with Local Rules with which he had previously adhered.

The plaintiff alleges, the "Court's actions have denied the pro se plaintiff a fair opportunity to be heard, considering a pro se litigant is held to less stringent standards than formal pleadings as lawyers because the pro se litigant has had no legal schooling or training." ROA.1508. Plaintiff's pro se status does not excuse his failure to keep the Court apprised of his own address. A litigant's *pro se* status does not excuse compliance with local rules and the Federal Rules of Civil

[3] The "power of attorney" document attached as Exhibit 1 to plaintiff's complaint contains language tending to indicate plaintiff intended Ms. Carter to actually act as his attorney. See ROA.1512, ¶9. A "power of attorney" cannot confer the authority to engage in the unauthorized practice of law and one that purports to do so is a nullity. See *Williamson v. Berger*, 05-83 (La.App. 3 Cir. 06/08/05), 908 So.2d 35.

Procedure. See *Thrasher v. City of Amarillo*, 709 F.3d 509, 512 (5th Cir. 2013) (citing *Martin v. Harrison County Jail*, 975 F.2d 192, 193 (5th Cir.1992) (*per curiam*)).

Plaintiff's pro se status further does not excuse his compliance with Local Rules as the plaintiff previously adhered to these very Rules. Plaintiff alleges he has been at the Alberta Drive, Baton Rouge address since October 15, 2010. ROA.1506. Presumably, he was released from prison on or about October 15, 2010. See ROA.1398. The plaintiff notified the Court of his new address within 30 days of October 15, 2010. *Id*. The record, therefore, reflects that the plaintiff knew of his obligation to notify the Court of an address change and knew how to provide such notification. Considering plaintiff's prior compliance with these Local Rules, the District Court did not abuse its discretion by finding that plaintiff's failure to change his address in 2012 indicated an intent to abandon this lawsuit. See ROA.1499.

C. The Local Rules do not require the Court or other parties suffer actual prejudice or delay before the suit is dismissed.

The plaintiff alleges, "[n]o record indicate[s] that the defendant's [sic] suffered any delay when the service notice was unreturned." ROA.1507. Furthermore, "[i]t did not prevent the court from ruling on pending motions or any facet of the case." *Id*. The Local Rules do not require the Court or other parties suffer actual delay or prejudice before dismissal. Rather, the Rules are clearly

designed to prevent delay by ensuring the Court can contact all parties throughout the litigation. Furthermore, although the Court did rule on defendants' motion to dismiss, ROA.1485, the Court dismissed the suit shortly after realizing that plaintiff likely did not get notice of and would not likely appear at the scheduling conference. See ROA.1497. In other words, the Court apparently opted to dismiss rather than hold a futile hearing with only defense counsel in attendance.

Communications between the Court and a pro se litigant are conducted principally by mail and, thus, it was "incumbent upon [the plaintiff] to inform the clerk of [his] address change[.]" *Pollard, supra* (quoting *Perkins, supra*). The Court was not required to wait for it or the defendants to suffer prejudice from plaintiff's failure to change his own address in the record. That being said, the Court was unable to proceed with setting the case for trial when it could not contact the plaintiff. The plaintiff failed to comply with the Local Rules by failing to keep the Court up-to-date on his contact information. The Court waited over six months after the Ruling was returned before dismissing the suit. The Local Rules establish that dismissal for failure to prosecute is the remedy for a plaintiff's failure to notify the Court of an address change. Dismissal was proper.

III. DISMISSAL WITH PREJUDICE WAS APPROPRIATE.

A subsequent suit would be barred by the applicable statute of limitations and, as such, should be considered a dismissal with prejudice even though the District Court expressed otherwise. *See* ROA.1500.[4]

> A district court's "dismissal with prejudice is warranted only where 'a clear record of delay or contumacious conduct by the plaintiff' exists and a 'lesser sanction would not better serve the interests of justice.' " *Gray v. Fid. Acceptance Corp.*, 634 F.2d 226, 227 (5th Cir.1981) (quoting *Durham v. Fla. East Coast Railway Co.*, 385 F.2d 366, 368 (5th Cir.1967), and *Brown v. Thompson*, 430 F.2d 1214, 1216 (5th Cir.1970)). Additionally, where this Court has affirmed dismissals with prejudice, it has generally found at least one of three aggravating factors: "(1) delay caused by [the] plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct." [*Price v. McGlathery*, 792 F.2d 472, 474 (5th Cir. 1986)].

Millan v. USAA Gen. Indem. Co., 546 F.3d 321, 326 (5th Cir. 2008). As explained above, the delay was caused solely by the plaintiff's intentional failure to notify the Court of his change of address. Failure to abide by the simple Local Rules was plaintiff's alone and was particularly egregious in light of his prior compliance with the Rules. As further explained above, actual prejudice is not required for this particular failure to abide by Local Rules. That being said, prejudice can be inferred from the undeniable delay resulting from the Court's inability to contact the plaintiff.

[4] Please see the Standard of Review above at pages 2-3 for a full explanation of why Louisiana's one-year prescription for delictual actions would bar a subsequent suit by the plaintiff.

A. No lesser sanction would serve the interests of justice.

No sanction other than dismissal is available to the Court if she cannot contact the plaintiff. Logic dictates this conclusion. A plaintiff who cannot be contacted cannot receive court orders. Furthermore, a judge with a crowded docket should not be expected to hold a hearing, conference, or trial if she cannot be sure the plaintiff received notice of the setting. Local Rules 41.2 and 11.1 are clearly designed to prevent unnecessary delays by ensuring the parties keep the Court updated on their contact information at every stage of the proceedings. There is no conceivable alternative to dismissal when the plaintiff disappears.

The plaintiff alleges the District Court abused its discretion by not "consider[ing] a broad range of less severe alternatives prior to entering dismissal." Plaintiff-Appellant's brief at p. 7 (citing Fed. R. Civ. P. 41(b)). This conclusory allegation does not establish abuse of discretion. The plaintiff does not identify a single less-severe-sanction that could have been considered by the District Court. This is simply because, as explained above, there is no conceivable alternative.

B. The plaintiff was incarcerated for nine months and the Court offered him six months to appear. The record reflects clear delay.

The most significant and pertinent delays in the record are plaintiff's incarceration for over nine months and the six-month-delay between return of the Ruling and dismissal of the suit.

> This Court has recognized that "delay which warrants dismissal with prejudice must be longer than just a few months; instead, the delay must be characterized by 'significant periods of total inactivity.' " *McNeal v. Papasan*, 842 F.2d 787, 791 (5th Cir.1988) (quoting *John v. Louisiana*, 828 F.2d 1129, 1131 (5th Cir.1987)). Our precedents have generally reserved dismissals with prejudice for "egregious and sometimes outrageous delays." *Rogers v. Kroger Co.*, 669 F.2d 317, 321 (5th Cir.1982). "In short, these are cases where the plaintiff's conduct has threatened the integrity of the judicial process, often to the prejudice of the defense, leaving the court no choice but to deny that plaintiff its benefits." *Id.*

Millan, 546 F.3d at 326-27.

The local rules provide litigants a full month to write their new address on a piece of paper and mail it to the Court. See MDLA-LR 41.2. The plaintiff in this case failed to do this simple task. Plaintiff's address of record was invalid for over nine months – nine times longer than the gracious period provided by the local rules. Furthermore, the Court waited six times longer than required before dismissal. Considering the foregoing, the record reflects clear delay caused solely by the plaintiff and the District Court did not abuse its discretion by dismissing this suit effectively with prejudice.

CONCLUSION

The Judgment entered in favor of the defendants-appellees should be affirmed. The plaintiff abandoned this suit by failing to keep the Court apprised of his proper mailing address. As a result of this failure, a Ruling was returned to the

Court undeliverable and the Court was left with no option but to dismiss this suit. The responsibility for keeping the Court up to date on his contact information rested solely with the plaintiff. He failed for over nine months while he was incarcerated. The District Court did not abuse its discretion by dismissing this suit and the Judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing brief was electronically filed on the *16th day of December, 2013*, using the court's CM/ECF system which will provide a notice of electronic filing to counsel of record. I further certify that on this same date, a copy of this brief was served on the *pro se* plaintiff at his most current address of record via First Class United States Mail postage prepaid.

s/Phyllis E. Glazer
PHYLLIS E. GLAZER

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32 a(7)(B) because this brief contains approximately *4300* words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). This brief was prepared using Microsoft Office Word 2010.

s/Phyllis E. Glazer — *December 16, 2013*

PHYLLIS E. GLAZER — **DATE**

Assistant Attorney General
Attorney for Defendants-Appellees

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 13-60206

JANICE BROWN,
Plaintiff/Appellant

VERSUS

MISSISSIPPI STATE SENATE
Defendant/Appellee

REPLY BRIEF OF APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIAM H. BARBOUR, United States District Court Judge

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REPLY ARGUMENT I.

DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT COULD NOT PROVE A CLAIM OF RACE DISCRIMINATION?

In its response Appellee takes the same approach as the district court did in its decision by simply avoiding Appellant's arguments. The three criteria Appellee contends it used to support the decision to terminate Appellant were (1) less seniority in her position, (2) least impact on the workplace, and (3) greatest costs saving benefit. The problem with each of these excuses is that each of them were made up during the litigation by Tressa Guynes, and Appellee offers no excuse for her changing her reasoning for her decision.

At first Ms. Guynes claimed Appellant had less seniority for the entire Senate because of some custom that employees assigned to the Lieutenant Governor lost seniority when the Lieutenant Governor changed and the employee was moved to another position. Ms. Guynes admitted the custom did not actually exist, and then claimed seniority was really based on the position and not the entire Senate. At no time has Appellee offered an explanation as to why it lied to the Equal Employment Opportunity Commission ("EEOC") about this false custom, or why it did not claim

seniority was based on class to the EEOC if that was the truth. Any reasonable juror would conclude the only reason Appellee would lie about this would be to cover up its discriminatory animus. However, the district court simply overlooked the evidence or arguments on this topic, and Appellee's brief makes it clear it hopes this Court will take the same approach. The district court also claimed it would not be a genuine issue of material fact because it would not show race discrimination, and only that an employer made an erroneous decision by basing seniority on the position instead of entire employment with the Senate. However, this is simply false. Had Appellee used seniority on the entire Senate, which it initially claimed to the EEOC, only two white employees would be left at the bottom of the seniority list. So Appellee lied to the EEOC to explain why it fired a black employee instead of leaving itself the option of firing one of two white employees. How the district court could not see the evidence of race discrimination is unbelievable.

During the EEOC's investigation Appellee contended one of the reasons Mrs. Brown was selected for lay off was complaints Ms. Guynes had received from Senators and other employees. The EEOC interviewed every person Ms. Guynes identified as making complaints, and every person

admitted to the EEOC investigator that they had made no complaints. Then during discovery some Senators changed their stories to completely unbelievable and contradictory explanations, and some continued to admit the allegations of complaints were not true. The most unbelievable was the testimony of former Senator Flowers, who admitted when he was questioned by the EEOC investigator whether he had any problems with Mrs. Brown that he said no. However, during his deposition he claimed he misunderstood the question to only ask about her personality, and that he would have answered yes if the EEOC investigator had specifically asked about her performance. (R. at p. 319-321). Faced with all these clear contradictories Appellee changes it reasoning with no explanation to it had the least impact on the workplace. Mrs. Brown also disputed each of these allegations regarding poor performance, and all the allegations that she was not really used by her Senators to support the new argument that her selection would have the least impact.

Finally, Appellee contends it selected Mrs. Brown because she had the higher salary compared to Ms. Ramsdale. The problem with this argument is it was never identified by the Senate as one of the criteria to use to select whom to lay off. Nor did Appellee use this as part of its reasoning

to the EEOC for selecting Mrs. Brown for lay off. This is another one of the excuses Ms. Guynes created during her deposition after her first excuses to the EEOC had been shown to be untrue. Appellee again offers no excuse for creating this new reason **twenty-nine (29) months** after Mrs. Brown was selected for lay-off. It is clear Appellee hopes this Court will avoid this issue just like the district court avoided it.

CONCLUSION

It is clear that Appellant proffered evidence to the trial court that proves a case of race discrimination, and the trial court's dismissal of the case at the summary judgment stage should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nick Norris, do hereby certify that I have this day by United States mail, postage prepaid, forwarded a true and correct copy of the above and foregoing document to all counsel of record:

THIS, the 25th day of July, 2013.

/s Nick Norris
NICK NORRIS

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
CASE NO. 13-60206

JANICE BROWN,
Plaintiff/Appellant

VERSUS

MISSISSIPPI STATE SENATE
Defendant/Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains:

A. 791 words in proportionally spaced typeface.

2. The brief has been prepared:

A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the Court's striking the brief and imposing

sanctions against the person signing the brief.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

GERALD REYELTS and BEATRIZ REYELTS,

Plaintiffs-Appellees

v.

CARY JAY CROSS; CARY JAY CROSS, P.C.; LON SMITH & ASSOCIATES, INC., and A-1 SYSTEMS, Inc., d/b/a LON SMITH ROOFING AND CONSTRUCTION

Defendants-Appellants.

_____

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division
No. 4:12-CV-00112

_____

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS IN SUPPORT OF APPELLEES

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The National Association of Public Adjusters ("NAPIA") is a nationwide trade association of public insurance adjusters organized in 1951 to professionalize the growing profession of public adjusting. NAPIA exists for primary purposes of professional education, certification, legal and legislative representation, scholarship and research, and marketing and promotion of the public insurance adjusting profession. NAPIA assesses its member firms annual membership fees to help further these several goals.

NAPIA's interest in the outcome of this appeal is a substantial and direct one. For over 60 years, NAPIA has worked closely with the insurance industry, state insurance departments, state governors and legislators, and attorneys general to ensure that public adjusters – the only professionals specifically licensed and regulated to prepare first-party insurance claims on behalf of a consumer or commercial insured – practice their profession in an ethical and accountable way.

One issue in this appeal by Appellants Lon Smith & Associates, Inc. and A-1 Systems, Inc. d/b/a Lon Smith Roofing and Construction ("the Lon Smith Appellants") is whether the District Court correctly concluded that their conduct violated Section 4102.051(a) of the Texas Insurance Code by contracting to provide unlicensed public adjusting services. That Section provides that "[a] person may not act as a public insurance adjuster in this state or hold himself or

herself out to be a public insurance adjuster in this state unless the person holds a license or certificate issued by the commissioner . . . ." TEX. INS. CODE § 4102.051(a). NAPIA firmly believes the District Court's decision that Lon Smith Appellants violated Section 4102.051 is correct and should be affirmed expressly on that basis.

For reasons explained further below, NAPIA and its public insurance adjuster members have a strong interest in ensuring that statutes like Section 4102.051 are enforced to prevent roofers and other contractors from acting or contracting to act as public insurance adjusters without being licensed as same. Enforcement of statutes like Section 4102.051 prohibiting the unlicensed practice of public adjusting not only protects the licensed public insurance adjuster profession, it protects consumers from financial conflicts of interest when unlicensed and sometimes unscrupulous construction contractors purport to act as intermediaries with the insurance company on behalf of the consumer, just as the Lon Smith Appellants attempted to do in this case.

Undersigned counsel, Brian S. Goodman, has been general counsel to NAPIA since approximately 2000. NAPIA's board of directors has authorized undersigned counsel to file this *Amicus* Brief in support of the Appellees on behalf of NAPIA. Additionally, undersigned counsel for NAPIA have authored this

Amicus Brief and NAPIA (and no other person or entity) has funded the preparation and submission of this *Amicus* Brief.[1]

SUMMARY OF ARGUMENT

The Lon Smith Appellants ignore the language of their roof repair contract with the Appellees Gerald and Beatriz Reyelts ("the Reyelts"), which specifically "authorize[d] Lon Smith Roofing and Construction ("LSRC") to pursue homeowner[']s best interest for all repairs, at a price agreeable to the insurance company and LSRC." ROA.359, 1066. The contract further stated that "[t]he final price agreed to between the insurance company and LSRC shall be the final contract price." *Id.* In other words, the repair contract gave the roofer full and final authority to negotiate the repair contract price with the insurer without the insured's knowledge or approval, in violation of Section 4102.051(a)'s prohibition on unlicensed contractors acting as public adjusters on behalf of insureds. The District Court correctly so concluded.

Strong public policy concerns further support enforcing Section 4102.051(a) to prevent such roof repair contracts. The Lon Smith Appellants' contract gave them the full authority to negotiate directly with the Reyelts' insurer with respect to the "final contract price" that the insurer would pay Lon Smith Roofing for the hail damage to the Reyelts' roof. Allowing unlicensed contractors to act as

[1] *See* F.R.A.P. 29(c)(5).

intermediaries between the insured and an insurer would wreck havoc on the licensed and regulated public insurance adjuster profession and would allow construction contractors to take advantage of insureds – particularly in the face of a catastrophic natural disaster, when they are the most vulnerable – in situations where the contractors' financial interests obviously conflict with those of the insured.

ARGUMENT

I. This Court Should Affirm The District Court's Conclusion That The Lon Smith Appellants' Roof Repair Contract Violated Texas' Prohibition Of The Unlicensed Practice Of Public Adjusting.

Section 4102.051(a) of the Texas Insurance Code provides that "[a] person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state unless the person holds a license or certificate issued by the commissioner under Section 4102.053, 4102.054, or 4102.069." TEX. INS. CODE § 4102.051(a). Section 4102.001(3) defines the term "public insurance adjuster" broadly to include, among others, "a person who, for direct, indirect, or any other compensation[,] acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property[.]" *Id.* at § 4102.001(3)(A)(i). A contract that violates Section 4102.051 "may be voided at

the option of the insured." *Id.* at § 4102.207(a). Additionally, Section 4102 contains administrative and criminal penalties. *Id.* at §§ 4102.204-206.

The Reyelts entered into a contract with the Lon Smith Appellants to repair hail damage to their home's roof for approximately $15,000 that specifically "authorize[d]" the Lon Smith Appellants "to pursue homeowner[']s best interest for all repairs, at a price agreeable to the insurance company and LSRC." ROA.359, 1066. That roof repair contract further stated that "[t]he final price agreed to between the insurance company and LSRC shall be the final contract price." *Id.* Apparently conceding that the terms of their roof repair contract violate Section 4102.051(a)'s prohibition on the unlicensed practice of public adjusting, the Lon Smith Appellants argue that notwithstanding their contractual ability to do so, they in fact did not negotiate on behalf of the Reyelts "a price agreeable to the insurance company" and the Lon Smith Appellants. Lon Smith App. Br. 25-26. Notably, the Lon Smith Appellants admit that "[t]here is no evidence in the record of what the Lon Smith Appellants actually did with the Reyelts' insurance company." *Id.* Moreover, the Lon Smith Appellants concede that they made the judicial admission below in their Joint Status Report that "[i]f there had been a dispute about the estimate or cost of the roof replacement, the insurance company and A-1 Systems would have negotiated an agreed upon price." ROA.179; *see also* Lon Smith App. Br. 25.

The overly technical distinction that the Lon Smith Appellants attempt to draw by contending on appeal that they did not actually "act" as unlicensed public insurance adjusters in violation of Section 4102.051, even through their roof repair contract illegally permitted them to do so, and even though they admittedly "would have" done so had the opportunity arisen, is immaterial to the question of whether they violated Section 4102.51. Section 4102.207 clearly states that "[a]ny ***contract for services*** regulated by this chapter that is entered into by an insured with a person who is in violation of Section 4102.051 may be voided at the option of the insured." TEX. INS. CODE § 4102.207(a) (emphasis added). Consistent with that provision, the District Court held that the Lon Smith Appellants' ***contract*** with the Reyelts violated Section 4102.51, and thus was void and unenforceable.

Moreover, as the Texas Commissioner of Insurance has recognized, and as common sense dictates, even holding oneself out as a public adjuster without a license to do so is a violation of Section 4102. *See* Appendix 1 (June 26, 2012 Tex. Dept. of Ins. Commissioner's Bulletin #B-0017-12) ("A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property is also performing the acts of a public insurance adjuster."). The Lon Smith Appellants' argument that one actually has to perform unlicensed public adjusting in order to trigger Section 4102 is therefore contrary to the text of

the statute, as well as the Insurance Commissioner's plain language interpretation of same.

Accordingly, the Lon Smith Appellants' roof repair contract with the Reyelts was void and unenforceable regardless of what the Lon Smith Appellants did or did not do pursuant to that illegal contract.[2] The District Court correctly so concluded and this Court should affirm that conclusion to discourage other unlicensed contractors from attempting to take advantage of unwitting insureds like the Reyelts.

II. Public Policy Strongly Favors Strict Enforcement Of Laws Like Section 4102.051 Prohibiting Contractors From Engaging In The Unlicensed Practice of Public Adjusting.

