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Summary of Significant Eleventh Circuit Decisions August 1, 2017 Through November 18, 2018

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Introduction

The Eleventh Circuit decides too many cases to summarize, so I have limited the summary to published precedential decisions in civil litigation in 1) first, fourth, eighth and fourteenth amendment claims, principally under 42 U.S.C. § 1983, including qualified immunity where relevant; 2) modern civil rights claims; 3) standing and mootness; 4) pleading and sanctions; and 5) the Federal Arbitration Act. Because the identity of panel members matters, I list the members of each panel, beginning with the author of the opinion. Under each heading, cases appear beginning with the most recent. I will update this summary weekly or more frequently.

First Amendment Freedom of Speech

Koeppel v. Valencia College, (9/13/18) (Ed Carnes, Marcus, Visiting Judge Ebel) Koeppel challenged on free speech grounds his one year suspension from a state college for stalking Roe, a female student, through two series of crude and offensive text messages, all reproduced in the opinion, sent to her at home after she repeatedly rejected his written romantic advances. Compounding his poor judgment, Koeppel continued to text Roe after her complaint to a Dean triggered the issuance of a no contact order pending an investigation. Koeppel sued to overturn his resulting one year suspension on both free speech and due process grounds, losing below on summary judgment. Roe argued his speech, though offensive, took place off campus, was not an unlawful threat, and therefore could not be the basis for discipline, and that the college disciplinary code was facially overbroad and vague. The panel held that *Tinker v. Des Moines Indep. Cmty. School Dsitrict*, 393 U.S. 503 (1969) prescribed the power of post-secondary schools to regulate speech both when it is disruptive and when it "impinges on the rights of other students." The panel held that among the rights of other students is right "to be secure and to be let alone," including the right to be "free from persistent unwanted advances and related insults." Accordingly, it held, the first amendment did not protect Koeppel from discipline for his speech even if, via the internet, it occurred off campus. The panel rejected his overbreadth challenge to the school's code since its stalking prohibition was not substantially overbroad, rendering moot his overbreadth challenge to other sections relating to sexual harassment and abuse. The court rejected his facial

vagueness challenge because the stalking prohibition was not vague as applied to his conduct, foreclosing any facial vagueness claim that therefore relied on vagueness to others. His due process claim failed as well for reasons discussed under Due Process. The court rejected his Title IX erroneous outcome sex discrimination claim for lack of any evidence of an erroneous outcome.

Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, (8/22/18) (Jordan, Tjoflat, and district judge Steele) Plaintiff FLFNB holds weekly vegetarian food sharing events in a downtown public park near city government buildings. Its members share food with the homeless and the public under a banner with the logo "Food not Bombs" and the image of a fist holding a carrot. The city enacted an ordinance tightly regulating and effectively prohibiting the food sharing events, and FLFNB sued to enjoin enforcement, arguing that the events were expressive conduct protected by the first amendment. The city voluntarily stayed enforcement pending resolution of the suit, and the district court dismissed the lawsuit, holding the first amendment inapplicable, reasoning that the events were not expressive conduct since a passerby would not know the specific message of the event without reading the banner, and therefore that only weak due process protection applied and was easily satisfied. The panel applied independent review to the facts relevant to first amendment protection, and reversed, holding that as a matter of law the food sharing events were expressive conduct protected by the first amendment. Judge Jordan explained that context matters in determining whether conduct is sufficiently expressive to constitute symbolic speech protected by the free speech clause, holding the key inquiry to be whether a reasonable passerby would interpret the event as expressing "*some* sort of message," not the particularized message of FLFNB. With no doubt that a passerby would interpret the events in the park as expressive, the court held the passerby need not be able to discern the particular message expressed, drawing an analogy to abstract art and parades viewed from a distance. Accordingly, the panel remanded for application of the *United States v. O'Brien*, standard for assessing the constitutionality of expressive conduct regulations as previously elaborated in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc) and for consideration of the heightened vagueness standards applicable to speech regulations.

Prison Legal News v. Secretary, Florida Dep't of Corrections, 890 F.3d 954 (11th Cir. 2018) (Ed Carnes, Dubina and district judge Conway) The panel held Florida did not violate the first amendment by banning distribution to prisoners of Prison Legal News. The state banned PLN because it contained some ads for forbidden three way calling services, pen pals, cash for stamps exchanges, concierge services and people locator services, applying deferential rational basis review to state's determination that the ads posed a danger to other inmates, the public and institutional security. Judge Carnes first dismissed an amicus argument that recent SCOTUS decisions undermined the degree of deference *Turner v. Safley* compels, derisively concluding

in a footnote: "While we categorically reject the contention and supporting arguments of the amici, we do not mean to be unfair. The professors' brief does have good grammar, sound syntax, and correct citation form." Next, applying *Turner* deference, the panel held it irrelevant that no other correction department in the nation bans distribution of PLN. The panel reasoned the ban still left PLN adequate alternative means to communicate with inmates by sending them handbooks and books, and was not an exaggerated response since no other alternative was readily available at no cost to the state. Finally, the Judge Carnes, writing for the panel, rejected New York's practice of attaching flyers warning inmates not to use the prohibited services, stating: "Really? If all New York has to do to prevent inmate misconduct and crime is gently remind them not to misbehave, one wonders why that state's prisons have fences and walls. Why not simply post signs reminding inmates not to escape. If New York wants to engage in a fantasy about convicted criminals behaving like model citizens while serving out their sentences, it is free to do so, but the Constitution does not require Florida to join New York in la-la-land."

Stardust, 3007 LLC v. City of Brookhaven, Georgia, (8/10/18) (William Pryor, Jill Pryor, and Visiting Judge Clevenger) In an erogenous zoning case, the panel upholds a city ordinance restricting the licensing and location of adult businesses but leaving 73 locations within the city in which hypothetically such a business could operate. Under the city ordinance, a business other than a pharmacy, drug store, medical clinic, or health care facility that "regularly features sexual devices" is subject to restrictive licensing and zoning requirements. The court construed the phrase to focus on the manner in which Stardust displayed its sexual devices, held that the first amendment potentially encompasses product display, but found the restrictions constitutional under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) based on the fiction that such restrictions are content neutral since they focus not on content but secondary effects of adult businesses and, absent a complete ban, leave adequate alternative channels for communication. If there's a lesson to be taken, it is the need to present evidence to challenge the government's contention that sexual device marketing and sales contribute to negative secondary effects.

Fernandez v. School Board of Miami-Dade County, Florida, (8/10/18) (Marcus, Wilson, and district judge Howard) Principal and assistant principal organized a campaign to convert a public school serving students with severe disabilities into what they believed would be a better performing charter school. In retaliation, the school board disciplined them by reassigning them to lower paying and less desirable jobs. They first brought state administrative proceedings claiming improper reprisal, and recovered backpay but not reinstatement for speech the state ALJ found was pursuant to their official duties. They then sued for retaliatory demotion. Affirming summary judgment for the board, the panel held the two administrators

spoke pursuant to their official duties. Restating what has become hornbook first amendment law for public employees, the court stated that courts begin by asking whether the employee spoke pursuant to official duties, or as a citizen on matters of public concern, for *Garcetti v. Ceballos*, 547 U.S. 410 (2006) treats official duty speech as government speech unprotected by the first amendment. Because Florida law vests the principal with authority to initiate charter conversion, and because the administrators' job description charged them with responsibility for education leadership and quality education, the panel held they spoke pursuant to their official duties. The panel held that *Lane v. Franks*, 134 S. Ct. 2369 (2014) (public employee testifying in response to grand jury subpoena about information acquired through performance of official duties spoke as citizen, not as employee) did not undermine its conclusion, noting that *Lane* only drew a distinction between speech pursuant to official duties and speech that relates to or concerns those duties. The panel further construed *Lane*'s inquiry into whether the employee spoke pursuant to "ordinary job duties" to focus on whether the speech was an ordinary job duty, not whether the speech and associated job duty was ordinarily or routinely performed.

Cadwell v. Kaufman, Englett and Lynd, PLLC, 886 F.3d 1153 (11th Cir. 2018) (Ed Carnes, Newsom, and visiting judge Siler). Plaintiff consulted defendant law firm for bankruptcy filing advice. Defendant law firm entered into a retainer agreement that required plaintiff to pay his initial retainer and all subsequent payments by credit card. He did. Plaintiff thereafter discharged defendant law firm and sued it for violating the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, specifically 11 U.S.C. 526(a)(4)'s prohibition against a law firm advising a client to incur more debt to pay an attorney for bankruptcy related legal services. The law firm moved to dismiss on the grounds that the statute contained an improper purpose requirement not alleged, and that the statute violated the first amendment by prohibiting attorney speech. The trial court granted the motion and the panel reversed, holding that the statute's blanket prohibition means what it says, and therefore does not contain an improper purpose requirement. With that reading established, the law firm conceded that the statute applied to its retainer requirement of payment by credit card since that caused the plaintiff to incur more debt. Turning to the free speech argument, the court held that the statute did not improperly restrict attorney client communications or prevent a lawyer from charging a fee, and that it did not run afoul of the first amendment by prohibiting an attorney from advising a client to incur more debt for bankruptcy related representation.

Keister v. Bell, 879 F.3d 1282 (11th Cir. 2018) (Ed Carnes, Black and district judge May) A traveling evangelist who routinely visits college campuses sought to preach at the University of Alabama on sidewalks adjoining a publicly traveled intersection located entirely within the campus, arguing that it was a traditional public forum not subject to the school's grounds use

policy. The district court denied a preliminary injunction and the court affirmed, finding the intersection to be a limited purpose public forum rather than a traditional public forum because of its location within the campus. Because plaintiff did not challenge the application of the relevant level of scrutiny (viewpoint neutral content based restrictions reasonable in light of the purpose of the forum), the court affirmed denial of injunctive relief.

Turner v. Wells, 879 F.3d 1254 (11th Cir. 2018) (Hull, Dubina and visiting International Court of Trade Judge Restani) The panel affirmed dismissal on the pleadings of a defamation claim by former Miami Dolphins football offensive line coach Jim Turner against the law firm that investigated allegations of homophobic bullying of Jonathan Martin and that concluded that Turner's unprofessional conduct contributed to the bullying. In addition to affirming dismissal based on Florida law, the panel concluded that Turner was a limited public figure who had thrust himself into the particular controversy, and that under the first amendment, he therefore he must plead facts sufficient to give rise to a reasonable inference that the allegedly defamatory statements were made with actual malice under Twombly/Iqbal pleading standards. Because in substance Turner only alleged that defendants failed to properly analyze certain information, he failed to allege facts that would support a reasonable inference that defendants knowingly or with reckless disregard published a false statement of fact as required by the first amendment (at least until President Trump "opens up libel law.")

Barrett v. Walker County School District, 872 F.3d 1209 (11th Cir. 2017) (Rosenbaum, Carnes, and Visiting Judge Gilman, Julie Carnes concurring) Affirming a judgment and permanent injunction enjoining enforcement of a school district' policy that required member of public who wished to address the board during the public comment portion of its meeting to first meet with superintendent at a time of the superintendent's choosing and then submit a written request at least one week before the board meeting, the panel unanimously held the policy violated the first amendment. The panel unanimously held that the school board meeting was a limited public forum in which speech restrictions must be reasonable and viewpoint neutral, that the prohibition against empowering a government official with unbridled discretion to prohibit otherwise permissible speech applies to licensing speech in a limited public forum, and that by empowering the superintendent with unbridled discretion to control the timing of the required meeting, the policy invested him with unbridled discretion to deny a speaker the opportunity to speak in violation of the first amendment's prohibition against covert viewpoint discrimination. The panel majority also held that the policy operated as an unconstitutional prior restraint on speech over the objection of Judge Carnes's concurrence that argued prior restraint analysis is inapplicable to a limited public forum since conventional prior restraint doctrine requires that a permissible restraint be content neutral, a requirement inapplicable to limited public forums.