Particularly following a catastrophic event like a fire, tornado, hurricane, or hail storm, insured homeowners seeking to rebuild or repair the resulting damage can be quite vulnerable. Victims of such catastrophes often are looking for help from anyone willing to offer it and are unlikely to check the offering party's training or qualifications. It is unfortunately increasingly common for

[2] The Lon Smith Appellants' additional reliance on a 2008 bulletin from the Texas Insurance Commissioner, *see* Lon Smith App. Br. 25, is similarly misplaced. That bulletin merely states that "Texas Insurance Code Chapter 4102 does not prevent contractors from providing estimates or discussing those estimates or other technical information with an insurer of its adjuster." *Id.* at Appendix 1. Notwithstanding the Lon Smith Appellants' assertion in their brief (for which they offer no citation to the record) that their "dealings with insurance companies on behalf of their customers is [sic] exactly what the Texas Insurance Commissioner said was permissible under Chapter 4102 of the Texas Insurance Code," *id.* at 25, their roof repair contract with the Reyelts does not limit their dealings with the Reyelts' insurer to "providing estimates" or discussing estimates "or other technical information." On the contrary, the Lon Smith Appellants' roof repair contract gives them full and exclusive authority to negotiate a final "price agreeable to the insurance company."

unscrupulous contractors to target these victims in their weakened state by offering to "work with the insurance company" to obtain the highest insurance payment possible to perform the necessary repairs. The inherent conflict of interest in allowing an unlicensed and unregulated contractor performing the repair work to negotiate the final price that the insurance company will pay for its work is insidious and inescapable. Requiring those parties to be licensed insurance adjusters provides insureds a level of protection from these perils that they might not otherwise be able to provide themselves.

Accordingly, 45 of the 50 states, plus the District of Columbia, have enacted comprehensive licensing statutes regulating public insurance adjusters.[3] These statutes address directly the problems inherent in allowing contractors or other unlicensed individuals or entities to act as unlicensed public adjusters. For example, in addition to prohibiting unlicensed contractors from practicing public adjusting, Texas law prohibits licensed public adjusters from conflicts of interest and from soliciting insureds during natural disasters, among other things. *See, e.g.*, TEXAS INS. CODE § 4102.151; *id.* at § 4102.158 (prohibiting licensed public adjusters from "engag[ing] in any . . . activities that may reasonably be construed as presenting a conflict of interest").

[3] The five states that do not have such licensing statutes are Alabama, Alaska, Arkansas, South Dakota and Wisconsin.

In the absence of prohibitions against the unlicensed practice of public adjusting, like Section 4102.051, the incentive for contractors to "adjust" the insured's claim with the insurer and then only to perform the minimum repairs necessary on the insured's property is simply too great. The Texas Insurance Commissioner herself has recognized this threat to the insured public, and particularly to non-English-speaking insureds:

> It has come to the attention of the Texas Department of Insurance that a number of contractors, roofing companies, and other individuals and entities not licensed by the department have been advertising or performing acts that would require them to hold a public insurance adjuster license. Additionally, the department has learned that the tactics used by these unlicensed individuals include visiting neighborhoods and areas of the state where languages other than English are commonly spoken. These unlicensed individuals often prey on unknowing consumers by promising to 'work' insurance claims to achieve a higher settlement.

Appendix 1 (June 26, 2012 Tex. Dept. of Ins. Commissioner's Bulletin #B-0017-12).[4]

Accordingly, the Insurance Commissioner has made clear that the Texas Department of Insurance "takes seriously the harm unlicensed individuals and entities can cause the marketplace when they prey on unsuspecting consumers and in the industry." *Id.* Consistent with this concern, the Commissioner has vowed to "refer unlicensed persons performing the acts of a public insurance adjuster to the

[4] Departments of Insurance in several other states, including New Mexico, North Carolina and Oklahoma, have issued similar bulletins. *See* Appendix 2.

Texas Attorney General" and to "pursue all remedies available under the Insurance Code." *Id.*

The District Court's conclusion that the Lon Smith Appellants' roof repair contract with the Reyelts was unenforceable and void is entirely consistent with the Texas Insurance Commissioner's stated goal of using the remedies available under the Insurance Code to prevent unlicensed contractors like the Lon Smith Appellants from victimizing vulnerable insureds, including elderly insureds like the Reyelts. Consistent with the State of Texas' clear desire to enforce the Insurance Code's prohibition of unlicensed insurance adjusting, this Court should affirm the District Court's legal conclusion.

Not only does the unlicensed practice of public adjusting pose a serious threat to insureds, it poses a threat to insurers and licensed public insurance adjusters as well. With respect to insurers, while some insurers knowingly may negotiate with unlicensed contractors purportedly acting as adjusters, many insurers may do so unknowingly and thus may fall victim to misleading statements by the unlicensed contractors concerning the scope of the repairs or construction, the materials to be used, etc.

With respect to NAPIA members and other properly licensed and regulated public insurance adjusters, the unlicensed practice of public adjusting poses a double threat to the industry. First, the unlicensed contractors unfairly compete

with licensed public adjusters who must, among other things, pass an exam and subject themselves to ongoing state oversight. Additionally, many states require that licensed adjusters complete continuing education courses to maintain their licenses. These laudable licensing requirements ensure that licensed public adjusters adhere to ethical and regulatory standards that unlicensed contractors can and often do ignore with impunity.

Second, the unlicensed practice of public adjusting unfairly portrays insurance adjusters as untrustworthy and as placing their own interests above those of the insureds. This is particularly damaging to NAPIA and its approximately 115 member firms, who consistently strive to promote the licensed public adjusters' standard of ethical and loyal representation of their insured clients.

A licensed public adjuster acts as a true and impartial intermediary between the insured and the insurer to protect the insured's best interests. Allowing contractors to engage in the unlicensed practice of public adjusting creates an inherent and substantial conflict of interest that immediately puts the contractor's best interests ahead of the insured's. Without strict enforcement of deterrent laws like Section 4102.051 prohibiting unlicensed public adjusting, the incentive to take advantage of the insured will only increase.

The District Court's ruling that the Lon Smith Appellants' roof repair contract with the Reyelts violates Section 4102 is an important one that this Court

should expressly affirm. NAPIA is aware of only one other court opinion in the United States to have enforced the laws prohibiting the unauthorized practice of public adjusting. *See Building Permit Consultants, Inc. v. Mazur*, 122 Cal. App. 4th 1400, 1414 (Cal. App. 2d Dist. 2004) (affirming trial court's decision that company's unlicensed practice of public insurance adjusting voided its agreement with the insured).

As the court recognized in *Mazur*, requiring public adjusters to be licensed provides "safeguards of accountability, competence, [and] professionalism." *Id.* at 1413. Moreover, as the Texas Legislature did in enacting in Section 4102,

> the [California] Legislature recognized that insureds would often be susceptible to exploitation in the wake of earthquakes, fires, floods, and similar catastrophes and that consumers of public adjusting services needed protection. In addition to price gouging and collusion with contractors, the Public Adjusters Act protects California consumers from a number of other abuses including high-pressure sales tactics, fraud, and incompetence. To ensure accountability and compliance with professional standards already in place for adjusters employed by the insurers, the Legislature included the licensure requirement as a part of the statutory scheme. In light of the consumer protection goals of the statute as a whole, we infer that the licensure requirement was aimed at any firm that might potentially exploit insureds in a vulnerable position by offering to help them through the insurance claim ordeal.

Id. at 1412.

Expressly affirming the District Court's ruling that the Lon Smith Appellants' contract with the Reyelts violated Section 4102 of the Texas Insurance Code would constitute an important recognition of the aforementioned harms

caused by the unauthorized practice of public adjusting and would further the Texas Legislature's important goal of protecting the citizens of Texas from these harms. The Texas Legislature has worked to guarantee that homeowners receive the services of a licensed public adjuster who will honestly and competently assist with the insurance claims process. What the Reyelts received instead in this case was precisely what the Texas Legislature has prohibited – a promise to provide public adjusting services from a roofer without the training and supervision necessary to ensure that the promised claims-handling services will be provided honestly and competently.[5]

[5] Effective September 1, 2013, the Texas Legislature amended provisions of the Texas Insurance Code specifically to exclude roofing contractors from the insurance claims process. Although this legislation was enacted after the conduct at issue in this appeal, it nonetheless underscores the concerns regarding the unlicensed practice of public adjusting in Texas and the legislative intent to protect Texas consumers from such practices. *See* Tex. Ins. Code §§ 4101.251, 4102.163(a)

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the District Court finding that the Lon Smith Appellants' roof repair contract with the Reyelts violated Section 4102.051 of the Texas Insurance Code.

Respectfully submitted,

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COUNSEL FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS

CERTIFICATE OF SERVICE

This is to certify that the foregoing BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS IN SUPPORT OF APPELLEES was served this 26th day of December, 2013 by first-class United States mail, postage pre-paid, and by electronic mail, on:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X this brief contains 3,203 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and at 14 pages is less than one-half the maximum length authorized for a party's principal brief, or

□ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/Steven J. Badger

Dated: December 26, 2013

NO. 13-10896

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

_____

GERALD REYELTS and BEATRIZ REYELTS,

Plaintiffs-Appellees

v.

CARY JAY CROSS; CARY JAY CROSS, P.C.; LON SMITH & ASSOCIATES, INC., and A-1 SYSTEMS, Inc., d/b/a LON SMITH ROOFING AND CONSTRUCTION

Defendants-Appellants.

_____

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division
No. 4:12-CV-00112

_____

APPENDIX TO MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF PUBLIC INSURANCE ADJUSTERS IN SUPPORT OF APPELLEES

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APPENDIX 1

TDI.TEXAS.GOV
TEXAS DEPARTMENT OF INSURANCE

COMMISSIONER'S BULLETIN #B-0017-12

June 26, 2012

TO: ALL AGENTS, PUBLIC INSURANCE ADJUSTERS, AND ADJUSTERS, AND TO ALL INSURANCE COMPANIES, CORPORATIONS, EXCHANGES, MUTUALS, COUNTY MUTUALS, RECIPROCALS, ASSOCIATIONS, LLOYDS, AND OTHER INSURERS WRITING PROPERTY AND CASUALTY INSURANCE IN THE STATE OF TEXAS

RE: Adjusting claims by unlicensed individuals and entities

It has come to the attention of the Texas Department of Insurance that a number of contractors, roofing companies, and other individuals and entities not licensed by the department have been advertising or performing acts that would require them to hold a public insurance adjuster license. Additionally, the department has learned that the tactics used by these unlicensed individuals include visiting neighborhoods and areas of the state where languages other than English are commonly spoken. These unlicensed individuals often prey on unknowing consumers by promising to 'work' insurance claims to achieve a higher settlement.

All agents, adjusters, and insurers should be mindful that, pursuant to the Insurance Code Chapter 4102:

1. A person who, for direct, indirect, or any other compensation, acts on behalf of an insured to negotiate or effect the settlement of an insurance claim is performing the acts of a public insurance adjuster.
2. A person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property is also performing the acts of a public insurance adjuster.

With limited exceptions, a person performing the acts of a public insurance adjuster or holding himself or herself out as a public insurance adjuster in this state must be licensed under the Insurance Code Chapter 4102. Additionally, insurers cannot utilize roofers as de facto public insurance adjusters nor provide commissions to them in the form of direct or indirect payments or rebates that are in excess of amounts owed under the policy.

The department takes seriously the harm unlicensed individuals and entities can cause on the marketplace when they prey on unsuspecting consumers and the industry. I urge insurers, agents, adjusters, and consumers to help call attention to and halt attempts by unlicensed persons to negotiate insurance claims, and I encourage everyone to report these practices to the department and the TDI Fraud Unit (1-800-252-3439 – Report Fraud).

The Insurance Code provides for both civil and criminal penalties for violating this licensing requirement. The department will refer unlicensed persons performing the acts of a public insurance adjuster to the Texas Attorney General, pursue all remedies available under the Insurance Code, and highlight these practices to the Legislature so that it may consider further steps to regulate these persons and activities.

Eleanor Kitzman
Commissioner of Insurance

Frequently Asked Questions (FAQs) - Unlicensed Individuals, Entities Adjusting Claims

For more information contact:

ConsumerProtection@tdi.texas.gov or 1-800-252-3439

Texas Department of Insurance
333 Guadalupe, Austin, TX 78701
P.O. Box 149104, Austin 78714
512-463-6169 | 1- 800-252-3439

APPENDIX 2

NEW MEXICO PUBLIC REGULATION COMMISSION

P.O. Box 1269
1120 Paseo de Peralta
Santa Fe, NM 87504-1269

John Gaherty
Chief Investigator
505-827-4439

DIVISION OF INSURANCE
John Franchini, Superintendent

Insurance Division Bulletin No. 2012-02
January 26, 2012

TO: PROPERTY CASUALTY INSURERS, ADJUSTING FIRMS AND ADJUSTERS

RE: CLARIFICIATON OF LICENSING AND REGISTRATION REQUIREMENTS FOR ADJUSTING FIRMS AND ADJUSTERS

THE FOLLOWING BULLETIN is issued pursuant to Insurance Division rule 13 NMAC 1.2.1 through 1.2.10. This Bulletin is also issued pursuant to NMSA 1978 §59A-13-1 *et seq.* (Adjusters), NMSA 1978 §59A-11-1 *et seq.* (Licensing Procedures) and NMSA 1978 §59A-61 *et seq.* (Fees).

Purpose:

The purpose of this Bulletin is to clarify the position of the Division of Insurance regarding all adjuster licenses and adjusting firm licenses. Currently "adjusting firms" have been required to register with the Insurance Division, but only individual adjusters have been licensed. Henceforth, any entity performing adjusting services will be required to obtain and maintain a valid adjusting license with the Insurance Division. This will apply to business entities as well as individuals.

Clarification:

The Insurance Code prohibits any "persons" from performing adjusting services in New Mexico unless licensed under the Insurance Code. See NMSA 1978 §59A-13-3. The Insurance Code defines "person" as individuals as well as business entities. See NMSA 1978 §59A-1-10. The Division of Insurance defines "adjusting firms" as any business engaged in processing and handling claims for any insurance company authorized under the Insurance Code operating in New Mexico. All adjusting firms must obtain and maintain a Business Entity Registration with the Division of insurance. All Adjusting firms must also ensure that all licensed adjusters employed by the adjusting firm are affiliated with the firm in accordance with the Insurance Code.

Procedures

All adjuster firm registrations and adjuster licenses are renewable on March 1 of each calendar year. Effective March 1, 2012, the Division of Insurance will ensure compliance by all adjusting firms and adjusters employed by the adjusting firm.

The Superintendent reminds all adjusting firms and adjusters of the following requirements:

1. All adjusting firms operating in New Mexico are required to obtain a Business Entity License from the Division of Insurance
2. All adjusters operating in New Mexico are required to obtain an adjuster license and to be affiliated with an adjusting firm.
3. All adjusting firms and adjuster are required to renew their respective licenses on March 1 of each calendar year

The Division of Insurance, Agent Licensing Bureau has posted all the required forms and fee schedules on the Division's website. For specific questions contact the Agent License Bureau at 505-827-4601 or agents.licensing@state.nm.us.

DONE AND ORDER on this 31st day of **January, 2012**

John G. Franchini
Superintendent of Insurance

North Carolina
DEPARTMENT OF INSURANCE
Wayne Goodwin | Commissioner of Insurance
AGENT SERVICES

TO: Property Insurers Licensed to do Business in North Carolina.
Other Interested Parties

FROM: Etta Maynard

DATE: May 6, 2010

RE: Public Adjusting Relative to Storm Damage Claims/Roofing Repair

The North Carolina Department of Insurance ("The Department") has become aware of questionable advertising and business practices by a small number of construction firms operating in the State. Last year, many home and small business owners experienced damage to their properties from storms, especially wind and hail storms.

As a result, many policyholders filed roof damage claims with their insurers. Multiple policyholders were also approached by contractors, especially those who regularly repair roofs, offering their repair or reconstruction services.

By itself, of course, a contractor offering his/her repair or construction services is a normal trade practice, is legal, and is not regulated by the Department. Some contractors, however, have offered their "representation" services by offering to "exclusively negotiate" the claim settlement with the insurer(s) involved, often as part of the repair contract. In some instances, the contracts have "required" the property owner to allow the contractor to "negotiate" the terms of the claim settlement on the owner's behalf.

The Department views this type of arrangement as "public adjusting" which is defined in North Carolina insurance law as "investigating, reporting to and assisting an insured in relation to first party claims arising under insurance contracts, other than life and annuity, that insure the real or personal property, or both, of the insured..."

The contractor's actions, offerings, or representations may constitute the contractor's acting as a public adjuster. **In North Carolina, it is a misdemeanor to act as a public adjuster without a license.**

The terms, written or otherwise, of the agreement with the property owner would determine whether the actions constitute violations of insurance law. Even the offering, in a marketing sense, of such "representation" may constitute a violation.

Insurers are encouraged to make their contractor clients aware of the Department's concerns, and advise their claims staff to be alert to possible violations. Please advise Agent Services Division of any apparent violations by contacting the Complaint Section at (919) 807-6800 ext 76816.

Oklahoma Insurance Department
State of Oklahoma

SPECIAL NOTICE

TO: ALL LICENSED INSURANCE PRODUCERS, INSURANCE ADJUSTERS AND INSURERS

FROM: KIM HOLLAND, INSURANCE COMMISSIONER

RE: ROOFING CONTRACTORS

DATE: MAY 27, 2010

PURPOSE OF THIS BULLETIN

Wind and hail storms in recent years have resulted in many Oklahoma homeowners and business owners filing claims for roof damage with their insurance companies. As a result, the Oklahoma Insurance Department is increasingly receiving complaints regarding the advertising and business practices of roofing contractors in the state. Roofing contractors that advertise to be "claim specialists", claim analysts", who refer to "denied claims", "deductibles" or assert they "deal with insurance companies" in their advertisements are acting as unlicensed public adjusters.

It is legal for contractors to approach homeowners and business owners, offering repair or reconstruction services. A roofing contractor may offer an opinion to an insured as to whether roof damage is from a storm or other incident normally covered by a homeowner's policy. The roofing contractor may recommend to the insured to file an insurance claim with the insurer. The roofing contractor may provide an estimate of repair which the insured may submit to the insurer. The roofing contractor may be present when the insurance adjuster inspects the damage. The roofing contractor may answer the adjuster's questions.

However, 36 O.S. § 6202(4) provides:

A public adjuster is any person, firm, association, company, or corporation that suggests or presents to members of the public that said public adjuster represents the interests of an insured or third party for a fee or compensation. Public adjusters may investigate claims and negotiate losses to property only.

A roofing contractor must be licensed as a public adjuster in order to negotiate and act as an intermediary between the insured and the insurer. A contractor who asks an insured to sign a power of attorney or any other contract authorizing him to act on the insured's behalf for a fee is acting as a public adjuster. For example, a roofing contractor must be licensed as a public adjuster in order to: (1) enter into a contract for services authorizing the contractor to negotiate or effect the settlement of a claim for a fee or compensation; (2) advocate on behalf of the insured or offer assistance to the insured to prepare, file or complete the insurance claim; and/or (3) advertise or solicit for employment as an adjuster of such claims.

Public adjusters may not:
Directly or indirectly, own or have a pecuniary interest in any business entity which provides construction or reconstruction related services on behalf of an insurance claimant or insured for which the adjuster is providing services, nor may the adjuster, directly or indirectly, own or have a pecuniary interest in any other business entity which furnishes any supplies, material, services or equipment purchased by or on behalf of the claimant or insured in settlement of the claim, other than the usual and customary supplies, materials, services or equipment utilized in the adjusting process". 36 O.S. §6220.1(A).

There is an exception if the adjuster:
Provides services on a claim which is located in the county in which the adjuster maintains his principal place of business or in a municipality having a population of less than 6,000 persons; provided that the adjuster gives written disclosure of the potential conflict of interest to both the insured and insurer prior to the performance any adjuster services.

Therefore, a roofing contractor can not be a licensed public adjuster except in the county the contractor has its principal place of business in or in municipalities of less than 6,000 persons. Any person who violates § 6220.1 shall be subject to disciplinary action or a civil fine, or both, as set forth in 36 O.S. § 6220.

As a general rule, to avoid disciplinary action, roofing contractors should act only as contractors and stay out of claim negotiation, participating in the claim process and advertising as "claim specialists". Insurers are encouraged to make their contractor clients aware of the Department's concerns and to advise their adjuster staff to be alert to possible violations of the Oklahoma Insurance Adjusters Licensing Act.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 13-31126

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

MARCUS PATTERSON CAREY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA, No. 2:10-CR-310-1

ORIGINAL BRIEF FOR THE APPELLANT MARCUS PATTERSON CAREY

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ATTORNEY OF RECORD FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 13-31126

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

MARCUS PATTERSON CAREY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA, No. 2:10-CR-310-1

ORIGINAL BRIEF FOR THE APPELLANT MARCUS PATTERSON CAREY

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of these proceedings. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

Appellant:

Marcus Patterson Carey
B.O.P. Reg. No. 14752-035

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United States Attorney
Western District of Louisiana
Daniel McCoy (in the district court)
Assistant United States Attorney
Western District of Louisiana

Lafayette, Louisiana this 27th day of January, 2014.

/s/ Rebecca L. Hudsmith
REBECCA L. HUDSMITH, La. Bar No. 7052
Office of the Federal Public Defender
Middle and Western Districts of Louisiana

STATEMENT REGARDING ORAL ARGUMENT

Undersigned counsel requests oral argument to assist the Court in deciding the multiple complex issues that arose in the sentencing hearing for second degree murder committed by an army veteran suffering from Post-Traumatic Stress Disorder and under the influence of JWH-018, a synthetic marijuana that has since been made illegal because of its psychotic and mind-altering affects.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 13-31126

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

MARCUS PATTERSON CAREY,
Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, No. 1:10-CR-310-1

ORIGINAL BRIEF FOR THE APPELLANT MARCUS PATTERSON CAREY

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court committed procedural error during sentencing when the district court refused to consider mitigating evidence under the theory that the government had already considered the mitigating evidence in the plea negotiations?