FF Cosmetics FL, Inc. v. City of Miami Beach, 866 F.3d 1290 (11th Cir. 2017) (Dubina, Marcus, and US Court of International Trade Judge Goldberg) The panel affirmed a preliminary injunction forbidding the city from enforcing its commercial solicitation and handbilling ordinances as amended to prohibit all commercial handbilling and solicitation within defined portions of the city. Although the commercial solicitation ordinance as amended during the litigation only prohibited commercial speech, the ordinance nevertheless violated the Central Hudson narrow tailoring requirement because the city failed to consider several less burdensome alternatives to a complete ban, including the licensing and spacing limitations it applies to artists and street vendors. The anti-handbilling ordinance was overbroad because it prohibited anyone from distributing any message about any good or service provided by a business, not just commercial speech, offering as examples a PETA demonstrator handbilling about a restaurant's treatment of animals and a Rabbi distributing a list of restaurants serving kosher meals.

First Amendment Religion Clauses

Kondrat'yev v. City of Pensacola, FL (9/7/18) (Per Curiam, Newsom, Hull and district judge Royal). Relying on the prior panel rule, the court held that *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce, Inc*., 698 F.2d 1098 (11th Cir. 1983) compelled affirmance of the judgment below ordering the city to remove its 34 foot Latin Cross from a public park. Judges Newsom and Royal each wrote long opinions concurring in the judgment in which they argued that *Rabun County* was wrongly decided on both standing and on the merits, conflicts with later SCOTUS decisions, and violates the original public meaning of the Establishment Clause, and therefore that the court should rehear this case en banc, a step the court is likely to take.

Voting Rights After *Shelby County*

Voketz v. City of Decatur, Alabama (9/13/18) (Julie Carnes, Tjoflat, district judge Bloom) Before *Shelby County*, Decatur operated under a mayor / council form of government in which five council members were elected from single member districts, one of which was majority black, and the mayor was elected at large. Voketz secured passage of an initiative to change the city

to a council / manager form of government in which two council members would be elected at large and three from single member districts. The city created three single member districts, but because of Decatur's population, could not retain a minority majority district without violating state equal population requirements. The city submitted for preclearance a plan with a 35% black district, but DoJ declined to preclear it without additional voting history information. Concluding that DoJ would not preclear the plan, the city withdrew it and in its place adopted a five member single district plan with a majority black district, and submitted it to DoJ for preclearance. DoJ approved the plan and the city implemented it in 2012 elections. In 2013 *Shelby County* held section 4's preclearance trigger formula of the VRA unconstitutional, and in 2014 plaintiff sued to compel the city to implement the earlier never precleared plan. The city defended on the ground that the elimination of the majority black district would violate section 5 of the VRA, arguing that *Shelby County* applied prospectively. The panel held the city must implement the earlier plan under a prospective application of *Shelby County*. It reasoned that, with the invalidation of section 4 of the VRA, the city (and every other formerly covered jurisdiction) no longer was a covered jurisdiction required by section 5 to obtain preclearance. Since section five imposed no limits on noncovered jurisdictions, and since the city's only defense was that implementation of the plan would violate section five even though it was no longer a covered jurisdiction, it followed that it must implement the plan. The court made clear that in any formerly covered jurisdiction in which the stature of limitations has not run, litigation to compel adoption of disapproved or withheld plans would be successful unless the city or minority interveners successfully established a defense under section 2 of the VRA or the constitution.

Equal Protection

Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018) (Wilson, Jordan, and district judge Conway) The panel held that plaintiffs stated a plausible claim that Alabama enacted legislation preempting the city of Birmingham's $10.10 per hour minimum wage ordinance the day after it took effect for the purpose and with the effect of depriving the city's majority Black residents of equal employment opportunities on the basis of race. The panel affirmed dismissal of claims alleging violation of the Voting Rights Act and discriminatory exclusion from full participation in the political process. Relying on *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252 (1977), the panel held that the complaint satisfied the *Twombly / Iqbal* plausible basis in fact standard for pleading intentional race discrimination based on circumstantial evidence. To show discriminatory impact, the complaint alleged that the state statute denied a higher percentage of black workers the preempted minimum wage than white workers, and that black workers earn on average less per hour than white workers. To show discriminatory purpose, the panel relied on "the rushed, reactionary and racially polarized

nature of the legislative process" and "Alabama's historical use of state power to deny local black majorities authority over economic decision-making." The plaintiffs also documented "extensive evidence suggesting that the [preemption legislation] reflects Alabama's longstanding history 'of official actions taken for invidious purposes'" quoting *Arlington Heights*. The panel sharply criticized the district court's use of the "clearest proof" standard for testing the sufficiency of the complaint's allegations, holding that the standard, rooted in ex post facto challenges to civil statutes, has no place in equal protection law. Nota bene: On August 6, the court ordered the mandate withheld, and on August 30 the defendants moved for rehearing en banc. It would be wise to stay tuned for further developments.

Levy v. U.S. Attorney General, 882 F.3d 1364 (11th Cir. 2018) (Per Curiam Ed Carnes, Tjoflat, and William Pryor) The single parent derivative naturalization provision of 8 U.S.C. 1432(a)(3) conditioning derivative naturalization of a child born to a single naturalizing parent based upon the paternity of the child not being established by legitimation does not violate the constitution either as sex discrimination or as illegitimacy discrimination. It is not sex discrimination since it applies equally to naturalizing custodial male and female single parents, and even if it is legitimacy discrimination, it is constitutional since it substantially relates to protecting the rights of the alien parent.

Stout v. Jefferson County Bd. Of Educ., 882F.3d 988 (11th Cir. 2018) (William Pryor, Jill Pryor, Visiting Circuit Judge Clevenger) In a school district still governed by a desegregation decree, a largely white neighborhood within the largely black and Hispanic district sought to secede from the district and establish its own predominately white school district. The district court found the secession plan to be racially motivated and to have a racially discriminatory effect, but approved a modified secession plan. Both parties appealed. The panel affirmed the factual findings but vacated the secession plan, ordering the district court to enjoin the secession given its racial motivation.