2. Whether the district court committed procedural error during sentencing when the district court imposed an upward departure under Guideline Section 5K2.8 for extreme conduct in a second degree murder case?

3. Whether a sentence of 30 years for a manslaughter committed by an army veteran, who suffering from Post Traumatic Stress Disorder and was under the influence of legal drugs, is substantively unreasonable when the Sentencing Guidelines provided a Guideline range of only 188 to 235 months?

STATEMENT OF THE CASE

Marcus Patterson Carey is a two-tour combat veteran suffering from Post Traumatic Stress Disorder (PTSD). ROA.411-12. On June 19, 2010, the 25-year-old Carey was living on Fort Polk military base with two friends and smoked JWH-018, a synthetic marijuana that has since been made illegal due its severe mind-altering and psychotic affect on its users. ROA.109, 225, 257, 411. While in a dissociative state (not in touch with reality) caused by the JWH-018, Carey awoke in the early morning and attacked his friends with a hammer, killing one and injuring the

other. ROA.109, 411. Carey then went to a neighbor's house and told him that he had killed his friend and the neighbor contacted military police. While in the custody of military police, Carey gave a video confession riddled with tears, confusion, and complete remorse for his actions. ROA.399.

I. MARCUS PATTERSON CAREY: MILITARY COMBAT VETERAN WITH PTSD

Marcus Carey joined the United States Army on August 18, 2004 and was stationed at Fort Polk, Louisiana. He was a member of 2/4 infantry, 4th Brigade, 10th Mountain Division during this time. He deployed to Afghanistan in 2006. His first enemy contact was in Chalakor Valley, which is where he received his Combat Infantry Badge. While in Afghanistan, Marcus was involved in heavy combat. One extended mission that Carey was involved in was Operation Medusa, which had a high operational tempo - there was constant bombing, the men slept as little as four hours a night, and it lasted for almost two weeks. ROA.223.

Similar to many other Afghanistan veterans returning after being exposed to counterinsurgency style warfare, sniper attacks, roadside bombs, Carey used drugs and alcohol to cope with what he had endured during his deployment as a form of self-medication. In September 2007, Carey had a positive urinalysis for marijuana. During this time when every trained serviceman was absolutely necessary, Carey was not discharged for his infraction. Instead, he was sent to Iraq. After being in combat

in Iraq for several months, Carey returned home to Ohio for leave in the summer of 2008 and he did not return for duty on time. Ultimately, Carey returned to Iraq and was disciplined. With his regular work schedule and the added working hours for discipline, Carey was sleeping as little as four hours a night. The chaos and uncertainty of combat in Iraq was harder for Carey than Afghanistan, particularly given that his symptoms of psychiatric illness were fully manifest by the time he served in Iraq. ROA.224.

Carey returned from Iraq in January 2009, with the warning signs of the serious mental health issues that he was facing. Doctors at that military clinic prescribed Klonopin and Ambien to treat his depression, anxiety and PTSD. ROA.241. Carey continued to self-medicate despite this preliminary effort to treat his symptoms with psychotropic medications. As a result, he had various military infractions, including missing physical training and being drunk on duty. Nevertheless, his military leaders noted that he had no problem with the daily tasks of being a soldier, which they attributed to the fact that he had so much experience, and his technical knowledge was very sharp - which allowed him to always be the first to answer questions and the first to explain things to his squad mates. Carey's knowledge and experience was needed and useful. Although Carey's motivation was low because he was scheduled to complete his expired time of service (ETS) in

December, 2009, his sergeant noted that it would only be human to act the way Carey did considering the circumstances. ROA.224, 244.

Carey, however, was suffering the symptoms of trauma, anxiety, and depression: hypervigilance, distressing dreams, sleep problems, agitation, worry, inability to plan, recurrent and intrusive thoughts of trauma, and substance use. He was a two-war combat veteran having difficulty adjusting to his life after war. The need for help was apparent. Instead of help, however, in August, 2009, Carey was discharged from the Army with a general under honorable discharge. ROA.247. This dismissal was less than four months before his expiration of term of service. Fellow soldiers wrote letters praising Carey's skills as a soldier in combat, and Carey pled for the opportunity to stay in the Army for four more months, so that he could have full benefits of his Army service after discharge, which would help him survive post-discharge. ROA.225, 249.

II. MARCUS CAREY, WHILE IN A DISSOCIATIVE STATE CAUSED BY HIS PTSD AND JWH-018, SYNTHETIC MARIJUANA, ATTACKS HIS BEST FRIEND AND ROOMMATE, KILLING ONE AND INJURING THE OTHER

Carey stayed at Fort Polk after his discharge because his army buddies had become his family and his comfort. His mother told him not to return to Ohio because the employment outlook was so bad. During the time between being discharged and the homicide, Carey lived with his best friend Howard Wayne Alley.

Carey ran errands for Wayne and helped around the house. Carey and Wayne moved in with Byron Whitcomb for a brief period. Carey began smoking JWH-018, a synthetic marijuana, which has since been made illegal due to the severe psychotic and mind altering effects it has on users, such as Carey, who are prone to psychosis due to preexisting mental illness. ROA.225, 257.

The night before the homicide, Carey smoked JWH. The next morning, Carey was in an altered state of consciousness and he attacked Byron Whitcomb with a hammer and knife while he was sleeping on a couch. Carey then went to where Howard Alley lay sleeping on a mattress on the floor and attacked him. Byron Whitcomb died from his injuries. Howard Alley survived, but suffered serious head and neck injuries.

The crime scene was chaotic and irrational and Mr. Alley's recount of the events illustrated how bizarre and unplanned the offense was. This evidenced the mental state that Carey was in, according to Dr. Pablo Stewart, a psychiatrist, who, after spending many hours with Carey, concluded that something triggered a dissociative event in Carey on June 19, 2010, which explained why Carey had only fragmented memories of the event, and why the event itself was so irrational. ROA.225, 411-12. Dr. Stewart further concluded that, "Mr. Carey's significant mental disturbance at the time of the crime made it impossible for him to plan or consider his actions as evidenced by the irrational nature of the offense and crime scene. For

instance, the surviving victim's statement reveals that during the offense he asked Mr. Carey why this was happening, indicating that Mr. Carey's actions were out of context, and the event was not provoked and had no recognizable rational cause. Similarly, Mr. Carey's post-offense behaviors indicate disorganization and lack rational planning: he did not try to benefit himself or flee, but rather walked to a neighbor in shock and stated that he had killed someone. This is an example of his thinking process at the time which indicates that what occurred was outside of any rational, planned or deliberate event between the victims and Mr. Carey. The only logical explanation for Mr. Carey's irrational behavior is that the event was a result of mental break with reality." ROA.411-12.

III. MARCUS CAREY IS CHARGED WITH FIRST DEGREE MURDER BUT PLEADS GUILTY TO SECOND DEGREE MURDER PURSUANT TO A RULE 11(c)(1)(C) PLEA AGREEMENT

Carey was charged, on October 13, 2010, by grand jury indictment, with one count of first degree murder in violation of 18 U.S.C. § 1111, and one count of attempted first degree murder in violation of 18 U.S.C. § 1113. ROA.22-24; Record Excerpts ("RE") at Tab 2. Although the indictment listed statutory aggravating factors, which made the case death eligible, the government ultimately decided not to seek the death penalty.

Instead, on June 12, 2013, Carey entered a plea of guilty, pursuant to a plea agreement, to one count of second degree murder and one count of attempted second

degree murder. ROA.97 (minutes); ROA.98 (plea agreement). The plea agreement provided that, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the maximum term of imprisonment as to both counts plead to was not more than 30 years. ROA.100. A Presentence Report (PSR) was prepared on August 8, 2013. ROA.395. Carey was a base offense level 38 under U.S.S.G. § 2A1.2 for second degree murder. ROA.407. Carey's offense level was increased by one point under the grouping provisions because there was an additional charge of attempted second degree murder. ROA.408. With acceptance of responsibility, Carey's total offense level was 36. Id. With criminal history category I and a total offense level of 36, Carey's guideline imprisonment range was 188 months to 235 months. ROA.413. The PSR identified U.S.S.G. § 5K2.8, (extreme conduct) as a factor for the district court to depart from the guidelines range. ROA.416.

Carey filed a sentencing memorandum setting forth the reasons why a guideline range sentence was appropriate. ROA.221. The sentencing memorandum set forth the history and circumstances of Carey's life and military service. See supra Part I; ROA.221. The sentencing memorandum also set forth Carey's history of PTSD and evidence of his mental break from reality that resulted in the death of one friend and the injuring of another friend. See supra Part II; ROA.225. Carey's sentencing memorandum further explained that this perfect storm of events will not recur and that Carey can be rehabilitated and safely returned to society. ROA.227.

The government filed a response to Carey's sentencing memorandum, maintaining that an upward departure and a sentence of 30 years was appropriate. ROA.267. The government maintained that an upward departure based on § 5K2.8 was warranted because Byron Whitcomb died after being attacked and suffering 14 sharp force wounds and two blunt injuries to the head and neck, and because Howard Alley was attacked and his life was changed forever by the crime.

IV. AT SENTENCING, THE DISTRICT COURT UPWARD DEPARTS FROM THE GUIDELINE RANGE OF 188 TO 235 MONTHS TO IMPOSE A SENTENCE OF 360 MONTHS

A sentencing hearing was held on October 8, 2013. ROA.126. At the hearing, Carey's counsel argued that an appropriate sentence was a guideline range sentence of 188 to 235 months. Counsel pointed out that Carey's remorse, mental health issues as established by his absolute confusion over the circumstances and events of June 19, 2010, along with his military service, supported a guideline range sentence and mitigate the possible heinousness of the actions. Carey made a statement, not asking for leniency from the district court but begging for forgiveness from the victims. ROA.135. Carey's family and friends also testified at the hearing. ROA.137. Carey's military friend, Wesley Johnson, testified that the things soldiers see in war are unimaginable, and that this crime was completely out of character for Carey, and that Carey has expressed his sincere remorse. ROA.137. Carey's mother and sister testified that Carey has their utmost support. Carey's sister explained that they are

very close and that the crime was shocking and not like him, and that he is sorry for what he did. ROA.138-39.

The government urged the district court to impose a sentence of 30 years and the victim's mother testified. ROA.140. Counsel for the government urged the district court to impose a sentence of 30 years based on the fact that the crime was unprovoked and it entailed the murder of a soldier and almost the murder of a second soldier. Byron Whitcomb's mother testified that the loss of her son has been unbearable and she asked the district court to impose the maximum sentence allowed.

The district court sentenced Carey to 360 months on Count 1 and 240 months on Count 2, to run concurrently. ROA.159. The basis of the upward departure was under United States Sentencing Guideline § 5K2.8 for "extreme conduct." ROA.161. Counsel objected to the upward departure because there was no evidence of torture of the victims, gratuitous infliction of injury or prolonging of pain or humiliation. ROA.162. Counsel also objected to the sentence as substantially unreasonable for the reasons set forth in the sentencing memorandum and the arguments at the sentencing hearing. In response, the district court stated that one reason for the sentence was that when the surviving victim was almost dying on the floor, Carey offered to choke him to get it over with, and the district court found that to be heinous and cruel. ROA.162.

The judgment of conviction and sentence was entered on October 24, 2013. ROA.118; RE at Tab 3. In the sealed amended statement of reasons, Section IV, the district court checked the box C titled "The court departs from the advisory guideline range for reasons authorized by the sentencing guideline manual." ROA.429. In Section V, the district court checked the box titled "The sentence imposed departs above the advisory guideline range." Id. Under Section VIII, the district court gave additional reasons for the sentence:

> It is apparent from the facts of this case, that the conduct of the defendant was especially cruel, heinous and brutal. The advisory guideline range does not adequately address the severity of the crimes and the violent manner in which the conduct occurred. The defendant brutally murdered Brian Whitcomb without provocation. There were 14 stab wounds, 2 blunt force injuries to the head and neck, as well as additional wounds. He also attempted to murder Hoard [sic] Wayne Alley. The defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years.

ROA.431. On October 28, 2013, Carey filed a timely notice of appeal. ROA.84; RE at Tab 4. Carey now appeals from the district court's judgment of 360 months as an unreasonable sentence under the facts of this case.

SUMMARY OF ARGUMENT

Marcus Carey is a young man with no criminal history. He grew up in a single parent home and decided to serve his country and better himself and his employment opportunities, so he joined the United States Army at the age of 19 years old. He

served this country in two wars and he was diagnosed with PTSD. He was only four months from discharging from the Army with full benefits, including mental health treatment, when he was abandoned by the Army and forced to survive without proper mental health treatment. He self-medicated with JWH-018, which is known to induce psychosis. On the morning of the homicide, something triggered an altered state of consciousness, and he acted without ration, and without a clear understanding of his actions. As soon as Carey began to realize what was happening, he went to a neighbor's house and confessed. Throughout this case, Carey repeatedly expressed his sincere and genuine remorse and asked for forgiveness. His friend and family testified that this crime was completely out of character for Carey.

During the sentencing hearing, the district court found that Carey's actions were irrational, that he requires mental health treatment that should be paid for by the military, that he is a two-tour combat veteran, that the military did not properly handle his mental health problems, and that he was sincerely remorseful. However, the district court refused to consider this mitigating evidence because the judge assumed that the evidence was considered by the government in plea negotiations and so Carey had already been "rewarded". The judge, however, was not privy to plea negotiations, and therefore did not, and could not, know or consider why this particular plea was entered into by both sides. Moreover, by refusing to consider the mitigation that was clearly evident and imposing the maximum sentence allowed

under the plea, the district court abrogated her sentencing duties and instead effectively allowed the sole decisions of the government to determine the sentence imposed. This amounted to procedural error and Carey's upward departure sentence should be reversed because it was imposed without proper consideration of the mitigation evidence.

The district court also committed procedural error when it imposed an upward departure sentence under U.S.S.G. § 5K2.8, extreme conduct. U.S.S.G. § 5K2.8 is not applicable to this case because Carey's actions, although violent as most second degree murders are, were not exceptionally or unusually heinous, cruel, brutal, or degrading to the victim. Carey did not prolong the victims' pain, he did not flee, he did not conceal the victims' whereabouts, and he did not prevent help from arriving. The fact that 5K2.8 is inapplicable becomes even more evident in light of the mitigation that was presented. This crime was totally irrational and impossible to bring ration to it, Carey suffered mental health issues, and was acting in a state of dissociation at the time of the crime. Carey did not act with cruel, brutal, or heinous intentions because he was acting without ration. Accordingly, Carey's sentence should be vacated and remanded with instructions that § 5K2.8 is inapplicable to this case.

The district court also abused its discretion in departing substantially above the guideline range and imposing a sentence of 30 years under the totality of the facts and

circumstances of this case. What occurred in this case is that Carey negotiated a plea with a stipulated maximum possible penalty, but not an agreed-upon sentence, yet was essentially precluded from demonstrating any reason that would justify a sentence below the 30 year maximum allowed by the plea agreement because the district court determined that any mitigation presented had already been considered by the government in plea negotiations. In essence, the district court did not sentence Carey. The government did. This sentence was substantively unreasonable because the district court did not properly consider the mitigation evidence, gave significant weight to the improper factor of the government's consideration of mitigation in plea negotiations, and did not balance the sentence factors.

ARGUMENT

I. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN THE COURT STATED THAT IT DID NOT CONSIDER MITIGATING EVIDENCE PRESENTED BY MARCUS CAREY BECAUSE THAT EVIDENCE WAS CONSIDERED BY THE GOVERNMENT IN PLEA NEGOTIATIONS

A. The Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally by, for example, miscalculating or failing to calculate the sentencing range under the

Guidelines, treating the Guidelines as mandatory, *failing to consider the 18 U.S.C. § 3553(a) factors*, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Id. (emphasis added). Under this step of analyzing for procedural error, this Court reviews the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error." United States v. Gutierrez–Hernandez, 581 F.3d 251, 254 (5th Cir. 2009) (footnote omitted) (quoting United States v. Armstrong, 550 F.3d 382, 404 (5th Cir. 2008)). If the sentence is procedurally proper, the court engages in a substantive review based on the totality of the circumstances. Mondragon-Santiago, 564 F.3d at 360.

At the conclusion of the district court's pronouncement of the sentence, Carey orally objected to the sentence as unreasonable for the reasons set forth in the sentencing memo, the arguments, and the sentencing proceedings. ROA.162. Carey presented exhaustive mitigation arguments in the sentencing memo and arguments and thus preserved this Court's review of the district court's refusal to consider those arguments.

B. Relevant Legal Authorities

A sentencing court commits procedural error when it "fail[s] to consider the § 3553(a) factors...." Gall v. United States, 552 U.S. 38, 51 (2007). While "a checklist recitation of the section 3553(a) factors is ... [in]sufficient," United States v. Smith,

440 F.3d 704, 707 (5th Cir. 2006), "a district court need not recite each of the § 3553(a) factors and explain its applicability," United States v. Herrera–Garduno, 519 F.3d 526, 531 (5th Cir. 2008) (citing Smith, 440 F.3d at 707).

Section 3553(a) provides that:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--
>
> (1) *the nature and circumstances of the offense and the history and characteristics of the defendant*;
>
> (2) the need for the sentence imposed--
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for--
>
> * * * * *
>
> (5) any pertinent policy statement--
>
> * * * * *
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). (emphasis added) A statement of reasons is legally sufficient so long as "[t]he sentencing judge ... set[s] forth enough to satisfy the appellate court

that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." Rita v. United States, 551 U.S. 338, 356 (2007).

C. Legal Analysis

The district court in this case explicitly refused to consider the substantial mitigating evidence under the theory that the government had already considered that evidence in the plea bargain with Marcus Carey. The district court violated the mandatory provisions of 18 U.S.C. § 3553(a) as well as the Supreme Court's mandatory instructions in Gall and Rita that a district court *must* consider all of the § 3553(a) factors. Marcus Carey's drastic upward departure sentence should be reversed because it was imposed without proper consideration of the mitigation evidence in his case.

18 U.S.C. § 3553(a)(1) states that the sentencing court "shall consider" the nature and circumstances of the offense and the history and characteristics of the defendant. The mandatory requirement imposed by statute on the district court was ignored in this case. The district court, instead, deferred its obligations to the government attorneys. The district court stated in its oral reasons for imposing the sentence:

> And I appreciate Mr. Carey's service to our country. I really do. I mean, a two war veteran, that means a lot to me. But the Government considered that when they took the death penalty off the table and they

> took life in prison off the table. And I have - - as much as I appreciate that, I have to acknowledge the fact that the Government has already rewarded him, and I say rewarded him, for that service by not seeking - - which they easily could have done because the evidence was so clear in this case, they easily could have done, and gone for the death penalty in this case or gone for a life sentence; and they didn't do that.

ROA.1599. In this statement, the district court stated that Carey was "rewarded" by the government entering into a plea agreement. The court impermissibly came up with her own interpretation of the plea negotiations in this case, negotiations that the judge cannot and should not be privy to. See United States v. Pena, 720 F.3d 561 (5th Cir. 2013) (there is a bright-line prohibition against all judicial participation in plea negotiations).

The district court also mentioned this improper consideration in its written statement of reasons stating that "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years." ROA.4311. The judge assumed that the government negotiated a plea to second degree murder as a result of the same mitigation evidence presented by Carey at sentencing. There is no basis in the record to support the district court's assumptions, as there are countless factors, all unknown to the court, that resulted in the plea negotiations.[1]

[1] As an example, the negotiations could have been determined by the government's glaring weakness in this case: the lack of any sort of intent or motive to commit first degree murder by Marcus Carey, and the potential for a not guilty by reason of insanity verdict.

Even if the district court was correct in its assumption that the government considered mitigation evidence in its plea negotiation, no legal authority authorizes a sentencing judge to abrogate its legal responsibility to consider those factors when determining the sentence. The language in §3553(a) is mandatory: sentencing court "shall consider" the evidence of mitigation concerning the nature and circumstances of the offense and the history and characteristics of the defendant.

The evidence of mitigation in this case was overwhelming. At the young age of 25, Marcus Carey was a two-tour veteran of the wars in Afghanistan and Iraq and was suffering from severe PTSD stemming from his experiences at war.ROA.223-24. The Army acknowledged Carey's PTSD and praised his abilities as a soldier. ROA.225, 249. Carey used marijuana and alcohol to cope with his PTSD and as a result was discharged from the Army four months shy of his ETS. ROA.224, 244. Broke, unemployed, and abandoned by the Army, Carey self-medicated with JSW-018, a synthetic marijuana that was legal at that time. ROA.225, 257. It has now been well-documents that JWH-018 has mind altering psychotic effects on its users. Id. Carey immediately went to a neighbor to contact the authorities once he realized what he had done and cooperated fully and completely with the authorities. ROA.399.

Dr. Pablo Stewart, a psychiatrist, who, after spending many hours with Carey, concluded that something triggered a dissociative event in Carey on June 19, 2010,

which explained why Carey had only fragmented memories of the event, and why the event itself was so irrational. ROA.225, 411-12. Dr. Stewart further concluded that, "Mr. Carey's significant mental disturbance at the time of the crime made it impossible for him to plan or consider his actions as evidenced by the irrational nature of the offense and crime scene. The only logical explanation for Mr. Carey's irrational behavior is that the event was a result of mental break with reality." ROA.411-12.