Morrissey v. United States, 871F.3d 1260 (11th Cir. 2017) (Newsom, Wilson, and district judge Moreno) A gay man was denied a medical care tax deduction for the cost of identifying, retaining, compensating and paying for the medical care for an egg donor and a gestational surrogate. The tax treatment of the costs did not deny him equal protection on the basis of sexual orientation since it treats heterosexual taxpayers identically for the cost of IVF related expenses and pregnancy care for non-spouse surrogates and because there is no evidence of discriminatory intent. The tax treatment does not deprive him of substantive due process because there is no fundamental right to procreate through IVF when it necessarily involves an unrelated third party egg donor and gestational surrogate.

Felon Disenfranchisement

Hand v. Scott, 888 F.3d 1206 (11th Cir. 2018) (Marcus and William Pryor, Martin dissenting) Stay pending appeal granted of trial court final judgment and permanent injunction barring enforcement of current state clemency system and directing creation of specific and neutral criteria to direct vote restoration decisions. The panel majority held the state is likely to prevail on appeal on equal protection and due process grounds even though it operates a standardless clemency regime because section two of the fourteenth amendment permits abridgement of a felon's right to vote and because plaintiffs neither allege nor try to prove that the state system has as its purpose an unconstitutional intent to discriminate, but claim only that there is a "real risk" of impermissible purpose. The panel also held the state is likely to prevail on first amendment unbridled discretion grounds because the first amendment provides no greater protection than the fourteenth amendment, and because the fourteenth amendment's text trumps the first amendment's more generalized language, and because unbridled discretion doctrine is concerned with authority to grant or deny licenses to engage in first amendment activity rather than voting rights within the ambit of the fourteenth amendment. The panel also held that the remedy improper since it barred the state from exercising section two power and because it presumes authority to tell the state how to exercise it. Although only deciding a stay application, the order may presage resolution of the issues on the merits appeal.

Due Process -- Abortion

West Alabama Women's Center v. Williamson (8/22/18) (Ed Carnes, Dubina, and, concurring in the judgment only, district judge Abrams). Bound by SCOTUS precedent, the panel affirmed a permanent injunction forbidding Alabama from enforcing its ban on D&E abortions, but writing for himself and Judge Dubina, Judge Carnes previewed what to expect once the Senate confirms Brett Kavanaugh. From his insistent characterization of the procedure as "dismemberment abortion" "ripping apart" "an unborn child" to his expressed contempt for current SCOTUS precedent, he makes clear that the future of abortion rights will be grim once SCOTUS bolstered by Justice Kavanaugh guts what remains of the undue burden standard. Judge Dubina concurred to assert that the Supreme Court's abortion jurisprudence has no basis in the constitution. Judge Abrams, whose sister coincidentally is running for governor of Georgia, concurred only in the judgment holding the Alabama statute unconstitutional. Winter is coming.

Due Process

Yarbrough v. Decatur Housing Authority, (10/3/18) (Per curiam, William Pryor, Martin, district judge Vratil) The housing authority terminated plaintiff's section 8 housing voucher for drug related criminal activity after learning she had been indicted on two felony drug distribution charges. She appealed her termination, invoking a federal regulation creating a right to a hearing governed by the preponderance of evidence standard. She simultaneously secured dismissal of the two indictments in return for payment of court costs. At the voucher revocation hearing, the only evidence the authority offered to prove drug related criminal activity were the two indictments. The hearing officer found that she was engaged in illegal drug activity and upheld the revocation of her housing voucher. She then sued, alleging a deprivation of procedural due process. The district court dismissed, and the panel reversed, relying on *Basco v. Machin*, 514 F.3d 1177 (11th Cir. 2008). *Basco* held that in voucher termination hearings, the due process clause required the authority to prove by a preponderance the ground for revocation. Applying Basco, the panel held that the probable cause determination underlying the indictments cannot prove by a preponderance the conduct alleged. Judge William Pyror concurred, but only because *Basco* bound the panel. He argued that the en banc court should rehear the case and overrule the *Basco* on two grounds. First, he argued that because the National Housing Act does not create an individually enforceable right to a hearing, the regulation requiring the provision of a hearing is not privately enforceable through a section 1983 claim. Second, he argued that the due process clause does not create the right to an error-free hearing process or give rise to an erroneous outcome cause of action. With a new conservative majority, en banc rehearing seems likely.

Koeppel v. Valencia College, (9/13/18) (Ed Carnes, Marcus, Visiting Judge Ebel) (See First Amendment Freedom of Speech for facts) Koeppel challenged his disciplinary suspension from a state college for stalking a female student as a denial of procedural and substantive due process. Koeppel argued that the disciplinary process in which a Dean conducted an investigation and then reported findings and recommendations to a hearing panel before which the complainant did not appear was procedurally inadequate and also deprived him of a fundamental right. The panel affirmed summary judgment for the school despite the dean's acknowledged assumption that the complainant spoke truthfully. The panel applied *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc) and the *Parrat v. Taylor / Hudson v. Palmer* doctrine under which no deprivation of procedural due process cannot occur as long as the state affords a post-deprivation process as a remedy. Because under Florida law Koeppel could challenge his suspension through certiorari, the panel held *McKinney* barred his procedural due process. In so ruling, the panel seemingly ignored the genesis of the *Parrat/Hudson* doctrine as applicable only to random and unauthorized deprivations that, by their very nature, can be remedied only by a post-deprivation hearing, a doctrine inapplicable to structurally inadequate process. Because the school policy, https://goo.gl/zKXy7y does not allow for compulsory process or require the complainant to testify, it appears to be structurally inadequate. For a recent contrary holding, see *Doe v. Baum*, (9/7/18) (6th Cir, 2018) (due process clause requires right to cross-examine adverse witnesses in public college

disciplinary hearing). Perhaps that is why, in footnote 11, acknowledged to be dicta, the panel opined that the fourteenth amendment likely would have required factfinding based on testimony rather than assumptions if credibility had been an issue, suggesting a disciplinary hearing could not have relied solely on an investigation report absent Koeppel's concession in the investigation that he sent the offending texts. The panel rejected his substantive due process claim because there is no fundamental right to education.

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) Arrested and held by municipal court policy for inability to post bail for the offense of walking while intoxicated, Walker challenged the constitutionality of a system that then required him to post secured money bail equivalent to the fine for his non-jailable offense. The day after filing suit, the municipal court amended its practice to establish a fixed bail schedule, require a judicial determination within 48 hours after arrest of whether indigency precluded an arrestee from posting secured bail, and if so provided for release on recognizance. Plaintiff was released on personal recognizance, then posted and forfeited bail equivalent to a fine. The district court certified a (b)(2) class and preliminarily enjoined enforcement of the fixed bail system, requiring the city to make bail determinations based on an arrestee's affidavit of indigency within 24 hours. The panel reversed, holding the city practice did not violate procedural due process. First, applying abuse of discretion review, the panel held the *Younger* doctrine did not bar the suit since plaintiff sought only a prompt bail determination, not an intrusion into the prosecution itself. It then applied clear error review and held the municipal court bail schedule to be official city policy, triggering *Monell* liability. The panel then held that the due process and equal protection clauses provided protection beyond the eighth amendment's excessive bail clause that, under circuit precedent, was not violated simply because bail was unaffordable. But despite those victories, Walker lost as the court held rational basis review to be the governing standard under the fourteenth amendment for the additional 24 hour delay in an indigency determination, and that the 48 hour time limit was sufficient to afford procedural due process. The court held the wide latitude the due process clause affords governments in creating procedures did not require an affidavit based system rather than a hearing based system. And finally, the court held that the case was not mooted by the adoption of the new bail schedule under the relaxed *Flanigan's* rule for voluntary cessation by local governments. The court reasoned that because a single judge of the municipal court ordered the change in policy in secret, refusing to reveal why, rather than through legislation, and because in such a circumstance the court could revert to that policy were the suit dismissed, the district court could still enjoin operation of the original bail system. It dismissed the appeal from class certification for lack of pendent appellate jurisdiction.

McGinnis v. American Home Mortgage Servicing, Inc. (8/22/2018) (Visiting Circuit Judge Branch, Tjoflat, and Rosenbaum) In a wrongful foreclosure suit arising in a state with non-judicial foreclosure, a jury awarded $6,000 for economic injury, $500,000 for emotional distress, and $3,000,000 in punitive damages. In post-trial motions, the defendant challenged as constitutionally excessive the punitive damages award. The trial court upheld the award, and exercising independent review required by *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the panel affirmed. First, the panel held the wrongful foreclosure highly reprehensible based both on the expert testimony linking it to plaintiff's depression and the repeated refusal to correct or explain seemingly incorrect charges it could not even explain at trial. Next the panel rejected the argument that the *State Farm* dicta suggesting that even single digit ratios between actual and punitive damages could be excessive, noting that prior panels have upheld a variety of awards within the single digit (maximum of 9:1) ratio approved in *State Farm* as a guidepost. Next and, importantly, the panel held that in calculating the constitutionally permissible ratio, emotional distress damages properly must be included in the calculation of actual damages, resulting here in an award of a constitutionally permissible ratio of slightly less than 6:1. Finally the court held the RESPA civil penalty for failure to provide a disclosure statement irrelevant to the constitutionality of the punitive damages award.

Checker Cab Operators, Inc. v. Miami-Dade County (8/6/2018) (Marcus, Wilson, and district judge Howard) Taxicab medallion holders have a property interest in medallions, but the interest is only a right to offer for-hire services, not a right to exclude competitors. Accordingly, even though the county caused the value of medallions to decline by 90% when it permitted Uber and Lyft to operate in competition under less restrictive regulatory requirements, the panel held the county took no property from the medallion owners and therefore was not required to compensate them. The panel rejected under weak rational basis the due process and equal protection challenges to the less restrictive regulatory requirements for Uber and Lyft services.

Bush v. Secretary, FL. Dep't of Corrections, 888 F.3d 1188 (11th Cir. 2018) (Tjoflat, Marcus and district judge Steele) Although there is a procedural due process right to a trial transcript for direct appeal of a criminal conviction, the unexplained loss of a transcript does not give rise to a substantive due process violation in a Rule 3.850 proceeding for post-conviction relief.

Waldman v. Conway, 871 F.3d 1283 (11th Cir. 2017) (Per Curiam) (Tjoflat, Fay and Marcus) Classification of incarcerated inmate as a sex offender following his conviction for kidnapping a minor for ransom does not shock the conscience of the court sufficiently to constitute a deprivation of substantive due process.

8th and 14th Amendment Deliberate Indifference to Arrestee's Medical Needs (including qualified immunity)

Estate of Campbell v. Davenport, (10/2/18) (William Pryor, Martin, Visiting Judge Baldock) A fellow inmate stabbed Cummings, who was transported to a hospital in critical condition with apparent brain damage, and later died. Before he died, defendant, the prison warden instructed hospital staff that no heroic measures were to be taken, to stop medication, and to disconnect life support while allegedly still breathing and responsive to visual cues. The estate sued for deliberate indifference to medical needs, and the warden moved to dismiss on the basis of qualified immunity and for failure to state a claim for relief. The district court denied the motion to dismiss, the warden appealed, and the court of appeals affirmed the denial of qualified immunity because, under state law, control over an inmate's end of life decisions is not within the range of his discretionary authority, a necessary predicate for the assertion of defense of qualified immunity. The court held it lacked jurisdiction under the collateral order doctrine to review whether the district court erred by denying dismissal for failure to state a claim, a merits argument reviewable only upon entry of an adverse final judgment.