Despite the objection by Carey to the sentence imposed, the district court reaffirmed its decision to refuse to consider mitigating evidence in the statement of reasons where it stated, "The defendant's service and mitigating circumstances were considered by the government when they chose not to pursue the death penalty and impose a cap of 30 years." ROA.431. This statement of reasons runs afoul of the instructions in Rita that a statement of reasons must satisfy "satisfy the appellate court that [s]he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision making authority." 551 U.S. at 356. Here the district court agreed with Carey's presentation of mitigation and found that: (1) the crime was irrational; (2) Carey was genuinely and immediately remorseful; (3) Carey has mental health problems; (4) Carey was not properly treated by the military after combat; and (5) Carey is a two-tour combat veteran. ROA.151, 153, 158-60. Yet despite finding this mitigation, the district court refused to consider that mitigation

in determining the sentence. Marcus Carey's sentence should be vacated because the district court explicitly refused to consider the overwhelming mitigation evidence presented.

II. THE DISTRICT COURT COMMITTED PROCEDURAL ERROR WHEN IT IMPOSED AN UPWARD DEPARTURE SENTENCE UNDER U.S.S.G. § 5k2.8, EXTREME CONDUCT

A. Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally. Id. Under this step of analyzing for procedural error, this Court reviews the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error." United States v. Gutierrez–Hernandez, 581 F.3d 251, 254 (5th Cir. 2009) (footnote omitted) (quoting United States v. Armstrong, 550 F.3d 382, 404 (5th Cir. 2008)). If the sentence is procedurally proper, the court engages in a substantive review based on the totality of the circumstances. Mondragon-Santiago, 564 F.3d at 360.

At the conclusion of the court's pronouncement of the sentence, Carey orally objected to "the upward departure based on the guideline of 5K2.8 as not applying in this case." ROA.162. Carey further explained the objection: "There was no

evidence of torture of victim, gratuitous inflection (sic) of injury or prolonging of pain or humiliation, which makes that guideline applicable." Id.

B. Relevant Legal Authorities

The Sentencing Guideline provision for second degree murder contains an application note that states:

> Upward Departure Provision – If the defendant's conduct was *exceptionally* heinous, cruel, brutal, or degrading to the victim, an upward departure may be warranted.

U.S.S.G. § 2A1.2, app. no. 1 (emphasis added). This application notes cross references to § 5K2.8 which is the general departure provision for "extreme conduct":

> If the defendant's conduct was *unusually* heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

U.S.S.G. § 5K2.8 (emphasis added). The specific provision under the second degree murder guideline requires that the offense be *exceptionally* heinous, cruel, brutal, or degrading to the victim, whereas the general departure provision only requires the offense be *unusually* heinous, cruel, brutal, or degrading to the victim. Compare U.S.S.G. § 2A1.2, app. no. 1, with U.S.S.G. § 5K2.8.

The Tenth Circuit has provided definitions for terms contained within § 5K2.8. In United States v. Hanson, the Tenth Circuit provided that *heinous* means "[h]ateful, odious; highly criminal or wicked; infamous, atrocious;" *cruel* means "[d]isposed to

inflict suffering; indifferent to or taking pleasure in another's pain or distress;" *brutal* means "[i]nhuman, coarsely cruel, savage, fierce"). 264 F.3d 988, 998 (10th Cir. 2001)(internal citations omitted).

C. Legal Analysis

The district court's application of departure provision § 5K2.8 of the Sentencing Guidelines was an abuse-of-discretion because nothing about the offense conduct was "extreme," nor did the district court make any factual findings that support any "extreme" conduct. In order for § 5K2.8 to apply in Carey's case, his second degree murder must have been committed in an *unusually*[2] or *exceptionally*[3] heinous, cruel, brutal manner, or be degrading to the victim. The district court's stated reasons for a finding of extreme conduct, was the fact that when the surviving victim was on the floor, Carey offered to choke him to get it over with. ROA.162. Carey submits that this fact does not make his offense *unusually* or *exceptionally* heinous and cruel.

This Court has applied the "extreme conduct" departure provision in one published case involving a murder conviction. In United States v. Gore, 298 F.3d 322 (5th Cir. 2002), the defendant engaged in recurring and brutal abuse of his girlfriend's

[2] U.S.S.G. § 5K2.8 uses the term *unusually* heinous, cruel, brutal, or degrading to the victim.

[3] Application note 1 to U.S.S.G. § 2A1.2 uses the term *exceptionally* heinous, cruel, brutal, or degrading to the victim.

three-year-old son. One evening, he hit the child so hard that the child defecated on himself and had difficulty breathing and could not stand up. Despite this, the defendant put the child to bed and refused to get help for the child when he found the child unresponsive because he feared getting himself in trouble. The defendant pled guilty to second degree murder. The Court found that the departure for extreme conduct was warranted because the defendant repeatedly beat the three-year-old over the course of days, refused to get the child treatment when he became unresponsive, and fled when the child died. Id. at 324.

In the case at bar, Carey was in an altered state at the time of the crime. The district court noted that the court was "trying to bring ration to something that's totally irrational, and it can't be done." ROA.158. The district court was also "convinced" that Carey's remorse was immediate, sincere and genuine. ROA.151. These findings by the district court show that Carey did not act with cruel and heinous intentions, because he was acting without ration. And, unlike the defendant in Gore, Carey did not delay getting help for the victim, nor did he try to hide to protect himself, but rather he was immediately remorseful.

Carey's conduct is also out of line with other Circuits' application of the extreme conduct departure to murder cases. See United States v. Roston, 986 F.2d 1287, 1293 (9th Cir. 1993)(the defendant cruelly killed his wife of nine days, he choked her into unconsciousness and throw her body into the sea over twenty miles

from land in the dark of night off the coast of Mexico knowing, as he must have known, that she was certain to perish); United States v. Iron Cloud, 312 F.3d 379, 382 (8th Cir. 2002)(defendant sexually assaulted the minor victim, then repeatedly dunked her conscious body into a river until she was swept away and drowned, then misled the police as to her whereabouts); See also United States v. Quintero, 21 F.3d 885, 889-90 (9th Cir. 1994)(defendant struck his four-year-old son in the head and refused to bring him to the hospital; when the child died, the defendant burned the child's body and removed the head to be buried in another location.). Here, Carey acted swiftly, without cruel intentions, he did not desecrate the victims, he did not try to hide or destroy evidence of his wrongdoing, but rather immediately turned himself in and confessed.

Carey's conduct in this case does not qualify as extreme conduct under § 5K2.8. Although this case involved a murder and attempted murder, there was nothing outside the heartland of murder cases that occurred in this case. Carey did not torture the victims, he did not conceal their whereabouts, and he did not prevent help from arriving.

The district court's factual findings during the sentencing hearing do not support a departure for extreme conduct. In response to Carey's objection to the district court's application of a § 5K2.8 departure, the district court stated that "when Mr. Alley was almost dying on the floor the defendant offered to choke him to get it

over with; and I find that to be heinous and cruel." ROA.162. This fact focused on by the judge does not support a finding of extreme conduct. As explained above, district courts have found heinous and cruel conduct where a victim's suffering was prolonged, or the defendant preventing help from arriving. In this case, Carey did not try to prolong the victim's suffering, and in fact when he began to realize what had happened, he went to the neighbor's house and asked for help to be called. Further, the fact the district court found that this crime was irrational belies a finding that his actions - and his statement to the surviving victim - could amount to extreme conduct because he was not in his right mind at the time.

The district court's factual findings in the statement of reasons also do not support a departure for extreme conduct. In the statement of reasons, the district court stated that Carey's conduct was "especially cruel, heinous and brutal." ROA.431. The district court stated that "there were 14 stab wounds, 2 blunt force injuries to the head and neck, as well as additional wounds." Id. This factual finding by the district court does not promote this homicide outside of the heartland of homicide cases. Extreme trauma is inherent in every death, but 14 stab wounds and 2 blunt force trauma are injuries that could be inflicted swiftly and without prolonged suffering. Under the district court's theory, nearly every murder would be extreme conduct, all but making § 5K2.8 applicable in every single murder case. The Sentencing Commission inclusion of the word *exceptionally* in its second degree

murder cross reference to § 5K2.8 shows that only a limited number of second degree murders should be considered extreme conduct.

If this Court were to agree with the district court that § 5K2.8 applies in this case, the extent of the departure imposed by the district court from Carey's guideline range was an abuse of discretion. Carey's guideline range was 188 to 235 months. The district court departed more than ten years above the top end of the guideline range to impose a thirty year sentence. This more than fifty percent increase in Carey's sentence is not supported by the fact that Carey made a comment to one the victims that he would end his suffering or the fact that there were multiple stab wounds and traumas. Under the facts and circumstances of this case and of Marcus Carey, this offense was not an *exceptionally* or *unusually* heinous, cruel, brutal, or degrading to the victims. The district court abused its discretion in departing upward by more than ten years using § 5K2.8. Marcus Carey's sentence should be vacated and remanded with instructions that § 5K2.8 is inapplicable under the facts of this case.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEPARTING SUBSTANTIALLY ABOVE THE GUIDELINE RANGE AND IMPOSING A SENTENCE OF 30 YEARS UNDER THE TOTALITY OF THE FACTS AND CIRCUMSTANCES OF THIS CASE

A. Standard of Review

The appellate court reviews sentences for reasonableness under an abuse-of-discretion standard. United States v. Mondragon-Santiago, 564 F.3d 357, 360 (5th Cir. 2009), cert. denied, 130 S.Ct. 192 (2009). This review occurs in two stages. Id. First, the court must ensure that the district court did not err procedurally by, for example, miscalculating or failing to calculate the sentencing range under the Guidelines, treating the Guidelines as mandatory, failing to consider the 18 U.S.C. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range. Id. If the sentence is procedurally proper, the district court engages in a substantive review based on the totality of the circumstances. Id.

B. Relevant Legal Authorities

This court recognizes three types of sentences. United States v. Brantley, 537 F.3d 347, 349 (5th Cir. 2008). A district court may impose (1) a sentence within the defendant's Guidelines range, (2) an upward or downward departure as allowed by the Guidelines, or (3) a non-Guideline sentence or a variance that is outside of the relevant Guidelines range. Id.

"[A]n upward departure and an upward variance are not one and the same." United States v. Jacobs, 635 F.3d 778, 782 (5th Cir. 2011). A "departure" refers only to a sentence imposed under the framework set out in the Guidelines. Id. at 780. "When the district court imposes an upward departure, it must explain its reasons for doing so in Section V of the standard-form Statement of Reasons." Id. In contrast, a "variance" is a sentence imposed outside the Guidelines framework. Id. A district court explains its reasons for imposing a variance in Section VI of the Statement of Reasons. Id.

The district court must make an individualized assessment based on the facts presented and may deviate from the Guidelines based on policy considerations or because the Guidelines fail to reflect the § 3553(a) factors. Mondragon-Santiago, 564 F.3d at 360. The district court should consider the factors in § 3553(a) in light of the parties' arguments, and may not presume the Guidelines range is reasonable. Gall v. United States, 552 U.S. 38, 48-49 (2007). The district court must adequately explain the sentence "to allow for meaningful appellate review and to promote the perception of fair sentencing." Id. at 597. A sentence outside the Guidelines is unreasonable if it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." United States v. Smith, 440 F.3d 704, 708 (5th Cir. 2006).

C. Legal Analysis

The sentence imposed in this case was substantively unreasonable because the district court imposed an upward departure sentence of 30 years (1) without accounting for a factor that should have been given significant weight–all mitigation evidence (2) for giving significant weight to an improper factor–the government's consideration of mitigating evidence in plea negotiations (3) and for committing a clear error of judgment in balancing the sentencing factors.

First, the district court refused to address or account for a factor that should have been given significant weight: Carey's plethora of mitigation evidence presented for consideration under 18 U.S.C. § 3553(a). This error is discussed in detail above. See supra, Part I. The district court in this case stated that it believed the government had already considered the mitigating evidence in its plea negotiations, and therefore the district court would not consider them at sentencing. See ROA.159 (The district court states that the government "already rewarded" Carey for his mitigation through plea negotiations); see also ROA.431 (In the written statement of reasons that district court stated "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years."). The district court violated 18 U.S.C. § 3553 and the Supreme court's instructions in Rita and Gall when it deferred its responsibility to consider mitigation evidence to the government. See Rita, 551 U.S. a 356; Gall, 552 U.S. at

51. The district court comments show that Carey was given a 30 year sentence because the district court refused to consider the mitigating evidence supporting a lower sentence.

Second, the district court gave significant weight to an improper factor: the government's consideration of mitigating evidence in its decision to enter into a plea with Carey. This improper consideration is discussed fully above. See supra, Part I. The record shows that the district court gave significant weight to this improper consideration. The district court mentioned this factor in both oral reasons and in the written statement of reasons for the sentence. See ROA.159 (The district court states that the government "already rewarded" Carey for his mitigation through plea negotiations); see also ROA.431 (In the written statement of reasons that district court stated "[t]he defendant's service and mitigation circumstances were considered by the Government when they chose not to pursue the death penalty and agreed to a cap of 30 years."). The district court comments show that Carey was given a 30 year sentence because the district court considered the government's unspoken reasons for entering into a plea agreement as a factor.

Third, the district court committed a clear error in balancing the sentencing factors in this case. The Sentencing Guidelines, which are presumed to be reasonable in this Circuit, hold that a defendant with no criminal history who commits one second degree murder and one attempted second degree murder should be sentenced

to 188 to 235 months imprisonment. With the base in mind, the district court was to consider the following mitigating and aggravating factors.

This case has overwhelming mitigation, as discussed throughout this brief. Marcus Carey has no criminal history. He joined the Army to serve his country, as many of his family members had, and to better his employment opportunities. He served in two wars, enduring and suffering the effects of heavy combat. He was diagnosed with PTSD while in the Army, but he was abandoned by the Army right before his term of service was set to expire, and forced to survive without proper mental health treatment. He self-medicated with JWH-018, a then legal synthetic marijuana, and on the morning of the homicide, something triggered an altered state of consciousness, and he acted without ration and without a clear understanding of his actions. As soon as Carey began to realize what was happening, he went to a neighbor's house and confessed. Help was called. His confession was filled with remorse and confusion, emotions he continued to express through the sentencing hearing. His family and war buddy testified that this crime was completely out of character for him. During the sentencing hearing, the district court agreed that this mitigation was present. As discussed above, the district court found that Carey: (1) did not act rationally on the morning of the crime; (2) was genuinely and immediately remorseful; (3) has mental health problems; (4) was not properly treated by the

military after combat; and (5) is a two-tour combat veteran. ROA.158, 151, 160, 153, 159.

Despite finding this mitigation, however, the district court refused to balance it against the purported aggravating factors of the amount of stab wounds to the victims and Carey's statement to one victim regarding helping him die quicker. And it is important to note, that Carey was not asking for a downward departure, but rather presenting mitigation evidence to further support the reasonableness of the sentencing guideline range. The district court refused to balance the sentencing factors and instead imposed the maximum sentence allowed, which was more than 10 years above the guideline range. The district court's basis for refusing to consider mitigation and refusing to balance the sentencing factors was that Carey had already been rewarded by the government by allowing him to enter into a plea with a maximum penalty of 30 years. By conducting the sentencing in this case in this fashion, the district court essentially allowed Carey to be sentenced during plea negotiations with the government. The refusal of the district court to balance the mitigation evidence with the aggravating factors in light of the sentencing guideline range of 188 to 235 months, was an abuse of discretion and the sentence should be vacated and the case remanded.

CONCLUSION

For all of the foregoing reasons, appellant Marcus Patterson Carey respectfully prays that this Court vacate his sentence, and remand to the district district court for imposition of a reasonable sentence.

RESPECTFULLY SUBMITTED,

/s/ Rebecca L. Hudsmith
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Original Brief for the Appellant Marcus Patterson Carey has been served by the 5th Circuit electronic filing system on Camille Ann Domingue, Assistant United States Attorney, on this 27th day of January, 2014.

/s/ Rebecca L. Hudsmith

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the page limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 7,895 words.

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3. The undersigned understands that a material representation in completing this certificate, or circumvention of the type-volume limits in Fifth Circuit Rule 32.2.7, may result in the Court's taking striking the brief and imposing sanctions against the undersigned counsel.

s/ Rebecca L. Hudsmith
Attorney for Appellant Marcus Patterson Carey

Dated: January 27, 2014

No. 13-20311

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSE MIGUEL SANCHEZ,
also known as José M. Sánchez,
also known as José Sánchez Zúñiga,
also known as José S. Zúñiga,
Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

BRIEF FOR APPELLANT

In accordance with Anders v. California, 386 U.S. 738 (1967)

MARJORIE A. MEYERS
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Southern District of Texas

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CERTIFICATE OF INTERESTED PERSONS

United States v. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga**,**
No. 13-20311

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Keith P. Ellison, United States District Judge (original case) and the Honorable Andrew S. Hanen, United States District Judge (revocation case).

2. The Honorable Felix Recio, United States Magistrate Judge (revocation case).

3. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga, Defendant-Appellant.

4. United States of America, Plaintiff-Appellee.

5. Counsel for Plaintiff-Appellee: United States Attorney Kenneth Magidson (revocation) and Former United States Attorney José Angel Moreno (original case); and Assistant United States Attorneys Suzanne El-Milady (district court counsel, original case) and Assistant United States Attorneys David Lindenmuth and Elena Salinas (district court counsel, revocation).

6. Counsel for Defendant-Appellant: Lourdes Rodriguez, (district court and appellate counsel, original case); Federal Public Defender Marjorie A. Meyers (revocation case); and Assistant Federal Public Defender Arturo Vasquez (district court counsel, revocation case) and Assistant Federal Public Defender Michael Herman (appellate counsel, revocation case).

CERTIFICATE OF INTERESTED PERSONS - (Cont'd)
United States v. José Miguel Sánchez, also known as José M. Sánchez, also known as José Sánchez Zúñiga, also known as José S. Zúñiga**,**
No. 13-20311

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Michael Herman
MICHAEL HERMAN

PREAMBLE

This brief is submitted in accordance with Anders v. California, 386 U.S. 738 (1967). Counsel has carefully examined the facts and matters contained in the record on appeal and has researched the law in connection therewith and has concluded that the appeal does not present a nonfrivolous legal question. In reaching this conclusion, counsel has thoroughly read the record and has examined the record for any arguable violations of the Constitution, the federal statutes, the federal rules, and the United States Sentencing Guidelines.

STATEMENT RESPECTING ORAL ARGUMENT

Counsel for the defendant-appellant has moved to withdraw as counsel based on Anders v. California; consequently, oral argument is not requested.

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SENTENCING GUIDELINES

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1291, as an appeal from a final judgment of revocation and sentence in the United States District Court for the Southern District of Texas, Brownsville Division, and under 18 U.S.C. § 3742, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

The judgment appealed from was entered on the docket on June 17, 2013. Mr. Sánchez filed his notice of appeal on June 6, 2013. This appeal is, therefore, timely. See Fed. R. App. P. 4(b)(1)(A)(i) and (2).

STATEMENT OF THE ISSUE

Whether there is any nonfrivolous issue regarding Mr. Sánchez's revocation of supervised release and sentence imposed thereon.

STATEMENT OF THE CASE

A. Proceedings Below.

On April 21, 2010, the defendant-appellant, José Miguel Sánchez ("Mr. Sánchez"), was charged in the Southern District of Texas, Houston Division, with being an alien unlawfully found in the United States after deportation after having been convicted of an aggravated felony, in violation of 8 U.S.C. § 1326(a) and (b)(2). ROA.11.[1] Mr. Sánchez entered a plea of guilty to the indictment on June 15, 2010. ROA.115. On September 1, 2010, the district court sentenced him to serve 32 months in the custody of the Bureau of Prisons, to be followed by 3 years of supervised release, including as a special condition of supervision that Mr. Sánchez not return illegally to the United States. ROA.30-35.

Mr. Sánchez's term of supervised release began on October 2, 2012. Docket Entry No. 49 (Court only). On February 28, 2013, the United States Probation Office petitioned the district court to revoke Mr. Sánchez's supervised release based on a new law violation of illegal reentry (as evidenced by Mr. Sánchez's new § 1326 case in the Southern District of Texas under Case No. 1:13CR00047, which is pending appeal under Fifth Cir. Case No. 13-40632). Docket Entry No. 49 (Court only). The second allegation was that Mr. Sánchez had violated his supervised release by

[1] The electronic record on appeal ("ROA.") will be cited by the USCA5 page numbers.

violating the special condition of release that he not return illegally to the United States if deported. Id.

Mr. Sánchez made an initial appearance on the Petition on May 3, 2013, at which time he was informed of the allegations in the Petition. ROA.134-35.