Nam Dang v. Sheriff, Seminole County, Florida, 871 F.3d 1272 (11th Cir. 2017) (Visiting judge Sentelle, Rosenbaum and Black) Police stopped plaintiff's car on 12/21/2011, pulled him out, threw him to the ground, and put a knee on his neck before releasing him. He started experiencing neck pain and headaches, went to an ER on 1/12/2012 but declined a recommended test to rule out meningitis. He was arrested 1/26/2012, and his mother advised officers he was still experiencing neck pain. He was booked, said nothing about neck pain, and had normal vitals. On 1/29 a jail nurse examined him due to his complaint of moderate to severe neck pain and a stiff neck. She ordered Motrin and put in an order for a doctor to prescribe a muscle relaxant. On 2/1 a doctor saw him, performed a brief exam, observed a temperature of 98.9 and prescribed a muscle relaxant for headaches, neck pain and neck stiffness. On 2/7 a nurse examined him and he reported headaches and neck pain and some vision and hearing problems; his temperature was still normal; he declined to see a dental mental or medical health doctor. On 2/9 he was examined by a nurse to whom he reported a headache and to whom he complained that "no one was doing anything for him." He had a fever of 101.5. The nurse encouraged him to drink fluids. Shortly thereafter he was found sitting on the floor and threatened with suicide prevention detention; he got up and walked away and later that night had a temperature of 97.9. On 2/20 he appeared to pass out and drool but the nurses believed his behavior was voluntary. He was admitted to the jail infirmary and seen by a doctor on 2/21 who concluded he had an idiosyncratic reaction to muscle

relaxants. On 2/22 he was rocking back and forth in his hard plastic bed. On 2/23 a nurse observed white patches on his tongue, his persistent headache, and unsteadiness when attempting to stand; she also noted that he was incontinent and very weak. She asked a doctor to examine him right away; he was then transported to the ER and diagnosed with meningitis which caused multiple strokes and permanent injuries. The court held that even assuming he manifested the requisite serious medical need, none of the nurses or the physician were deliberately indifferent and affirmed summary judgment for all defendants.

Eleventh Amendment State Sovereign Immunity

Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018) (Wilson, Jordan, and district judge Conway) Reversing a trial court's contrary ruling in a challenge to state legislation preempting the City of Birmingham's minimum wage ordinance, the panel held that Section Two of the Voting Rights Act constitutionally strips states of eleventh amendment immunity from suit. The panel then held the complaint failed to state a claim cognizable under the VRA. See separate discussions of the case under Standing and especially under the Equal Protection Clause.

Cassady v. Hall, 892 F.3d 1150 (11th Cir. 2018) (per curiam Tjoflat, William Pryor and Anderson) The eleventh amendment barred a post-judgment garnishment action filed against the Georgia Dep't of Administrative Services to enforce a $200,000 section 1983 sexual assault judgment against a state correction officer still employed by the state. The panel reasoned that because the garnishment sought to compel the state to pay plaintiff rather than the employee, it was in substance a claim against the state. Because the state has not consented to suit in federal court, the panel held the only remedy available to the successful plaintiff is an action in state court to enforce the federal judgment.

Standing

J.W. v. City of Birmingham, Alabama (9/23/18) (Per curiam Ed Carnes, Jordan, district judge Lamberth) On various occasions over three years, school resource officers sprayed plaintiffs with Freeze +P, a chemically incapacitating spray that caused them to vomit, to suffer irritation of mucus membranes, pain, and difficulty breathing. Other SROs failed to decontaminate them, exacerbating their discomfort. Plaintiffs sued, alleging excessive force, seeking compensatory damages against the spraying SROs and those who failed to decontaminate, and injunctive relief against the future use of the spray absent specific necessity in a *Monell* claim. After a 12 day trial, the court awarded compensatory damages against both groups of SROs and entered

injunctive relief against the city. All but the SROs who sprayed appealed. The court of appeals vacated the injunction, holding that plaintiffs lacked standing to sue for injunctive relief, relying on *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) to conclude that the risk of future spraying or non-decontamination was too speculative to constitute injury in fact. Evidence showed that SROs deployed the spray an average of only 1.7 times a year at each school, and that an individual student had only a 0.4%, or 4 out of a 1000, chance of being intentionally sprayed or denied decontamination, probabilities too low to create *Lyons* standing for injunctive relief. Over Judge Jordan's dissent on standing for the decontamination injunction, the panel reversed the injunction and ordered the claims for injunctive relief dismissed for lack of standing. It reversed the compensatory damages awarded against the SROs who failed to decontaminate on the basis of qualified immunity.

Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018) (Wilson, Jordan, and district judge Conway) (see Equal Protection for merits analysis) Reversing the trial court, the panel held that plaintiffs had standing to sue the Attorney General of Alabama to enjoin enforcement of state legislation preempting the city of Birmingham's $10.10 per hour minimum wage. The panel reasoned that lost wages paid by third party employers covered by the ordinance were an injury in fact fairly traceable to the "sweeping authority" of the attorney general to enforce state laws, citing his recent exercise of that authority to sue the city to prevent the erection of a plywood barrier around a confederate monument. The panel reasoned that injunctive relief, if granted, likely would redress plaintiff's economic injuries.

Georgia Republican Party v. SEC, 888 F.3d 1198 (11th Cir. 2018) (Julie Carnes, William Pryor, district judge Corrigan) The Financial Industry Regulatory Authority adopted a rule prohibiting placement agents from soliciting or coordinating to make payments to a political party of a state with which the covered member is engaging or seeking to engage in distribution or solicitation activities on behalf of an investment advisor. The Georgia Republican party joined with the Tennessee and New York republican parties to mount an APA challenge in a petition to the Eleventh Circuit. The court held the Georgia Republican Party failed to establish standing as an entity or on behalf of its members, and ordered the petition of the other state parties transferred to the D.C. Circuit. Although the party asserted the rule would hinder its ability to fundraise, it offered no evidence beyond a conclusory allegation to support the allegation. Similarly, it failed to offer evidence beyond a conclusory allegation that it would be harmed by having to divert resources to advise state and local office holders about the rule. And although it asserted standing on behalf of its members, it failed to make specific allegations that at least one identified member of the party has suffered or will suffer harm; the panel stated: "We cannot accept an organization's 'self-description of [its] membership…regardless of whether it is challenged" quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 499 (2009). With the

Georgia party having failed to establish standing, venue was improper in the Eleventh Circuit, and the court transferred the petition without addressing standing of the out of circuit parties.