On May 29, 2013, in conjunction with the sentencing on Mr. Sánchez's new § 1326 offense, the district court conducted a hearing on whether Mr. Sánchez's supervised release should be revoked. ROA.156. At that hearing, Mr. Sánchez pleaded true to violating his supervised release as alleged in the Petition. ROA.156. Upon revoking Mr. Sánchez's supervised release, the district court sentenced him to 18 months' imprisonment in the custody of the Federal Bureau of Prisons, with 6 months to run concurrently to the prison sentence imposed for his new § 1326 offense and the remaining 12 months to run consecutively thereto. ROA.156-57 (oral pronouncement); ROA.95 (written judgment). The court did not reimpose a term of supervised release in this case. See ROA.156-57.

On June 6, 2013, Mr. Sánchez filed his notice of appeal to this Court. ROA.73-74.

B. Statement of the Facts.

The relevant facts are covered in the statement of proceedings above, and the argument section below.

SUMMARY OF THE ARGUMENT

There is no nonfrivolous issue on appeal with regard to either the revocation of Mr. Sánchez's supervised release or the sentence imposed thereon. The evidence admitted at the revocation hearing – Mr. Sánchez's admission of committing the violations alleged – fully supported that Mr. Sánchez had violated his conditions of supervised release. The court was justified in revoking the term of supervised release based on these violations.

There is no nonfrivolous issue with regard to the other procedural requirements of Fed. R. Crim. P. 32.1 or other applicable law in revoking Mr. Sánchez's supervised release and in sentencing him thereon. Finally, the sentence was within statutory limits and was neither in violation of law nor plainly unreasonable.

Accordingly, because there are no nonfrivolous issues on appeal, counsel moves to withdraw, pursuant to Anders v. California, 386 U.S. 738 (1967).

ARGUMENT

ISSUE RESTATED: There is no nonfrivolous issue regarding Mr. Sánchez's revocation of supervised release and the sentence imposed thereon.

A. Standard of Review.

"A district court may revoke a defendant's supervised release if it finds by a preponderance of the evidence that a condition of release has been violated." United States v. McCormick, 54 F.3d 214, 219 (5th Cir. 1995); see also 18 U.S.C. § 3583(e)(3). This Court "review[s] for [an] abuse of discretion a decision to revoke supervised release." McCormick, 54 F.3d at 219 (footnotes omitted).

This Court reviews a sentence imposed on revocation of supervised under the "plainly unreasonable" standard. United States v. Miller, 634 F.3d 841, 843 (5th Cir.), cert. denied, 132 S. Ct. 496 (2011). Under that standard, the Court "evaluate[s] whether the district court procedurally erred before [it] consider[s] 'the substantive reasonableness of the sentence under an abuse-of-discretion standard.' If the sentence is unreasonable, then [the Court] consider[s] whether the error was obvious under existing law." Id. (citations omitted).

B. There Is No Nonfrivolous Issue with Respect to the Revocation of the Supervised Release or the Sentence the District Court Imposed.

The district court substantially complied with the requirements of Federal Rule of Criminal Procedure 32.1 and other applicable law, as set forth in the chart and discussion below:

REQUIREMENT	APPLICABLE FEDERAL RULE OR STATUTE	RECORD CITATION
Written notice of alleged violation	Fed. R. Crim. P. 32.1(b)(2)(A)	See discussion below.
Disclosure of the evidence against the defendant	Fed. R. Crim. P. 32.1(b)(2)(B)	See discussion below.
An opportunity to appear, present evidence, and question any adverse witness	Fed. R. Crim. P. 32.1(b)(2)(C)	ROA.156
Notice of defendant's right to counsel	Fed. R. Crim. P. 32.1(b)(2)(D)	ROA.142-43
Defense attorney given opportunity to make a statement and present information in mitigation	Fed. R. Crim. P. 32.1(c)(1)	ROA.156
Defendant given opportunity to make a statement and present information in mitigation	Fed. R. Crim. P. 32.1(c)(1)	ROA.156

District court considered policy statements contained in Chapter 7 of the Federal Sentencing Guidelines	18 U.S.C. § 3553(a)(4)(B)	See ROA.156; see also discussion below.
Sentence is within statutory limits	18 U.S.C. § 3583(e)(3) & (h)	Yes. See discussion below.
Sentence is not plainly unreasonable	18 U.S.C. § 3742(a)(4) & (e)(4)	Yes. See discussion below.
Judgment correctly reflects the sentence		Yes. Compare ROA.156 with ROA.94-95.

Although it is not evident from the record whether Mr. Sánchez received written notice of his alleged violations of supervised release, Mr. Sánchez acknowledged that he understood the allegations during his initial appearance before the Magistrate Judge, who recited to Mr. Sánchez the substance of the allegations. ROA.135. As Mr. Sánchez was actually informed by the Magistrate Judge of the allegations in the revocation petition, there was no failure to receive notice.

Although there was no evidence presented at the revocation hearing apart from Mr. Sánchez's plea of true to the allegations, the evidence nevertheless clearly supported the district court's decision to revoke supervised release. Mr. Sánchez pleaded true to the violations. ROA.156. Mr. Sánchez had also previously pleaded

guilty to having been found in the United States after deportation in the new § 1326 case cited in the petition to revoke supervision. See United States v. Spraglin, 418 F.3d 479, 480-81 (5th Cir. 2005) (convictions may provide sufficient evidentiary basis for revocation of supervised release).

Although the district court did not explicitly refer to the Chapter 7 Policy Statements of the Sentencing Guidelines when determining the sentence, the prosecutor made the district court aware that the recommended range of imprisonment was 18 to 24 months.[2] ROA.156. The district court then imposed an 18-month sentence – the bottom of the proposed Guideline range and less than the maximum permitted by statute. ROA.156-57.

There is no error in the district court's sentence. Mr. Sánchez's sentence was clearly within the statutory maximum punishment allowed. Mr. Sánchez was originally convicted of illegal reentry, in violation of 8 U.S.C. § 1326(a) and (b)(1). ROA.30. This offense carried a statutory maximum prison sentence of 10 years, see 8 U.S.C. § 1326(b)(1), and was thus a Class C felony. See 18 U.S.C. § 3559(a)(3).

[2] The Guideline range of 18 to 24 months was correct because (1) Mr. Sánchez's new illegal reentry offense was a Grade B violation, see USSG § 7B1.1(a)(2)(p.s.); (2) his original Criminal History Category in his underlying case was V; see USSG § 7B1.4(a)(p.s.) n.* (directing sentencer to use original Criminal History Category); USSG § 7B1.4(a)(p.s.) (Revocation Table) (intersection of Grade B violation and Criminal History Category V is 18-24 months' imprisonment); and (3) his underlying illegal reentry conviction was a Class C felony, 18 U.S.C. § 3559(a)(3), so that the statutory maximum upon revocation was 24 months, less than the 18-month sentence imposed. See 18 U.S.C. § 3583(e)(3).

Mr. Sánchez was thus subject to up to 2 years of imprisonment upon revocation of his supervised release term. See 18 U.S.C. § 3583(e)(3). The 18-month prison sentence imposed upon revocation was within the aforementioned statutory maximum prison term. Under these circumstances, the sentence imposed upon Mr. Sánchez, at the bottom of the Guideline range, was not plainly unreasonable. See United States v. Juarez-Duarte, 513 F.3d 204, 212 (5th Cir. 2008) ("If the district court imposes a sentence within a properly calculated guideline range, we presume that the district court considered all the necessary factors, and that the sentence is reasonable."). Lastly, there is no nonfrivolous issue with respect to the district court imposing the revocation sentence to run partially consecutively to the sentence in the new § 1326 case. The Sentencing Guidelines express a preference for consecutive sentences in this scenario. See USSG § 5G1.3, comment. (n.3(C)); USSG § 7B1.3(f)(p.s) & comment. (n.4).

For the foregoing reasons, there is no nonfrivolous issue arising from either the revocation of Mr. Sánchez's supervised release or the sentence imposed thereon.

CONCLUSION

After examining the facts of the case in light of the applicable law, it is the opinion of counsel on appeal that there is no basis for presenting any legally nonfrivolous issue.

Respectfully submitted,

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Southern District of Texas

By s/ Michael Herman
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CERTIFICATE OF SERVICE

I certify that today, October 23, 2013, the foregoing brief for appellant was served upon Assistant United States Attorney Renata A. Gowie, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system. A courtesy copy of this document will be hand-delivered to Ms. Gowie, at United States Attorney's Office, 1000 Louisiana, Suite 2300, Houston, Texas 77002 and a copy will be served by first-class United States mail, postage prepaid, Signature Confirmation No. 91 3408 2133 3931 9080 1512, upon Mr. José Miguel Sánchez, Register No. 33298-279, Fairton FCI, P.O. Box 420, Fairton, NJ 08320.

s/ Michael Herman
MICHAEL HERMAN

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. APP. P. 32(a)(7)(B) because it contains 1,762 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

s/ Michael Herman
MICHAEL HERMAN

No. 12-20571

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JESUS MENDOZA ZAMORA,
also known as Jesus Zamora Mendoza, also known as Jesus Mendoza,
also known as Jesus Mendoza-Zamora, also known as Jesus Z. Mendoza,
also known as Jesus Mendozz,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

REPLY BRIEF FOR APPELLANT

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STATEMENT OF THE REPLY ISSUE

Whether the district court reversibly erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C), because Mr. Mendoza Zamora did not have a qualifying "aggravated felony" under 8 U.S.C. § 1101(a)(43).

ARGUMENT

REPLY ISSUE RESTATED: The district court reversibly erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C), because Mr. Mendoza Zamora did not have a qualifying "aggravated felony" under 8 U.S.C. § 1101(a)(43).

(Responsive to Gov't Br. 7-10)

A. Introduction.

In his opening brief, Mr. Mendoza Zamora argued that the district court erred in applying an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) because neither his 1996 Texas retaliation conviction nor his 1999 federal illegal-reentry conviction was a conviction for a qualifying "aggravated felony." See Appellant's Opening Br. 10-18. He also argued that this error was not harmless and required resentencing. See id. at 18-19.

In response, the government does not independently address the 1996 retaliation conviction at all. Nor has the government argued that any error was harmless. Instead, the government's sole argument is that the § 2L1.2(b)(1)(C) enhancement was properly applied on the basis of the 1999 illegal-reentry conviction. See Gov't Br. 7-10. For the reasons set out below, that contention is incorrect.

B. Mr. Mendoza Zamora's Federal Conviction for Illegal Reentry Has Not Been Shown to Be an "Aggravated Felony" Under 8 U.S.C. § 1101(a)(43)(O).

Seeking to bring this case within the holding of this Court's decision of United States v. Gamboa-Garcia, 620 F.3d 546 (5th Cir. 2010), the government argues that, as in that case, the record shows that Mr. Mendoza Zamora pleaded to, and hence was convicted of, a violation of 8 U.S.C. § 1326(b)(2). See Gov't Br. 8-10. The government is mistaken, and Gamboa-Garcia is distinguishable. In Gamboa-Garcia, the record showed that the defendant had actually pleaded guilty to – and hence had admitted – a § 1326(b)(2) offense. See Gamboa-Garcia, 620 F.3d at 549. The government assumes that the same is true in this case. See Gov't Br. 9 & n.3.

The government's assumption is not correct, and Mr. Mendoza Zamora has supplemented the record on appeal with various documents from the 1999 conviction to show why that is so. First off, the charging instrument in Mr. Mendoza Zamora's 1999 case (a criminal information) does not charge an antecedent "aggravated felony" conviction; rather, it charges only illegal reentry simpliciter under 8 U.S.C. § 1326.[1] Thus, contrary to the government's argument, Mr. Mendoza Zamora's plea to that information was ***not*** an admission to an antecedent "aggravated felony."

[1] Although the charge is followed by a statutory citation to 8 U.S.C. § 1326(a) and 1326(b)(2), the mere fact of a statutory citation, unaccompanied by a supporting allegation, is insufficient to charge a § 1326(b)(2) offense. See, e.g., United States v. Conley, 349 F.3d 837, 840 (5th Cir. 2003).

And, in fact, there is further evidence that Mr. Mendoza Zamora did not admit an antecedent "aggravated felony." Particularly, after his plea and in connection with his sentencing, Mr. Mendoza Zamora specifically challenged the characterization of his 1996 retaliation conviction as an "aggravated felony." See Defendant's Supplemental Objection to the Presentence Report, at 1-2; Defendant's Response to the Addendum to the Presentence Report and Motion for Downward Departure, at 3. There would have been no point in objecting at sentencing to an "aggravated felony" enhancement if Mr. Mendoza Zamora had already admitted to having an antecedent "aggravated felony" at his guilty plea.

Thus, unlike in Gamboa-Garcia, the evidence here shows that Mr. Mendoza Zamora did not, by pleading guilty in the 1999 case, admit to an antecedent "aggravated felony." The government has not carried its burden of showing, with evidence competent for the purpose under Shepard v. United States, 544 U.S. 13 (2005), that Mr. Mendoza Zamora was necessarily convicted of a § 1326(b)(2) offense in that prior case.[2] The 1999 illegal-reentry conviction is thus not a valid basis for the

[2] To the extent that the government appears to rely on the mention of § 1326(b)(2) in the prior judgment of conviction, that reliance is directly contrary to Shepard, which permits reliance on judicial findings only when they are assented to by the defendant. See Shepard, 544 U.S. at 16. As stated, there is no evidence that Mr. Mendoza Zamora ever assented to that finding, and there is plenty of evidence to the contrary. For this reason, too, the government's appeal to the principles of res judicata/collateral estoppel is misguided: unassented-to judicial findings do not become Shepard-approved evidence simply because the case in which they were made has become final.

§ 2L1.2(b)(1)(C) enhancement in this case.

C. This Court Should Vacate Mr. Mendoza Zamora's Sentence and Remand for Resentencing.

For the reasons stated in Mr. Mendoza Zamora's briefing, the 1999 illegal-reentry conviction is not a proper basis for the § 2L1.2(b)(1)(C) enhancement in this case. Additionally, the government has waived reliance on the 1996 retaliation conviction as an independent basis for the enhancement, by failing to brief that issue at all.[3] Cf. United States v. Luciano-Rodriguez, 442 F.3d 320, 322 n.5 (5th Cir. 2006) (government argument, made only in a single bare assertion in a footnote in its brief, was waived by inadequate briefing). The government has also completely failed to brief – and thus has waived – any argument that the error in this case was harmless.[4] Cf. id. Accordingly, this Court should vacate Mr. Mendoza Zamora's sentence and remand for resentencing.

[3] In any event, such an argument would be without merit, for the reasons set out in Mr. Mendoza Zamora's opening brief, q.v. at 12-16.

[4] In any event, such an argument would be without merit, for the reasons set out in Mr. Mendoza Zamora's opening brief, q.v. at 18-19.

CONCLUSION

For the reasons set forth in Mr. Mendoza Zamora's briefs, this Court should vacate Mr. Mendoza Zamora's sentence and remand for resentencing.

Respectfully submitted,

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s/ Timothy Crooks
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CERTIFICATE OF SERVICE

I certify that today, February 4, 2013, the foregoing reply brief for appellant was served upon Assistant United States Attorneys Terri-Lei O'Malley and Renata A. Gowie, counsel for appellee, by notice of electronic filing with the Fifth Circuit CM/ECF system. A courtesy hard copy of this document will be hand-delivered to Ms. O'Malley and Ms. Gowie at the United States Attorney's Office, 1000 Louisiana Street, Suite 2300, Houston, Texas 77002.

s/ Timothy Crooks
TIMOTHY CROOKS

CERTIFICATE OF COMPLIANCE

1. This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,042 words, excluding the parts of the reply brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This reply brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect X5 software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

3. This reply brief was filed electronically, in native Portable Document File (PDF) format, via the Fifth Circuit's CM/ECF system.

s/ Timothy Crooks
TIMOTHY CROOKS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 13-30244

DEAN VICKNAIR

Plaintiff – Appellant

v.

LOUISIANA DEPT. OF PUBLIC SAFETY AND CORRECTIONS AND THE STATE OF LOUISIANA

Defendants – Appellees

On appeal from the United States District Court For the Middle District of Louisiana

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Petition for Panel Rehearing

Respectfully submitted,
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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Dean Vicknair– plaintiff/appellant;

Dan M. Scheuermann – counsel for plaintiff/appellant;

Louisiana Department of Public Safety and Corrections– defendant/appellee

Mary Lou Blackley– counsel for defendant/appellee;

David G. Sanders – counsel for defendant/appellee.

s/Dan M. Scheuermann

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Request for Oral Argument

The plaintiff-appellant, Dean Vicknair, respectfully requests oral argument in this case due to the complexities of both the legal and factual issues involved and to bring to the attention of the panel claimed errors of fact and law in its opinion of February 4, 2014. This Honorable Court would benefit from a face-to-face confrontation wherein the defendant/appellee must explain, and answer pertinent questions about, just why it was necessary to subject Vicknair to illegal constructive discharge, retaliation, and a hostile work environment. Mr. Vicknair wants the opportunity to face the three-judge panel cross-examination in order to advance the merits of his argument.

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Cases

Rules

ARGUMENT:

In accordance with Fifth Circuit Rule 40.2, Dean Vicknair herein respectfully brings to the attention of the panel claimed errors of fact and law in its opinion. The opinion cites *Landgraf v. USI Film Prods.,* 968 F.2d 427, 430 (5th Cir. 1992),[1] distinguishable on its facts: "…at the time Landgraf resigned USI was taking action reasonably calculated to alleviate the harassment."[2] By contrast, at the time Vicknair resigned, DPS was not "…taking action reasonably calculated to alleviate the harassment."[3] And his "…motivation for quitting…"[4] was not any "…conflicts and unpleasant relationships…"[5] with his co-workers but much else.[6] Nor had DPS given Selvaratnam "…its most serious form of reprimand and acted to reduce his contact with…"[7] Vicknair at the workplace.[8] He did "…report these incidents to…"[9] DPS before resigning.[10] And this was not "…the first documented offense by an individual employee"[11] against Selvaratnam.[12] Furthermore Vicknair does "…prove that 'working conditions would have been so difficult or

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[1] Opinion, p. 7.
[2] Id.
[3] Id. See ROA.122,148-150,416-417,590,610.
[4] *Landgraf, supra*, at 429.
[5] Id. See Original Brief of Appellant (OBA), p. 13. ROA.1772-1775.
[6] OBA, pp. 4-20. See n. 36, 39-40, 43-46.
[7] *Landgraf, supra,* at 429.
[8] ROA.611-617,1630 (Pla-1).
[9] *Landgraf, supra,* at 429.
[10] Reply Brief (RB), p. 4. ROA.503-509,610,899-944,970-971,980-985,1630 (Pla-2-6, 8, 9, 12).
[11] *Landgraf, supra,* at 429.
[12] ROA.611-617,1630 (Pla-1).

unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' *Bourque v. Powell Electrical Mfg. Co.,* 617 F.2d 61, 65 (5th Cir. 1980); *Jurgens v. EEOC,* 903 F.2d 386, 390-91 (5th Cir. 1990)."[13]

The opinion then cites *Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646 653 (5th Cir. 2004),[14] likewise distinguishable on its facts:

> UMS further argues that venue is improper in this case because it does not comport with the venue provisions of the Brussels Convention of 1968. Because UMS did not sufficiently raise this issue in the prior appeal the argument is abandoned and we will not address the merits of the issue here.[15]

Vicknair, on the other hand, did "…sufficiently raise this issue in the prior…"[16] briefings regarding retaliation.[17]

Feist v. La., Dep't of Justice, Office of the Att'y Gen., 730 F.3d 450, 452 (5th Cir. 2013)[18] informs the case sub judice:

> A plaintiff alleging retaliation may satisfy the causal connection element by showing '[c]lose timing between an employee's protected activity and an adverse action against him.'[19]

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[13] *Landgraf,* supra, at 429-430. See OBA, pp. 4-20; n. 36, 39-40, 43-46.
[14] Opinion, p. 7.
[15] *Adams, supra*, at 653.
[16] Id.
[17] OBA, pp. 20-25, 32-44; ROA.412-426.
[18] Opinion, p. 7.
[19] *Feist, supra*, at 454-455.

For Vicknair the timing could not be closer.[20] There is also "…other evidence of retaliation,.."[21] including "…an employment record that does not support dismissal,..."[22] Based on this evidence, DPS has not "…satisfied its burden of showing a legitimate, non-retaliatory reason for terminating[Vicknair]. *See Medina v. Ramsey Steel Co.,* 238 F.3d 674, 684-85 (5th Cir. 2001) (noting that evidence of poor work performance satisfies burden)."[23] In any event Vicknair has "…shown any basis for rescinding the…"[24] February 4, 2013, opinion of this Honorable Court.[25]

The opinion then cites *Stewart v. Miss. Transp. Comm'n,* 586 F.3d 321, 331 (5th Cir. 2009).[26] The dissent therein better informs the case sub judice:

> After having been transferred away from her abuser in 2004, Stewart testified that she was amazed to learn that Loftin would again become her supervisor in 2006. Hope springs eternal, and perhaps MDOT thought Loftin had turned over a new leaf. Such hopes were almost immediately dashed….[27]

Thus was Vicknair's experience at DPS.[28] "Viewed against the backdrop of what…"[29] Vicknair "…had already experienced from…"[30] Selvaratnam, his 2004

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[20] RB, p. 5, n. 35. See ROA.423,679-680,1630 (Def-5, pp. 4-5),1646,1804-1805.
[21] *Feist, supra,* at 454.
[22] Id. ROA.1630 (Def. -2, p. 5), 1654-1655, 1666-1662, 1684-1686, 1696-1697, 1772-1776.
[23] *Feist, supra,* at 455.
[24] Id.
[25] OBA, RB..
[26] Opinion, pp. 7-8.
[27] *Stewart, supra*, at 333.
[28] Original Brief of Defendant-Appellee (OBD-A), p. 10; RB, p. 7.
[29] *Stewart, supra*, at 333.
[30] Id.

conduct goes from not merely boorish but continues being "…legally actionable."[31] Vicknair "…was certainly justified in concluding that…"[32] Selvaratnam "…had not 'learned his lesson' and that the 2009 "…conduct was reminiscent of the prior wrongful conduct. This was not merely…"[33] Vicknair's "…subjective perception but an objectively reasonable conclusion from the…"[34] 2009 "…events in the context of what had occurred previously:"[35] Thus "[c]redibility determinations, of course, are not the stuff of summary judgment affirmances."[36] Unlike that of *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012), the Internal Affairs "investigation" initiated by DPS occurred during Vicknair's employment and it was used as a tool for his discharge.[37]

The opinion cites "*McCoy v. City of Shreveport*, 492 F.3d 551, 557 (5th Cir. 2007),"[38] distinguishable on its facts:

> …SPD never indicated that she would not be reinstated to her previous position when cleared medically to return to work. She was not reassigned to menial or degrading work, and she never received an offer of early retirement.[39]

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[31] Id.
[32] Id., at 334.
[33] Id.
[34] Id.
[35] Id. ROA.1630 (Pla-1), 1684.
[36] *Stewart, supra*, at 333.
[37] ROA.1630 (Def-3). See OBA, pp. 7, 14-19, RB, pp. 4-5.
[38] *McCoy, supra,* at 557, 558.
[39] Id., at 558. ROA.680, 737, 1732, 1807.

DPS did indicate that he "…would not be reinstated to…"[40] his previous position.[41] And Vicknair was "…reassigned to menial or degrading work,..:"[42] Those "…actions, when viewed in the context of the circumstances surrounding them, were…"[43] calculated by DPS to encourage Vicknair's resignation and do "…meet the established standard for a constructive discharge."[44] As to retaliation there is also this recognition of Vicknair's plight:

> Consequently, placement on administrative leave may carry with it both the stigma of the suspicion of wrongdoing and possibly significant emotional distress. Instances of administrative leave can also negatively affect an officer's chances for future advancement.[45]

The opinion cites *Gollas v. Univ. Tex. Health Sci. Ctr. At Hous.,* 425 F.App'x 318, 321 (5th Cir. 2011) (citing *Byers v. Dall. Morning News, Inc.*, 209 F.3d 419, 427 (5th Cir. 2000)).[46] The latter case is distinguishable on its facts:

> …there is no evidence showing that Brown treated similarly situated, non-white employees any differently….[47]

Vicknair's evidence shows that DPS treated similarly situated employees, who did not complain about sex harassment, differently.[48] As Vicknair was not the

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[40] *McCoy, supra*, at 558.
[41] ROA.1630 (Def -7, -8).
[42] *McCoy, supra*, at 558. See ROA. 680, 737, 1732, 1807.
[43] *McCoy, supra*, at 558.
[44] Id. OBA, pp. 3-20.
[45] Id., at 560.
[46] Opinion, p. 8.
[47] *Byers, supra,* at 429.
[48] ROA.1709, 1712.

perpetrator, the former case is inapposite.[49] Furthermore "[b]ecause the summary-judgment record reflects that Dr. Reichman was unaware of a sexual-harassment complaint, there is no genuine dispute of material fact on whether he harbored retaliatory animus."[50] Selvaratnam was certainly aware of Vicknair's complaints and "…he harbored retaliatory animus."[51] In any event Vicknair's "…subjective belief,.."[52] comes with more.[53]

Aryain v. Wal-Mart Stores Tex. LP, 584 F.3d 473, 485 (5th Cir. 2008) says this:

> Also, Aryain never raised any complaint about the negative treatment she supposedly endured in the infant department. After discovering that she was left off the schedule, Aryain resigned just a day or two later, giving Wal-Mart no opportunity to improve her situation in the infant department. In the constructive discharge context, we have recognized that "part of an employee's obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast."[54]

Vicknair, by contrast, made numerous complaints[55] and resigned more than six months after Selvaratnam installed Chris Artall as Vicknair's supervisor.[56] He gave DPS numerous opportunities to improve his situation in the IT department.[57]

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[49] *Gollas, supra,* at 320.
[50] Id., at 326.
[51] Id. See ROA.405,423,434,440,478,1630 (Pla-1, -3, -5, -6, -9, -12, Proffer -1; Def -5. [52] Opinion, p. 8.
[53] ROA.1630, 1653-1751 (testimony of Weber, Louque and Hoyt).
[54] *Aryain v. Wal-Mart Stores,* 534 F.3 473, 481-482 (5th Cir. 2008).
[55] ROA.503-509, 610, 1630 (Pla – 2-6, 8, 9, 12).
[56] ROA.1630 (Def – 5), 1776, 1836-1837.
[57] ROA.1630 (Pla – 2-6, 9, 12; Def – 4, 5), 1775-1776, 1836-1837.

Not until the very end did he "…assume the worst."[58] Thus did Vicknair exert considerable effort to allow DPS "…the opportunity to remedy the problems…"[59] he identified.

The opinion cites *Pacheco v. Mineta*, 448 F.3d 783, 788-89 (5th Cir. 2006) and *Haverda v. Hays Cnty., Tex.*, 723 F.3d 586, 591 (5th Cir. 2013). What is omitted from the former case is what immediately precedes the opinion's quoted passage:

> The scope of the exhaustion requirement has been defined in light of two competing Title VII policies that it furthers. On the one hand, because 'the provisions of Title VII were not designed for the sophisticated,' and because most complaints are initiated pro se, the scope of an EEOC complaint should be construed liberally.[60]

That the District Court "…pretermitted the question of whether Vicknair exhausted administrative remedies and dismissed the constructive-discharge claim on the merits,"[61] was wrong on both counts.[62]

As to the latter case the opinion again omits what immediately precedes the quoted matter:

> A court considering a motion for summary judgment must consider all facts and evidence in the light most favorable to the nonmoving party. Id. (citing *United Fire & Cas. Co. v. Hixson Bros., Inc.,* 453 F.3d 283, 285 (5th Cir. 2006)). Moreover, a

[58] ROA.35, 1630 (Pla – 12, p. 5).
[59] *Aryain, supra*, at 482.
[60] *Pacheco, supra*, at 788.
[61] Opinion, pp. 9-10.
[62] OBA, pp. 3-20, RB, pp. 16-21.

> court must draw all reasonable inferences in favor of the nonmoving party and may not make credibility determinations or weigh the evidence. *Vaughn,* 665 F.3d at 635 (citing *Sandstad v. CB Richard Ellis, Inc.,* 309 F.3d 893, 896 (5th Cir. 2002)). In addition, a court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)….[63]

Like plaintiff Haverda, Vicknair "…has presented sufficient evidence to raise a genuine dispute as to a material fact relating to his…"[64] claims: "…he was aware of who his friends and who his enemies were."[65] Thus should this Honorable Court "…REVERSE the district court's grant of summary judgment to Appellees and REMAND for further proceedings…."[66]

The opinion cites *Fine v. GAF Chem. Corp*., 995 F.2d 576, 578 (5th Cir. 1993) and *Simmons-Myers v. Caesars Entm't Corp*., 515 F.App'x 269, 272 (5th Cir.).[67] As did the plaintiff in the first case cited, Vicknair "…asks the court to liberally construe her EEOC charge. See *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. Unit B 1981)."[68] And to also determine that "…the grant of summary judgment is VACATED, and the case is REMANDED for further proceedings…."[69] As to the second case cited, Vicknair's "…charge has stated

[63] *Haverda, supra*, at 591.
[64] Id., at 588.
[65] ROA.434. See also ROA.405, 423, 440, 478.
[66] *Haverda, supra*, at 589.
[67] Opinion, p. 10.
[68] *Fine, supra*, at 577-578.
[69] Id., at 578.

sufficient facts to trgger an EEOC investigation, id., and to put an employer on notice of the existence and nature of the charges against…"[70] it.[71]

Contrary to the opinion, "…the facts alleged in the second EEOC complaint put DPS on notice of a possible constructive-discharge claim:"[72]

> Dear Ms. Boudreaux:
>
> The following is a response to your letter titled "Intended Termination"….[73]

Therefore Vicknair did "…exhaust administrative remedies and…"[74] can "…seek judicial relief on that claim. Summary judgment was…"[75] improper.

The opinion next cites *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488 (5th Cir. 2012), *KeyBank Nat'l Ass'n v. Perkins Rowe Assocs., LLC*, No. 12-30998, 2013 WL 4446820, at *5 (5th Cir. 21 Aug. 2013), citing *Ins. Corp. of Ireland, Ltd. V. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)) and *Chilcutt v. United States,* 4 F.3d 1313, 1322 (5th Cir. 1993).[76]

The first case is distinguishable on it s facts:

> …Smith allowed dissemination of the protected information to personal injury lawyers who sue Cooper and other tire manufacturers.[77]

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[70] *Simmons-Myers, supra*, at 272-273. [71] ROA.35,82,509,980-985.
[72] Opinion, p. 11.
[73] ROA.980. See ROA.35,82,980-985. [74] Opinion, p. 11.
[75] Id.
[76] Opinion, p. 11.
[77] *Smith & Fuller, supra*, at 488.

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> Appellants concede that they violated the court's Protective Order.[78]

So, too, is the second case:

> …the magistrate judge and the district court, who together issued some fifteen orders related to discovery.[79]

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> At a subsequent status conference, the district judge specifically discussed the imposition of sanctions, and even mentioned possibly placing Spinosa in jail.[80]

As is the third case:

> Petitioners' failure to supply the requested information as to its contacts with Pennsylvania supports "the presumption that the refusal to produce evidence…was but an admission of the want of merit in the asserted defense."[81]

And the fourth "…case is also similar to *Insurance Corp. of Ireland....*"[82]

There is no "…inconsistency between Vicknair's claim he did not have access to the e-mails and his inclusion of a confidential, undisclosed e-mail (Jones' e-mail to DPS' general counsel) in his opposition to DPS' second summary-judgment motion."[83] The District Court should not have "…rejected Vicknair's proposed solutions, including having DPS search its own systems for a log file to track Vicknair's previous access or for DPS' attorneys to drive to Baton Rouge

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[78] Id., at 490.
[79] *KeyBank, supra*, at 2103 U.S. App. LEXIS 17544, *9.
[80] Id., * 13.
[81] *Ins. Corp. of Ireland, supra*, at 456 U.S. 709, 102 S.Ct. 2099, 2107, 72 L.Ed.2d 492.
[82] *Chilcutt, supra*, at 1321.
[83] Opinion, pp. 11-12. ROA.1332-1333.

with a laptop to have Vicknair transfer the database digitally."[84] Nothing in the evidence/record shows "…Vicknair's refusal to satisfy his discovery obligations."[85] The sanctions were both unjust and unrelated to the discovery order. Thus was there an abuse of discretion.

The opinion states:

> Evidentiary rulings by the district court are reviewed for abuse of discretion. *E.g., United States v. Pruett,* 681 F.3d 232, 243 (5th Cir. 2012); *see* Fed.R.Evid. 103 (Rulings on Evidence). 'The application of the attorney-client privilege is a question of fact, to be determined in light of the purpose of the privilege and guided by judicial precedents.' *United States v. Nelson*, 732 F.3d 504, 517-18 (5th Cir. 2013) (citation and internl quotation marks omitted); *see* Fed.R.Evid. 501 (Privilege in General). The application of controlling law is reviewed *de novo*; factual findings, for clear error. *Nelson,* 732 F.3d at 518 (citation omitted).[86]

The former case is inapposite "For the reasons stated above, Appellants' convictions and sentences are AFFIRMED."[87]

The District Court ignored the facts that DPS did not carry its burden of proof:

> To assert the privilege, a party must show: (1) a confidential communication; (2) to a lawyer or subordinate; (3) for theprimary purpose of securing a legal opinion, legal services, or assistance in the legal proceeding. *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997). The privilege does not protect "everything that arises out of the existence of

[84] Opinion, p. 12. OBA, pp. 26-27. ROA.1336-1338, 1630 (Def-2, pp. 2, 7, 8), 1799-1802.
[85] Opinion, p. 12. ROA.1-1932.
[86] Opinion, p. 12.
[87] *U.S. v. Pruett, supra*, at 250.

> an attorney-client relationship," *United States v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976).[88]

There is also this to consider:

> In-house corporate counsel face an additional challenge in preserving the attorney-client privilege while functioning in the dual role of legal counselor and business advisor. As the Court of Appeals of New York explains in *Rossi v. Blue Cross and Blue Shield of Greater New York,* 73 N.Y.2d 588 (N.Y. 1989), unlike outside lawyers who are retained to provide legal advice for a discrete, particular legal issue, in-house counsel may be corporate officers with a combination of business and legal responsibilities who have a continuing relationship with their corporate clients. In *Rossi,* the court held that in light of the closeness of that ongoing, permanent relationship, in-house counsel should be subject to stricter scrutiny when they assert the attorney-client privilege. As such, in-house counsel should be aware that some courts may demand heightened evidence indicating that the communications between the lawyer and corporate client were for the purpose of providing legal advice.[89]

The correspondence from Ronnie Jones to in-house counsel is dated August 7, 2009. Vicknair did not file his charge with the EEOC until September 3, 2009, nearly a month after the date of the correspondence and, therefore, could not have been in anticipation for litigation. Secondly, in-house counsel did not participate in the litigation. Therefore the communication is not privileged.

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[88] *Nelson, supra*, at 518.

[89] Raymond L. Sweigart, *Attorney-Client Privilege, Pitfalls and Pointers for Transactional Attorneys*, Vol. 17, No. 4, ABA, Business Law Section, Business Law Today (March/April 2008).

CONCLUSION

The opinion cites the inapposite *Cardenas v. United of Omaha Life Ins. Co.*, 731 F.3d 496, 499 (5th Cir. 2013)[90] "…claim for benefits from a life insurance policy taken out by Cardenas's daughter,…"[91] Be that as it may, the jury at Vicknair's trial did "…have a legally sufficient evidentiary basis to find for the party on…"[92] each and every issue.[93] As for the retaliatory animus of Boudreaux there is this:

> H.R. never received any copies of – we didn't know Dean had filed a grievance.[94]
>
> *******
>
> Without having given Vicknair the opportunity to give hie side of the story, she levels an accusation against of "…disruption of our workplace."[95]
>
> *******
>
> Received Cease and Desist Order signed by Ms. Boudreaux regarding voice recording in the workplace.[96]

Apart from Boudreaux's own retaliatory animus, there is this evidence also not addressed by the opinion:

> The timing alone shows that Selvaratnam, once he reviewed, in 2009, the transcript of Vicknair's earlier testimony, told

[90] Opinion, p. 13.
[91] *Cardenas, supra,* at 497.
[92] Id.
[93] ROA.1630,1653-1751,1771-1915.
[94] OBA, p. 34. ROA.1630, 1653-1751, 1771-1915.
[95] OBA, p. 35. ROA.1630, (Pla-10, para. 3).
[96] OBA, p. 36. ROA.1775-1776,1836. See ROA.1630 (Def. -5, p. 4).

> Dennis Weber "…he was aware of who his friends and who his enemies were."[97]

The opinion did not follow the dictate of its own case:

> The Court "'must draw all reasonable inferences in favor of the nonmoving party, and [we] may not make credibility determinations or weigh the evidence.'"[98]

It did engage in credibility calls:

> By late June 2012, DPS still had not received copies of the requested files or access to Vicknair's electronic database. [99]
>
> *******
>
> …DPS' deputy secretary, Edmonson, was called, out of order, as a witness by DPS. He testified he had no qualms about reprimanding or even firing friends if they disobeyed rules, and he did not hold grudges against employees for filing grievances.[100]

There was the weighing of evidence:

> …he was not authorized to peruse employee e-mails without prior authorization.[101]

And the opinion ignores the import of another of its cases:

> … the ultimate decisionmaker could inherit the taint of discriminatory intent if he "merely acted as a rubber stamp,…[102]
>
> *******

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[97] RB, p. 5. ROA.423. See also ROA.679-680,1630 (Def – 3, pp. 4-5), 1646, 1864-1865. [98] *Russell v. McKinney Hospital Venture,* 235 F.3d 219, 222 (5th Cir. 2000), quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000)).

[99] Opinion, p. 4.

[100] Opinion, p. 6.

[101] Opinion, p. 5.

[102] *Russell v. University of Texas,* 234 Fed.Appx. 195, 203 (5th Circ. 2007).

> …the degree to which the ultimate decisionmaker based his decision on an independent investigation is a question of fact reserved for the jury).[103]

And the analysis of Justice Scalia:

> …if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning.[104]

Applying the Supreme Court "…analysis to the facts of this case, it is clear that …"[105] this petition should be granted and the District Court judgment reversed.

[103] Id., at 204.
[104] *Staub v. Proctor Hosp.,* 131 S.Ct. 1186, 1193, 179 L.Ed.2d 144 (2011).
[105] Id., at 131 S.Ct. 1194.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed via CM/ECF and that a copy thereof is being served upon counsel of record via the Court's electronic notification system.

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Baton Rouge, Louisiana, this 18th day of February, 2014.

/s/ *Dan M. Scheuermann*
Dan M. Scheuermann (#11767)

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir.R. 32.2.7(c), undersigned counsel certifies that this original brief complies with the type-volume limitations of 5th Cir.R. 32.2.7(b).

1. Exclusive of the portions exempted by 5th Cir.R. 32.2.7(b)(3), this brief contains 15 pages printed in a proportionally spaced typeface, pursuant to FRAP 40(b).
2. This brief is printed in a proportionally spaced, serif typeface using Time New Roman 14 point font in text and Times New Roman 12 point font in footnotes produced by Microsoft Word software.
3. Undersigned counsel will provide an electronic version of this brief and/or a copy of the word printout to the Court.
4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir.R. 32.2.7, may result in the Court's striking this brief, and imposing sanctions against the person who signed it.

Signed this 18th day of February, 2014.

Respectfully submitted,
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-20081

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

Defendants-Appellants,

vs.

VERA CHAPMAN AND KRYSTAL HOWARD,

Plaintiffs-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
Houston Division

PETITION FOR REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the persons and entities listed below have an interest in the outcome of this case. This representation is made in order that the Judges of this Honorable Court may evaluate possible disqualification or recusal.

1. A.S.U.I. Healthcare and Development Center, Inc., the Defendant-Appellant.
2. Diann Simien, the Defendant-Appellant.
3. Vera Chapman, the Plaintiff-Appellee.
4. Krystal Howard, the Plaintiff-Appellee.
5. Joseph R. Willie, II, D.D.S., J.D., attorney for the Defendants-Appellants.
6. Lori Chambers Gray, Esquire, attorney for the Defendants-Appellants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-20081

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

Defendants-Appellants,

vs.

VERA CHAPMAN AND KRYSTAL HOWARD,

Plaintiffs-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
Houston Division

CERTIFICATE OF INTERESTED PERSONS

The undersigned certifies that the persons and entities listed below have an interest in the outcome of this case. This representation is made in order that the Judges of this Honorable Court may evaluate possible disqualification or recusal.

1. A.S.U.I. Healthcare and Development Center, Inc., the Defendant-Appellant.
2. Diann Simien, the Defendant-Appellant.
3. Vera Chapman, the Plaintiff-Appellee.
4. Krystal Howard, the Plaintiff-Appellee.
5. Joseph R. Willie, II, D.D.S., J.D., attorney for the Defendants-Appellants.
6. Lori Chambers Gray, Esquire, attorney for the Defendants-Appellants.

7. Stacy M. Allen, Esquire, attorney for the Defendants-Appellants.

8. Mark Siurek, Esquire, attorney for the Plaintiffs-Appellees.

9. Patricia Haylon, Esquire, attorney for the Plaintiffs-Appellees.

10. Willie & Associates, P.C., Dr. Willie's law firm.

11. Law Offices of Lori Gray & Associates, Attorney Gray and Attorney Allen's law firm.

12. Warren & Siurek, L.L.P., Attorney Siurek and Attorney Haylon's law firm.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

ATTORNEY FOR APPELLANTS
A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

IN THE UNITED STATES COURT OF APPEALS
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A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

Defendants-Appellants,

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For the Southern District of Texas
Houston Division

STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Bobby v. Bies, 129 S.Ct. 2145 (2009).

Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

Roussell v. Brinker, 441 Fed.Appx. 222 (5th Cir. 2011).

Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913 (5th Cir. 2008).

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002).

Terrell v. DeConna, 877 F.2d 1267 (5th Cir. 1989).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

1. This appeal involves an important question f law that is of first impression in this Court: Does the filing of virtually identical collective actions in Fair Labor Standards Act ("FLSA") cases satisfy the written "opt in" requirement of 29 U.S.C. § 216(b), such that the doctrine of collateral estoppel will apply and if it does, did the panel so depart from the guidelines mandated by the Supreme Court in Bies and the holdings of this Court as announced in Sandoz and Terrell.