Mootness

Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia, 868 F.3d 1248 (11th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 1326 (2018) (Anderson) Married couples with disabilities and a vendor challenged a city ordinance prohibiting the sale of devices used primarily for genital stimulation, seeking declaratory and injunctive relief and nominal damages. Due to the prior panel rule, plaintiffs lost before the district court and a panel of the Eleventh Circuit, but the panel invited rehearing en banc to reconsider the earlier circuit precedent. The court granted rehearing en banc, and the parties briefed and argued the case, after which the city repealed the ordinance. The court dismissed the appeal as moot. It first held repeal of the ordinance mooted claims for declaratory and injunctive despite the rule that voluntary cessation of illegal conduct ordinarily does not moot such claims. The court approved application of a more lenient exception from the rule for governmental defendants, overruling past precedent to the extent it treated timing of repeal as controlling, and reframed the inquiry as whether there is a reasonable likelihood that the same or similar ordinance will be reenacted. The majority concluded there was little likelihood of reenactment even though the city defended the ordinance's constitutionality through oral argument before the en banc court and repealed it only after questioning portended a likely adverse outcome. Even more importantly, the en banc court overruled past panel decisions to hold that repeal also mooted the claim for nominal damages despite contrary holdings from six other circuits and the seemingly binding decision in *Carey v. Piphus*, 435 U.S. 247 (1978). The majority reasoned that permitting nominal damage claims to circumvent mootness would force courts to decide claims that could have no practical effect on the rights or obligation of parties; it distinguished *Carey* on the basis that the *Carey* plaintiffs sought both actual and nominal damages but were not entitled to actual damages. Judge Wilson, joined by Judges Martin, Jordan, Rosenbaum, and Jill Pryor dissented from the nominal damages mootness holding.

*Gagliardi v. TJCV Land Trus*t, 889 F.3d 728 (11th Cir. 2018) (Marcus, Fay and Hull) The court affirmed dismissal of plaintiffs' claim that the City of Boca Raton violated the Establishment Clause by approving construction of a Chabad religious facility near their homes. The panel held a post-filing state court judgment barring the construction of the center rendered their claims for injunctive relief moot. Although plaintiffs had also sought compensatory and punitive damages, they abandoned economic remedies on appeal. The court observed that plaintiffs had not sought nominal damages, but that even had they done so, a claim for nominal

damages would not prevent the claim from becoming moot, citing the en banc holding in *Flanigan's*

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) See discussion of and rejection of mootness claim based on voluntary cessation pursuant to *Flanigan's* under Due Process.

Haynes v. Hooters of America, LLC, 893 F.3d 781 (11th Cir. 2018) (District judge Ross, Ed Carnes, and Marcus) Plaintiff, who is blind, sued claiming www.hooters.com was not accessible for users of screenreader software, and therefore violated the ADA; he sought an order compelling the creation of an accessible website and that the site be continually updated to ensure full accessibility. A different plaintiff previously brought a nearly identical lawsuit, and entered into a settlement agreement with Hooters that required it to conform to WCAG 2.0, the industry accessibility standard, by September, 2018. The district court dismissed Haynes' lawsuit as moot. The court of appeals reversed, reasoning that Hooters had not proven that it had made its website compliant with the earlier settlement, and that even had it done so, the case would not be moot for two reasons – 1) Haynes, who sought an order he could enforce, did not as a nonparty to the earlier settlement have the power to enforce that settlement, and 2) Haynes seeks an order that requires continued updating, a requirement not part of the earlier settlement. The court held that the test for whether an independent settled lawsuit will moot a claim for injunctive relief only if it grants the precise relief sought by the plaintiff in this case." The court did not opine on the merits question of whether the ADA requires the website to be accessible.

Hall v. Secretary, State of Alabama, 8/29/18 (Anderson and William Pryor, Jill Pryor dissenting) Alabama requires an independent candidate running for a House seat to file a petition signed by at least 3% of the number of district voters who last voted for governor in a general election, a provision held constitutional as applied to general elections. Plaintiff challenged the 3% requirement as applied to a special election to fill a newly vacant House seat claiming the short time to gather signatures for special elections rendered the requirement unconstitutional. The trial court denied preliminary relief, but finding the capable of repetition yet evading review exception applicable, entered judgment for plaintiff after the election. After a long discussion of whether the *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam) "same complaining party" rule governed ballot access claims, the panel vacated the judgment as moot. The panel reasoned the case was moot because in its view Hall was unlikely to have an opportunity to run in another special election in his lifetime and because he did not sue on behalf of a class. Judge

Jill Pryor dissented, reasoning that Hall submitted sufficient evidence of his intent to run again (Hello Harold Stassen).

Younger v. Harris and other Abstention

Walker v. City of Calhoun, Ga., (8/22/18) (Visiting Judge O'Scannlain, Julie Carnes, Martin concurring and dissenting) See discussion of and rejection of *Younger* abstention in a challenge to a pretrial bail system under Due Process.

Fourth Amendment – Excessive Force, Probable Cause and Qualified Immunity

Alcocer v. Mills (10/9/18) (Rosenbaum, Jordan, Dubina) Plaintiff, a U.S. citizen, sued two jail employees who, following her arrest for driving with a suspended license, processed her into jail and refused to release her even though she arranged bail. She was jailed for an additional 25 hours based on an ICE fax stating, without evidence, that she was unlawfully present within the United States even though she had a Georgia driver's license and even though her sister produced copies of her birth certificate, social security card, and school records. On appeal from a blanket denial of qualified immunity to both defendants, the panel first distinguished two kinds of over-detention claims. Claims arising from a refusal to release an individual based on suspicion of another crime are in essence second detention claims governed by the fourth amendment and require proof of lack of probable cause. Claims arising from continued detention after a right to release due to jail misadministration assert a deprivation of substantive due process requiring proof that defendants acted with deliberate indifference to due process rights. Because jail employees detained plaintiff based on an ICE fax stating that "records indicate that this subject is not legally in the United States" but that "this is not a government detainer," plaintiff stated a fourth amendment claim, and the panel remanded for an individualized determination of qualified immunity to be based on the role of each defendant.