2. Whether the panel so departed from the guidelines mandated by the Supreme Court as they relate to the "companionship exemption" in FLSA cases so as to be in conflict with the law espoused in Long Island.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

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Appeal from the United States District Court
For the Southern District of Texas
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PETITION FOR REHEARING EN BANC

STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. The panel did not give the Order of Partial Dismissal and the Final Judgment the preclusive effect under the doctrine of collateral estoppel, as it was required to by binding and controlling case law precedent issued by the Supreme Court and this Court.

2. The Defendants properly preserved their "companionship exemption" defense by proffering their defense in their Rule 12(b)(6) motion to the trial court.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Appellees filed their Original Collective Action Complaint in the United States District Court, Southern District of Texas, Houston Division, bearing Civil Action No. H-11-3025 on August 18, 2011. The presiding judge was the Honorable Gray H. Miller. (ROA.8-15.)

On December 1, 2011, the district court denied the Appellants' Rule 12(b)(6) Motion to Dismiss. (R.O.A. 59-60.) On December 8, 2011, the district court denied the Appellants' Motion for Reconsideration. (ROA.79.)

On August 21, 2012, the district court entered its Memorandum Opinion and Order granting in part and denying in part Appellees' Motion for Summary Judgment. (ROA.211-224.) On October 10, 2012, the district court denied the Appellants' Motion for Reconsideration. (ROA.277.)

On November 5, 2012, trial commenced before the bench and on November 6, 2012, the bench trial concluded. (ROA.537-647,648-700.)

On February 6, 2013, the district court entered its Memorandum Opinion, Order and Findings of Fact and Conclusions of Law (ROA.481-498.) On February 6, 2013, the district court entered its Final Judgment in favor of the Appellees. (ROA.499.)

The Appellants timely filed their Notice of Appeal on February 12, 2013. (ROA.500-501.)

February 3, 2014, the Court entered its per curiam opinion affirming the judgment of the district court.

On February 11, 2014, the Appellants timely filed their Petition for Rehearing En Banc.

STATEMENTS OF FACTS

It is undisputed that the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a domestic non-profit corporation doing business in the State of Texas. Additionally, the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a Medicaid Provider for the Provision of Home and Community-Based Services Program with the Texas Department of Aging and Disability Services ("DADS").The corporation provides residential based care for physically and mentally disabled individuals. First and foremost, it is uncontroverted and undisputed that the Plaintiffs were employed by the corporation and not the personal employees of the individual Defendants, Kim McLemore and Diann Simien. The Plaintiff's in this case have did not plead the theory alter ego to pierce the corporate veil and have not pled that the individual Defendants committed actual fraud.

The Plaintiffs judicially admit that they are domestic service employees who provide companionship services to the physically and mentally disabled and that they are employed by a third-party ("A.S.U.I.") as opposed to a family or household recipient.

Specifically, Plaintiffs made the following factual allegations: 1) The direct caregivers (Plaintiffs) are responsible for assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking

meals and other household functions, 2) These direct caregivers, including the Plaintiffs, work in a home from 2:00 p.m. until 9:00 a.m. when the clients are taken to a day facility. The Plaintiffs and other similarly situated employees are not paid at all for all of the hours worked in the home after 10:00 p.m. which is considered "down time" and is "off-the-clock," 3) As a result of this schedule, direct caregivers (Plaintiffs) regularly work in excess of forty (40) hours per week. However, they are not paid overtime compensation for all hours worked in excess of forty (40) hours per week. Even if these factual allegations are assumed to be true, they do not show a right to relief.

ARGUMENT AND AUTHORITIES

A. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the applicability of the doctrine of collateral estoppel in a FLSA case.

The panel, in its opinion held, "The final judgment therefore was not an adjudication of the issues presented in the instant case. See Chapman, Et Al. v. A.S.U.I. Healthcare, Et Al., No. 13-20081, slip op. at 2 (5th Cir. Feb. 3, 2014) (per curiam). It is respectfully submitted that the panel has made a factually incorrect statement as it pertains to the appellate record in this case.

On August 18, 2011, the Plaintiffs filed their Original Collective Action Complaint under the FLSA. (ROA.8-15.) On January 10, 2012, a virtually identical collective action under the FLSA was filed and styled Ovlyn Lee v. A.S.U.I. Healthcare and Development Center, Et Al; In the Southern District of Texas,

Houston Division. The presiding judge was the Honorable Lynn N. Hughes. The case bears Cause No. H-12-0082. (ROA.432-441.) The Court, en banc, is requested to take judicial notice of both collective action complaints.

The record clearly reflects that on April 2, 2012, Judge Hughes issued a Partial Dismissal which unambiguously held that A.S.U.I. Healthcare and Development Center was not Ovlyn Lee's employer. (ROA.442.) This was and is an adjudication on the merits of a portion of Ovlyn Lee's FLSA claim. It is also undisputed that Ovlyn Lee's FLSA claims were prosecuted as a "collective action" and involved the same Defendants and an almost identical set of operative facts as the case at bar. (R.O.A.432-441.) This set of circumstance made the rest of Ovlyn Lee's **overtime and damages claims** under the FLSA legally untenable and she abandoned her overtime and damages claims on July 6, 2012, by written stipulation. (ROA.461-462.) On October 19, 2012, Judge Hughes entered a Final Judgment that Ovlyn Lee takes nothing from A.S.U.I Healthcare and Development Center, Inc. (ROA.443.) This action merged the interlocutory Partial Dismissal into the Final Judgment and was applicable to **all** claims asserted by Ovlyn Lee. The Final Judgment was not appealed to this Court and is the current state of the law concerning collective actions under the FLSA as they relate to A.S.U.I.

The Appellees and the panel have sought to assail and challenge the finality and preclusive effect of Judge Hughes' Partial Dismissal and Final Judgment, in contravention to applicable case law and rules of procedure. Judge Hughes' Partial

Dismissal and Final Judgment were entered pursuant to the provisions of FED. R. CIV. P. 41(b), which operates as an adjudication on the merits. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (rules of finality treat dismissal on statute of limitations grounds as a judgment on the merits).

The two FLSA collective action cases at issue have the same alleged employer, similarly-situated employees and the same set of operative facts. Although an issue of first impression in this Court, the Defendants contend that the collective action that the Plaintiffs filed would meet the written "opt in" requirements of 29 U.S.C. § 216(b), which in turn, would make collateral estoppel available to the Defendants. See Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913, 916-917 (5th cir. 2008); Roussell v. Brinker, 441 Fed.Appx. 222, 227 (5th Cir. 2011); Heirs of Guerra v. United States, 207 F.3d 763, 766-767 (5th Cir. 2000); Swate v. Hartwell, 99 F.3d 1282, 1289-1290 (5th Cir. 1996); Hendrick v. Avent, 891 F.2d 583, 586-589 (5th Cir. 1990).

This Court in Roussell, 441 Fed.Appx. at 227, held:

> Section 216(b) collective actions are intended "to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer."

(Emphasis added.)

Collateral estoppel (issue preclusion) bars the relitigation of determinations necessary to the ultimate outcome of a prior proceeding. Bobby v. Bies, 129 S.Ct. 2145, 2149 (2009). Moreover, collateral estoppel (issue preclusion) bars successive litigation

of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and is essential to the judgment. Id. at 2152.

Lastly, neither Judge Hughes nor Judge Miller ever decertified the class in both cases and they both proceeded as collective actions. See Roussell, 441 Fed.Appx. at 227. The Defendants claim that the doctrine of collateral estoppel bars the Plaintiffs subsequent "collective action" suit and more than meets the "three-prong" test announced by this Court in Terrell v. DeConna, 877 F.2d 1267, 1270-1272 (5th Cir. 1989).

B. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the de novo review with regard to the denial of the Defendants' Rule 12(b)(6) motion.

The panel, in its opinion, is totally incorrect that the Defendants did not proffer their "companionship exemption" defense in the trial court and did not argue said defense in its briefs. The Court, en banc, is requested to take judicial notice of Defendants' Rule 12(b)(6) Motion to Dismiss as well as the Defendants' briefs that are on file. (ROA.24-38,46-48,49-58; Brief of Appellants, pp. 12-16; Reply Brief of Appellants, pp. 3- 6.) The appellate record is replete with evidence that the exemption is applicable as the Plaintiffs were companionship service providers contemplated by 29 C.F.R. § 552.3. As a matter of law, FED. R. APP. P. 28(a)(9) is totally not applicable to the case at bar.

The denial of a Rule 12(b)(6) motion is to be reviewed de novo. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564-570

(2007). It is the contention of the Defendants that the panel gave "short shrift" to the Defendants' "companionship exemption" defense and did not conduct the proper appellate review.

In Long Island, the Supreme Court recognized the companionship services exemption applied to workers contracting with a third-party agency to provide care to consumers. See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007). Plaintiffs, in their complaint, judicially admitted they were direct caregivers providing services within the purview of the companionship exemption, including assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking meals and other household functions. (ROA.8-15.)

Moreover, Welding, the case upon which the panel and the Plaintiffs heavily rely, is not binding on the Fifth Circuit and has not been adopted by all of the federal circuits. See generally Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004). However, if the Court, en banc, chooses to follow the analytical framework outlined by the Welding court, that case acknowledges the term "private home" contained in 29 C.F.R. § 552.3 encompasses more than the traditional home; rather, it applies to housing situations along a continuum:

> At one end of the continuum is a traditional family home in which a single family resides, which clearly constitutes a private home. At the other end of the continuum is "an institution primarily engaged in the care of the sick, the aged, the mentally ill . . . which clearly [does] not constitute a private home. In between lie a variety of living arrangements, many

> which may constitute "private homes' for the purposes of the companionship services exemption."

Welding, 353 F.3d at 1218 (citations omitted).

To determine where in the continuum a particular residence lies and if it constitutes a private home under the companionship services exemption, the Court in Welding constructed six factors: 1) whether the client lived in the living unit as his private home prior to receiving services from the provider, 2) who owns the living unit, 3) who manages and maintains the residence, 4) whether the client would be allowed to live in the unit if the client were not contracting with the provider, 5) the relative difference in cost/value of the services provided and the total cost of maintaining the living unit and, 6) whether the service provider uses any part of the residence for the provider's own business. Id. at 1219-1220.

The panel and the Plaintiffs relied heavily on the fact that A.S.U.I. consumers did not live in the living unit as their private home before beginning to receive services and that their names were not on the lease. However, Welding states that no single factor is dispositive. Id. at 1218. Moreover, the remaining factors weigh in favor of the Defendants.

The evidence and case law tendered concerning the Defendants' Rule 12(b)(6) motion more than sets out that the Plaintiffs were direct caregivers that are subject to the companionship exemption defense. (ROA.28-38,51-58.)

Additionally, the evidence presented by both the Defendants and the Plaintiff's raise a genuine fact issues as to whether the

companionship exemption is applicable and whether the living units were the clients private homes. (ROA.119,129,148-158, 161-165,186-187,190.) See also 29 U.S.C. § 213(a)(15); 29 C.F.R § 552.3. This case should be decided by the trier of fact that was demanded, the jury. It was inappropriate for the panel to affirm the denial of Plaintiffs' Rule 12(b)(6) motion and the granting of the Plaintiffs' motion for summary judgment.

CONCLUSION

For the forgoing reasons, the Appellants request that the opinion and judgment of the panel vacated, that the Court, en banc, reverse the final judgment of the district court and render judgment in favor of the Defendants or, in the alternative, remand the case to the district court with instructions to order a new trial.

Respectfully submitted,

WILLIE & ASSOCIATES, P.C.

By: /s/ Joseph R. Willie, II, D.D.S., J.D.
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CENTER, INC. AND DIANN SIMIEN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the CM/ECF system to Mark Siurek, 3334 Richmond Avenue, Suite 100, Houston, Texas 77098 and to Sarah K. Marcus, 200 Constitution Avenue, Room N-2716, Washington, D.C. 20210, on the 11th day of February, 2014.

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief uses a monospaced typeface and contains 300 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 3, 2014
Lyle W. Cayce
Clerk

No. 13-20081

VERA CHAPMAN; KRYSTAL HOWARD,

Plaintiffs-Appellees

v.

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER; DIANN SIMEN,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-3025

Before REAVLEY, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

The principal issue in this Fair Labor Standards Act ("FLSA") case is whether Plaintiff-Appellees Vera Chapman and Krystal Howard were employees of Defendants-Appellants A.S.U.I. Healthcare and Development Center and Diann Simien[1] (collectively "ASUI"). The district court held on summary judgment that they were employees, rather than independent

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although Simien's name is spelled "Simen" on the district court docket sheet, we adopt the spelling used in the Appellant's brief.

contractors, and therefore entitled to be paid for overtime. The court conducted a bench trial as to damages. We AFFIRM.

Chapman and Howard worked as direct caregivers in group homes for persons with mental disabilities. ASUI contracted with the state to provide the assistive services, and it leased the homes. Chapman and Howard's duties included cooking, cleaning, and assisting the clients with medication. The plaintiffs began their shifts at approximately 3:00 p.m. and worked until 9:00 a.m. the next morning. Although they stayed at the group homes overnight, they were not paid for all of the hours on duty, specifically the "downtime" from 10:00 p.m. to 6:00 a.m. They filed the instant suit against ASUI to recover for unpaid overtime wages in excess of forty hours worked per week. *See* 29 U.S.C. §§ 206(a), 207(a).

ASUI contends first that the instant suit is barred by collateral estoppel because of a similar suit filed in the Southern District of Texas that resulted in a take nothing judgment against the plaintiff. The plaintiff in that case made a claim not only for overtime pay but also for personal injuries. The record shows that the plaintiff subsequently abandoned the FLSA overtime claim. The final judgment therefore was not an adjudication of the issues presented in the instant case. *See Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (party seeking to apply collateral estoppel must prove that an issue was actually litigated in a prior action); *see also Nichols v. Anderson*, 788 F.2d 1140, 1141-42 (5th Cir. 1986).

ASUI next contends that the district court erroneously found that the plaintiffs were employees because, *inter alia*, Simien testified that the plaintiffs were hired as independent contractors, and they signed contracts acknowledging that status. Neither a defendant's subjective belief about employment status nor the existence of a contract designating that status is dispositive. *See Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th

Cir. 1983). Rather, we look to multiple factors to assess the "economic reality" of whether the plaintiff is so dependent on the alleged employer that she is an employee or is so independent that the plaintiff essentially is in business for herself. *See Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976). The factors include the "degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required." *Pilgrim Equip.*, 527 F.2d at 1311.

The record shows that ASUI controlled all the meaningful aspects of the employment relationship. ASUI hired Chapman and Howard, assigned them to their respective group homes, set their work schedule, and determined how much to pay them on an hourly basis and when to increase their hourly rate. There was no opportunity for the plaintiffs to profit beyond their hourly wage, and they were not at risk to suffer any capital losses. Both plaintiffs worked for ASUI for multiple years, although Chapman had two short gaps in her employment. The plaintiffs' only investment in the business was the purchase of their uniforms. ASUI, on the other hand, contracted with the state to provide the services; operated a dayhab facility for the clients' day time use; and maintained a central office headquarters. Any lack of supervision by ASUI as to how Chapman and Howard should go about cooking and cleaning does not transform the plaintiffs into independent contractors. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). The economic reality test does not show that the plaintiffs were so independent of ASUI that they were in business for themselves. *See Pilgrim Equip.*, 527 F.2d at 1311-14. The district court did not err by concluding that they were employees.

We also conclude that under a similar economic reality test for determining employer status, the district court did not err by concluding that Diann Simien, ASUI's vice president and program manager, was a statutory employer for purposes of the FLSA. *See* 29 U.S.C. § 203(d); *Martin v. Spring*

Break '83 Productions, L.L.C., 688 F.3d 247, 251 (5th Cir. 2012). To determine whether an individual or entity is an employer, we look to who has operating control over the employees, and we consider "whether the alleged employer: '(1) possessed the power to hire and fire employees; (2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records.'" *Gray v. Powers*, 673 F.3d 352, 354-55 (5th Cir. 2012) (citation omitted).

The district court correctly determined that Simien exercised substantial control over management of the plaintiffs' employment, set the plaintiffs' rate of pay, and personally reviewed their hours and compensation. Chapman and Howard testified that Simien hired them both, assigned them to their group homes, and decided when to raise their hourly pay. She also scheduled them to work when needed to cover for employees who did not show up. Howard testified that Simien told her she would not be paid for certain hours. Simien's own testimony showed that on various occasions she exercised authority and control by authorizing the billing specialist to pay the direct caregivers for certain time. Simien also testified that she ensured criminal background checks were performed on new hires and that letters of reference were obtained. Based on the economic realty test, the record supported the district court's finding that Simien exercised operating control over the plaintiffs.

We are not persuaded by ASUI's argument that the FLSA's companionship services exemption applies in this case. *See* 29 U.S.C. § 213(a)(15). ASUI offered no evidence as to this exemption in opposition to the plaintiff's summary judgment motion, which ordinarily precludes review. *See Colony Creek, Ltd. v. Resolution Trust Corp.*, 941 F.2d 1323, 1326 (5th Cir. 1991); *see also Bell v. Thornburg*, 738 F.3d 696, 702 (5th Cir. 2013); Fed. R. Civ. P. 56(c)(1). ASUI's further attempt to incorporate by reference arguments it made in its motion to dismiss is also impermissible. *See Yohey v. Collins*,

985 F.2d 222, 225 (5th Cir. 1993); Fed. R. App. P. 28(a)(9). Moreover, the record shows that the exemption does not apply because the plaintiffs were not working in private homes within the meaning of the FLSA. *See* 29 C.F.R. § 552.3; *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1219-20 (10th Cir. 2004). Although the clients do reside in the living units, albeit in groups of three, these group homes are maintained primarily to facilitate provision of the assistive services. *See Welding*, 353 F.3d at 1219. But for their receipt of assistive services from ASUI, the clients would not necessarily be living in these units. ASUI's reliance on *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339 (2007), is inapposite as that case provides no assistance for determining what is a "private home" for purposes of the companionship services exemption.

ASUI next challenges the district court's admission in the bench trial of summary exhibits used to determine damages. Summaries are generally admissible when "(1) they are based on competent evidence already before the jury, (2) the primary evidence used to construct the charts is available to the other side for comparison so that the correctness of the summary may be tested, (3) the chart preparer is available for cross-examination, and (4) the jury is properly instructed concerning use of the charts." *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001); *see* Fed. R. Evid. 1006. The summaries here were based on ASUI's own records and/or the plaintiffs' testimony. The district court was fully able to compare the summaries with the primary evidence. Although ASUI correctly argues that the chart preparer was not available for cross-examination, this was a bench trial, not a jury trial. ASUI was able to argue about claimed inaccuracies in the evidence, and the district court expressly took those claims into account. ASUI fails to show that the district court abused its discretion. *See Triple Tee Golf, Inc. v. Nike, Inc.*,

485 F.3d 253, 265 (5th Cir. 2007) (evidentiary rulings are reviewed for abuse of discretion).

ASUI further argues that the district court erroneously declined to exercise its discretion to omit an award of liquidated damages. *See* 29 U.S.C. § 216(b); *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1030 (5th Cir. 1993) (Section 216(b) "mandates the award of liquidated damages in an amount equal to actual damages following a determination of liability."). Although the district court has discretion not to award liquidated damages, the employer must first satisfy the court that it acted in good faith and with a reasonable ground for believing it was not violating the FLSA. *See* 29 U.S.C. § 260; *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1263 (5th Cir. 1986). ASUI has not met this "substantial burden." *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). The only evidence bearing on ASUI's good faith was Simien's bare agreement with counsel that ASUI had spoken to an attorney and an unnamed consultant when forming its opinion that the plaintiffs were not employees. No further explanation or discussion was provided about any investigation by ASUI into the plaintiffs' employment status. We conclude that the district court did not abuse its discretion by refusing to omit a liquidated damages award. *See, e.g., Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1415 (5th Cir. 1990).

AFFIRMED.

7. Stacy M. Allen, Esquire, attorney for the Defendants-Appellants.

8. Mark Siurek, Esquire, attorney for the Plaintiffs-Appellees.

9. Patricia Haylon, Esquire, attorney for the Plaintiffs-Appellees.

10. Willie & Associates, P.C., Dr. Willie's law firm.

11. Law Offices of Lori Gray & Associates, Attorney Gray and Attorney Allen's law firm.

12. Warren & Siurek, L.L.P., Attorney Siurek and Attorney Haylon's law firm.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

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Houston Division

STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Bobby v. Bies, 129 S.Ct. 2145 (2009).

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Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

Roussell v. Brinker, 441 Fed.Appx. 222 (5th Cir. 2011).

Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913 (5th Cir. 2008).

Rivera v. Wyeth-Ayerst Labs., 283 F.3d 315 (5th Cir. 2002).

Terrell v. DeConna, 877 F.2d 1267 (5th Cir. 1989).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance:

1. This appeal involves an important question f law that is of first impression in this Court: Does the filing of virtually identical collective actions in Fair Labor Standards Act ("FLSA") cases satisfy the written "opt in" requirement of 29 U.S.C. § 216(b), such that the doctrine of collateral estoppel will apply and if it does, did the panel so depart from the guidelines mandated by the Supreme Court in Bies and the holdings of this Court as announced in Sandoz and Terrell.

2. Whether the panel so departed from the guidelines mandated by the Supreme Court as they relate to the "companionship exemption" in FLSA cases so as to be in conflict with the law espoused in Long Island.

WILLIE & ASSOCIATES, P.C.

By:/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-20081

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC. AND DIANN SIMIEN

Defendants-Appellants,

vs.

VERA CHAPMAN AND KRYSTAL HOWARD,

Plaintiffs-Appellees.

Appeal from the United States District Court
For the Southern District of Texas
Houston Division

PETITION FOR REHEARING EN BANC

STATEMENT OF ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

1. The panel did not give the Order of Partial Dismissal and the Final Judgment the preclusive effect under the doctrine of collateral estoppel, as it was required to by binding and controlling case law precedent issued by the Supreme Court and this Court.

2. The Defendants properly preserved their "companionship exemption" defense by proffering their defense in their Rule 12(b)(6) motion to the trial court.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Appellees filed their Original Collective Action Complaint in the United States District Court, Southern District of Texas, Houston Division, bearing Civil Action No. H-11-3025 on August 18, 2011. The presiding judge was the Honorable Gray H. Miller. (ROA.8-15.)

On December 1, 2011, the district court denied the Appellants' Rule 12(b)(6) Motion to Dismiss. (R.O.A. 59-60.) On December 8, 2011, the district court denied the Appellants' Motion for Reconsideration. (ROA.79.)

On August 21, 2012, the district court entered its Memorandum Opinion and Order granting in part and denying in part Appellees' Motion for Summary Judgment. (ROA.211-224.) On October 10, 2012, the district court denied the Appellants' Motion for Reconsideration. (ROA.277.)

On November 5, 2012, trial commenced before the bench and on November 6, 2012, the bench trial concluded. (ROA.537-647,648-700.)

On February 6, 2013, the district court entered its Memorandum Opinion, Order and Findings of Fact and Conclusions of Law (ROA.481-498.) On February 6, 2013, the district court entered its Final Judgment in favor of the Appellees. (ROA.499.)

The Appellants timely filed their Notice of Appeal on February 12, 2013. (ROA.500-501.)

February 3, 2014, the Court entered its per curiam opinion affirming the judgment of the district court.

On February 11, 2014, the Appellants timely filed their Petition for Rehearing En Banc.

STATEMENTS OF FACTS

It is undisputed that the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a domestic non-profit corporation doing business in the State of Texas. Additionally, the Defendant, A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER, INC., is a Medicaid Provider for the Provision of Home and Community-Based Services Program with the Texas Department of Aging and Disability Services ("DADS").The corporation provides residential based care for physically and mentally disabled individuals. First and foremost, it is uncontroverted and undisputed that the Plaintiffs were employed by the corporation and not the personal employees of the individual Defendants, Kim McLemore and Diann Simien. The Plaintiff's in this case have did not plead the theory alter ego to pierce the corporate veil and have not pled that the individual Defendants committed actual fraud.

The Plaintiffs judicially admit that they are domestic service employees who provide companionship services to the physically and mentally disabled and that they are employed by a third-party ("A.S.U.I.") as opposed to a family or household recipient.

Specifically, Plaintiffs made the following factual allegations: 1) The direct caregivers (Plaintiffs) are responsible for assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking

meals and other household functions, 2) These direct caregivers, including the Plaintiffs, work in a home from 2:00 p.m. until 9:00 a.m. when the clients are taken to a day facility. The Plaintiffs and other similarly situated employees are not paid at all for all of the hours worked in the home after 10:00 p.m. which is considered "down time" and is "off-the-clock," 3) As a result of this schedule, direct caregivers (Plaintiffs) regularly work in excess of forty (40) hours per week. However, they are not paid overtime compensation for all hours worked in excess of forty (40) hours per week. Even if these factual allegations are assumed to be true, they do not show a right to relief.

ARGUMENT AND AUTHORITIES

A. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the applicability of the doctrine of collateral estoppel in a FLSA case.

The panel, in its opinion held, "The final judgment therefore was not an adjudication of the issues presented in the instant case. See Chapman, Et Al. v. A.S.U.I. Healthcare, Et Al., No. 13-20081, slip op. at 2 (5th Cir. Feb. 3, 2014) (per curiam). It is respectfully submitted that the panel has made a factually incorrect statement as it pertains to the appellate record in this case.

On August 18, 2011, the Plaintiffs filed their Original Collective Action Complaint under the FLSA. (ROA.8-15.) On January 10, 2012, a virtually identical collective action under the FLSA was filed and styled Ovlyn Lee v. A.S.U.I. Healthcare and Development Center, Et Al; In the Southern District of Texas,

Houston Division. The presiding judge was the Honorable Lynn N. Hughes. The case bears Cause No. H-12-0082. (ROA.432-441.) The Court, en banc, is requested to take judicial notice of both collective action complaints.

The record clearly reflects that on April 2, 2012, Judge Hughes issued a Partial Dismissal which unambiguously held that A.S.U.I. Healthcare and Development Center was not Ovlyn Lee's employer. (ROA.442.) This was and is an adjudication on the merits of a portion of Ovlyn Lee's FLSA claim. It is also undisputed that Ovlyn Lee's FLSA claims were prosecuted as a "collective action" and involved the same Defendants and an almost identical set of operative facts as the case at bar. (R.O.A. 432-441.) This set of circumstance made the rest of Ovlyn Lee's **overtime and damages claims** under the FLSA legally untenable and she abandoned her overtime and damages claims on July 6, 2012, by written stipulation. (ROA.461-462.) On October 19, 2012, Judge Hughes entered a Final Judgment that Ovlyn Lee takes nothing from A.S.U.I Healthcare and Development Center, Inc. (ROA.443.) This action merged the interlocutory Partial Dismissal into the Final Judgment and was applicable to **all** claims asserted by Ovlyn Lee. The Final Judgment was not appealed to this Court and is the current state of the law concerning collective actions under the FLSA as they relate to A.S.U.I.

The Appellees and the panel have sought to assail and challenge the finality and preclusive effect of Judge Hughes' Partial Dismissal and Final Judgment, in contravention to applicable case law and rules of procedure. Judge Hughes' Partial

Dismissal and Final Judgment were entered pursuant to the provisions of FED. R. CIV. P. 41(b), which operates as an adjudication on the merits. Cf. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995) (rules of finality treat dismissal on statute of limitations grounds as a judgment on the merits).

The two FLSA collective action cases at issue have the same alleged employer, similarly-situated employees and the same set of operative facts. Although an issue of first impression in this Court, the Defendants contend that the collective action that the Plaintiffs filed would meet the written "opt in" requirements of 29 U.S.C. § 216(b), which in turn, would make collateral estoppel available to the Defendants. See Sandoz v. Cingular Wireless, L.L.C., 553 F.3d 913, 916-917 (5th cir. 2008); Roussell v. Brinker, 441 Fed.Appx. 222, 227 (5th Cir. 2011); Heirs of Guerra v. United States, 207 F.3d 763, 766-767 (5th Cir. 2000); Swate v. Hartwell, 99 F.3d 1282, 1289-1290 (5th Cir. 1996); Hendrick v. Avent, 891 F.2d 583, 586-589 (5th Cir. 1990).

This Court in Roussell, 441 Fed.Appx. at 227, held:

> Section 216(b) collective actions are intended "to avoid multiple lawsuits where numerous employees have allegedly been harmed by a claimed violation or violations of the FLSA by a particular employer."

(Emphasis added.)

Collateral estoppel (issue preclusion) bars the relitigation of determinations necessary to the ultimate outcome of a prior proceeding. Bobby v. Bies, 129 S.Ct. 2145, 2149 (2009). Moreover, collateral estoppel (issue preclusion) bars successive litigation

of an issue of fact or law that is actually litigated and determined by a valid and final judgment, and is essential to the judgment. Id. at 2152.

Lastly, neither Judge Hughes nor Judge Miller ever decertified the class in both cases and they both proceeded as collective actions. See Roussell, 441 Fed.Appx. at 227. The Defendants claim that the doctrine of collateral estoppel bars the Plaintiffs subsequent "collective action" suit and more than meets the "three-prong" test announced by this Court in Terrell v. DeConna, 877 F.2d 1267, 1270-1272 (5th Cir. 1989).

B. The panel violated the doctrine of stare decisis by departing from the mandates of the Supreme Court and this Court concerning the de novo review with regard to the denial of the Defendants' Rule 12(b)(6) motion.

The panel, in its opinion, is totally incorrect that the Defendants did not proffer their "companionship exemption" defense in the trial court and did not argue said defense in its briefs. The Court, en banc, is requested to take judicial notice of Defendants' Rule 12(b)(6) Motion to Dismiss as well as the Defendants' briefs that are on file. (ROA.24-38,46-48,49-58; Brief of Appellants, pp. 12-16; Reply Brief of Appellants, pp. 3- 6.) The appellate record is replete with evidence that the exemption is applicable as the Plaintiffs were companionship service providers contemplated by 29 C.F.R. § 552.3. As a matter of law, FED. R. APP. P. 28(a)(9) is totally not applicable to the case at bar.

The denial of a Rule 12(b)(6) motion is to be reviewed de novo. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 564-570

(2007). It is the contention of the Defendants that the panel gave "short shrift" to the Defendants' "companionship exemption" defense and did not conduct the proper appellate review.

In Long Island, the Supreme Court recognized the companionship services exemption applied to workers contracting with a third-party agency to provide care to consumers. See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007). Plaintiffs, in their complaint, judicially admitted they were direct caregivers providing services within the purview of the companionship exemption, including assisting the clients with their personal care and hygiene, ensuring medications are taken on schedule, cooking meals and other household functions. (ROA.8-15.)

Moreover, Welding, the case upon which the panel and the Plaintiffs heavily rely, is not binding on the Fifth Circuit and has not been adopted by all of the federal circuits. See generally Welding v. Bios Corp., 353 F.3d 1214 (10th Cir. 2004). However, if the Court, en banc, chooses to follow the analytical framework outlined by the Welding court, that case acknowledges the term "private home" contained in 29 C.F.R. § 552.3 encompasses more than the traditional home; rather, it applies to housing situations along a continuum:

> At one end of the continuum is a traditional family home in which a single family resides, which clearly constitutes a private home. At the other end of the continuum is "an institution primarily engaged in the care of the sick, the aged, the mentally ill . . . which clearly [does] not constitute a private home. In between lie a variety of living arrangements, many

> which may constitute "private homes' for the purposes of the companionship services exemption."

Welding, 353 F.3d at 1218 (citations omitted).

To determine where in the continuum a particular residence lies and if it constitutes a private home under the companionship services exemption, the Court in Welding constructed six factors: 1) whether the client lived in the living unit as his private home prior to receiving services from the provider, 2) who owns the living unit, 3) who manages and maintains the residence, 4) whether the client would be allowed to live in the unit if the client were not contracting with the provider, 5) the relative difference in cost/value of the services provided and the total cost of maintaining the living unit and, 6) whether the service provider uses any part of the residence for the provider's own business. Id. at 1219-1220.

The panel and the Plaintiffs relied heavily on the fact that A.S.U.I. consumers did not live in the living unit as their private home before beginning to receive services and that their names were not on the lease. However, Welding states that no single factor is dispositive. Id. at 1218. Moreover, the remaining factors weigh in favor of the Defendants.

The evidence and case law tendered concerning the Defendants' Rule 12(b)(6) motion more than sets out that the Plaintiffs were direct caregivers that are subject to the companionship exemption defense. (ROA.28-38,51-58.)

Additionally, the evidence presented by both the Defendants and the Plaintiff's raise a genuine fact issues as to whether the

companionship exemption is applicable and whether the living units were the clients private homes. (ROA.119,129,148-158, 161-165,186-187,190.) See also 29 U.S.C. § 213(a)(15); 29 C.F.R § 552.3. This case should be decided by the trier of fact that was demanded, the jury. It was inappropriate for the panel to affirm the denial of Plaintiffs' Rule 12(b)(6) motion and the granting of the Plaintiffs' motion for summary judgment.

CONCLUSION

For the forgoing reasons, the Appellants request that the opinion and judgment of the panel vacated, that the Court, en banc, reverse the final judgment of the district court and render judgment in favor of the Defendants or, in the alternative, remand the case to the district court with instructions to order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via the CM/ECF system to Mark Siurek, 3334 Richmond Avenue, Suite 100, Houston, Texas 77098 and to Sarah K. Marcus, 200 Constitution Avenue, Room N-2716, Washington, D.C. 20210, on the 11th day of February, 2014.

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief uses a monospaced typeface and contains 300 lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Joseph R. Willie, II, D.D.S., J.D.
Joseph R. Willie, II, D.D.S., J.D.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
February 3, 2014
Lyle W. Cayce
Clerk

No. 13-20081

VERA CHAPMAN; KRYSTAL HOWARD,

Plaintiffs-Appellees

v.

A.S.U.I. HEALTHCARE AND DEVELOPMENT CENTER; DIANN SIMEN,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-3025

Before REAVLEY, PRADO, and OWEN, Circuit Judges.

PER CURIAM:*

The principal issue in this Fair Labor Standards Act ("FLSA") case is whether Plaintiff-Appellees Vera Chapman and Krystal Howard were employees of Defendants-Appellants A.S.U.I. Healthcare and Development Center and Diann Simien[1] (collectively "ASUI"). The district court held on summary judgment that they were employees, rather than independent

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] Although Simien's name is spelled "Simen" on the district court docket sheet, we adopt the spelling used in the Appellant's brief.

contractors, and therefore entitled to be paid for overtime. The court conducted a bench trial as to damages. We AFFIRM.

Chapman and Howard worked as direct caregivers in group homes for persons with mental disabilities. ASUI contracted with the state to provide the assistive services, and it leased the homes. Chapman and Howard's duties included cooking, cleaning, and assisting the clients with medication. The plaintiffs began their shifts at approximately 3:00 p.m. and worked until 9:00 a.m. the next morning. Although they stayed at the group homes overnight, they were not paid for all of the hours on duty, specifically the "downtime" from 10:00 p.m. to 6:00 a.m. They filed the instant suit against ASUI to recover for unpaid overtime wages in excess of forty hours worked per week. *See* 29 U.S.C. §§ 206(a), 207(a).

ASUI contends first that the instant suit is barred by collateral estoppel because of a similar suit filed in the Southern District of Texas that resulted in a take nothing judgment against the plaintiff. The plaintiff in that case made a claim not only for overtime pay but also for personal injuries. The record shows that the plaintiff subsequently abandoned the FLSA overtime claim. The final judgment therefore was not an adjudication of the issues presented in the instant case. *See Matter of Braniff Airways*, 783 F.2d 1283, 1289 (5th Cir. 1986) (party seeking to apply collateral estoppel must prove that an issue was actually litigated in a prior action); *see also Nichols v. Anderson*, 788 F.2d 1140, 1141-42 (5th Cir. 1986).

ASUI next contends that the district court erroneously found that the plaintiffs were employees because, *inter alia*, Simien testified that the plaintiffs were hired as independent contractors, and they signed contracts acknowledging that status. Neither a defendant's subjective belief about employment status nor the existence of a contract designating that status is dispositive. *See Robicheaux v. Radcliff Material, Inc.*, 697 F.2d 662, 667 (5th

Cir. 1983). Rather, we look to multiple factors to assess the "economic reality" of whether the plaintiff is so dependent on the alleged employer that she is an employee or is so independent that the plaintiff essentially is in business for herself. *See Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311-12 (5th Cir. 1976). The factors include the "degree of control, opportunities for profit or loss, investment in facilities, permanency of relation, and skill required." *Pilgrim Equip.*, 527 F.2d at 1311.

The record shows that ASUI controlled all the meaningful aspects of the employment relationship. ASUI hired Chapman and Howard, assigned them to their respective group homes, set their work schedule, and determined how much to pay them on an hourly basis and when to increase their hourly rate. There was no opportunity for the plaintiffs to profit beyond their hourly wage, and they were not at risk to suffer any capital losses. Both plaintiffs worked for ASUI for multiple years, although Chapman had two short gaps in her employment. The plaintiffs' only investment in the business was the purchase of their uniforms. ASUI, on the other hand, contracted with the state to provide the services; operated a dayhab facility for the clients' day time use; and maintained a central office headquarters. Any lack of supervision by ASUI as to how Chapman and Howard should go about cooking and cleaning does not transform the plaintiffs into independent contractors. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). The economic reality test does not show that the plaintiffs were so independent of ASUI that they were in business for themselves. *See Pilgrim Equip.*, 527 F.2d at 1311-14. The district court did not err by concluding that they were employees.

We also conclude that under a similar economic reality test for determining employer status, the district court did not err by concluding that Diann Simien, ASUI's vice president and program manager, was a statutory employer for purposes of the FLSA. *See* 29 U.S.C. § 203(d); *Martin v. Spring*

Break '83 Productions, L.L.C., 688 F.3d 247, 251 (5th Cir. 2012). To determine whether an individual or entity is an employer, we look to who has operating control over the employees, and we consider "whether the alleged employer: '(1) possessed the power to hire and fire employees; (2) supervised or controlled employee work schedules or conditions of employment; (3) determined the rate or method of payment; and (4) maintained employee records.'" *Gray v. Powers*, 673 F.3d 352, 354-55 (5th Cir. 2012) (citation omitted).

The district court correctly determined that Simien exercised substantial control over management of the plaintiffs' employment, set the plaintiffs' rate of pay, and personally reviewed their hours and compensation. Chapman and Howard testified that Simien hired them both, assigned them to their group homes, and decided when to raise their hourly pay. She also scheduled them to work when needed to cover for employees who did not show up. Howard testified that Simien told her she would not be paid for certain hours. Simien's own testimony showed that on various occasions she exercised authority and control by authorizing the billing specialist to pay the direct caregivers for certain time. Simien also testified that she ensured criminal background checks were performed on new hires and that letters of reference were obtained. Based on the economic realty test, the record supported the district court's finding that Simien exercised operating control over the plaintiffs.

We are not persuaded by ASUI's argument that the FLSA's companionship services exemption applies in this case. *See* 29 U.S.C. § 213(a)(15). ASUI offered no evidence as to this exemption in opposition to the plaintiff's summary judgment motion, which ordinarily precludes review. *See Colony Creek, Ltd. v. Resolution Trust Corp.*, 941 F.2d 1323, 1326 (5th Cir. 1991); *see also Bell v. Thornburg*, 738 F.3d 696, 702 (5th Cir. 2013); Fed. R. Civ. P. 56(c)(1). ASUI's further attempt to incorporate by reference arguments it made in its motion to dismiss is also impermissible. *See Yohey v. Collins*,

985 F.2d 222, 225 (5th Cir. 1993); Fed. R. App. P. 28(a)(9). Moreover, the record shows that the exemption does not apply because the plaintiffs were not working in private homes within the meaning of the FLSA. *See* 29 C.F.R. § 552.3; *see also Welding v. Bios Corp.*, 353 F.3d 1214, 1219-20 (10th Cir. 2004). Although the clients do reside in the living units, albeit in groups of three, these group homes are maintained primarily to facilitate provision of the assistive services. *See Welding*, 353 F.3d at 1219. But for their receipt of assistive services from ASUI, the clients would not necessarily be living in these units. ASUI's reliance on *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 127 S. Ct. 2339 (2007), is inapposite as that case provides no assistance for determining what is a "private home" for purposes of the companionship services exemption.

ASUI next challenges the district court's admission in the bench trial of summary exhibits used to determine damages. Summaries are generally admissible when "(1) they are based on competent evidence already before the jury, (2) the primary evidence used to construct the charts is available to the other side for comparison so that the correctness of the summary may be tested, (3) the chart preparer is available for cross-examination, and (4) the jury is properly instructed concerning use of the charts." *United States v. Bishop*, 264 F.3d 535, 547 (5th Cir. 2001); *see* Fed. R. Evid. 1006. The summaries here were based on ASUI's own records and/or the plaintiffs' testimony. The district court was fully able to compare the summaries with the primary evidence. Although ASUI correctly argues that the chart preparer was not available for cross-examination, this was a bench trial, not a jury trial. ASUI was able to argue about claimed inaccuracies in the evidence, and the district court expressly took those claims into account. ASUI fails to show that the district court abused its discretion. *See Triple Tee Golf, Inc. v. Nike, Inc.*,

485 F.3d 253, 265 (5th Cir. 2007) (evidentiary rulings are reviewed for abuse of discretion).

ASUI further argues that the district court erroneously declined to exercise its discretion to omit an award of liquidated damages. *See* 29 U.S.C. § 216(b); *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1030 (5th Cir. 1993) (Section 216(b) "mandates the award of liquidated damages in an amount equal to actual damages following a determination of liability."). Although the district court has discretion not to award liquidated damages, the employer must first satisfy the court that it acted in good faith and with a reasonable ground for believing it was not violating the FLSA. *See* 29 U.S.C. § 260; *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260, 1263 (5th Cir. 1986). ASUI has not met this "substantial burden." *Barcellona v. Tiffany English Pub, Inc.*, 597 F.2d 464, 468 (5th Cir. 1979). The only evidence bearing on ASUI's good faith was Simien's bare agreement with counsel that ASUI had spoken to an attorney and an unnamed consultant when forming its opinion that the plaintiffs were not employees. No further explanation or discussion was provided about any investigation by ASUI into the plaintiffs' employment status. We conclude that the district court did not abuse its discretion by refusing to omit a liquidated damages award. *See, e.g., Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1415 (5th Cir. 1990).

AFFIRMED.