Glasscox v. City of Argo (9/12/18) (Jill Pryor, Rosenbaum and Visiting Judge Ripple) The panel affirmed denial of a motion to dismiss by a city asserting failure to state a claim and an officer asserting qualified immunity who, following a traffic stop, repeatedly tased an unarmed driver who was attempting to exit his car. With the benefit of the officer's bodycam video, the court recited events that began with Glasscox speeding and driving erratically for five miles before pulling over. The officer ordered him out of the car while he was still strapped in his seat belt, and when, per the officer, Glasscox appeared to reach, tased him just after he unbuckled his

seat belt. Although it was apparent that Glasscox's hands were empty, and that from his statements and actions he was attempting to get out of the car, the officer tased him three more times, leaving him bloody, bruised and suffering PTSD. When the officer demanded to know "what is wrong" the driver explained that he was diabetic and suffering a hypoglycemic episode, a fact confirmed by the EMS report following his arrest. Applying the *Graham v. Connor* factors, the panel held that at least the latter two tasings violated the fourth amendment and clearly established law given Glasscox's effort to comply and his lack of any threat; though the court acknowledged the seriousness of the reckless driving, it held that largely irrelevant since the offense had already ended. After noting the expansive character of qualified immunity, the court found the law clearly established as of the time of the incident based both on earlier cases and the repeatedly stated principle that the gratuitous use of force when a suspect is not resisting constitutes excessive force.

Blue v. Lopez, 8/28/18 (Rosenbaum, Jill Pryor, and district judge Bartle) Under Georgia law, a trial court's denial of a motion for directed verdict in a criminal case conclusively establishes probable cause, foreclosing the acquitted criminal defendant from suing for the state law tort of malicious prosecution. After acquittal in a state criminal prosecution, plaintiff brought a section 1983 malicious prosecution claim against the officer responsible for his arrest. The district court dismissed, ruling that under Georgia law, the denial of his earlier directed verdict motion established probable cause, foreclosing his claim. The panel reversed, holding the earlier denial of a directed verdict in the criminal trial does foreclose the federal claim or establish probable cause to arrest because, in denying a directed verdict motion, the criminal trial judge assessed only the sufficiency, not the credibility or weight of the evidence in submitting the case to a jury.

Cozzi v. City of Birmingham, 892 F.3d 1288 (11th Cir. 2018) (Jill Pryor, Rosenbaum and visiting district court judge Bartle) A rare case upholding the denial of qualified immunity on summary judgment for a fourth amendment wrongful arrest claim. On two consecutive days, a man wearing a partial face mask robbed or tried to rob pharmacies of drugs. Two witnesses identified X from photo lineup, but he was in jail on the days of robbery. Then the video was shown on Crime Stoppers TV show, and an anonymous tipster said Cozzi "resembled the subject, had a tattoo that said "Lori" on his right hand, and lived in Center Point. The CI also identified Cozzi because of a walking style, hat, shoes, and a face mask similar to one Cozzi used to paint cars. The CI also claimed Cozzi had a Lortab addiction and drove a purple pickup truck. Officer Thomas obtained a search warrant for Cozzi home based only on the two tips. The search did not discover any mask, note or clothing matching the videos, but did discover a plastic bag containing 32 loose pills. Thomas showed roommates pictures of the robber; one pointed out he could not be Cozzi because the robber had tattoos up and down arm, but Cozzi

had only one tattoo; the other later said (after arrest) that Cozzi looked like the robber in the photo. Cops never looked at Cozzi's arm, arrested him, took him to the station, and did not release him until the next day. The pills were over the counter medicine for heartburn and pain. The panel held that Thomas lacked arguable probable cause for the warrantless arrest because clearly established law from 2004 held he could not "unreasonably disregard[] certain pieces of evidence" by "choosing to ignore information that has been offered to him or her" or "elect[ing] not to obtain easily discoverable facts" that would exculpate the suspect. The visible tattoos on the photos clearly exculpated Cozzi, the refusal to examine his arm and the weak tip evidence were insufficient to establish arguable probable cause since Thomas knew nothing of the reliability of either tipster; even though the two tips were corroborative, they only corroborated resemblance, but the eyewitnesses id'd someone else, undermining the value of the tip. Although address and the vehicle matched one tip, they are "quintessential examples of innocent and easily observable facts." The plastic bag of pills did not resemble the stolen pills, and at most gave reason to continue investigating, not arguable probable cause to arrest since the officer found no evidence that matched anything taken or shown on the video. Since all Thomas had to do was examine an arm, he could not even have arguable probable cause.

Manners v. Cannella, 891 F.3d 959 (11th Cir. 2018) (Marcus, Fay and Hull) The court affirmed summary judgment for arresting officers in an unlawful seizure and excessive force case who stopped plaintiff for running a red light, an offense he denied committing, because even if he committed no traffic offense, they had probable cause to arrest him for fleeing an officer. At 3:00 a.m., allegedly lacking probable cause, the officers signaled plaintiff to pull over. He continued to drive for three blocks at a slow speed for 14 seconds before pulling into a well-lit gas station because, per his testimony, as a black male he feared for his life pulling over on an unlit street. He also argued that as construed the flight statute was unconstitutional for vagueness. The panel held a general fear of law enforcement is not enough to show real, imminent impending danger sufficient to refuse to pull over. When he questioned the arrest and moved back into his car, officers were entitled to use force to effect the arrest, and therefore to tase and punch him in order to subdue him because no clearly established law said otherwise. None of the panel members who proclaimed that black men need not fear stopping on a dark, unlit street were black.

Montanez v. Carvajal, 889 F.3d 1202 (11th Cir. 2018) (Ed Carnes, Newsom, Circuit Judge Siler) Cop cruising neighborhood with rash of daytime burglaries sees nervous man talking on cell phone who walked down side street toward back of dwelling (co-owned by Montanez and mother), saw another man "huddling" nearby, radioed for backup describing burglary in progress. With guns drawn, seized two men (on street?) near back door of house, cuffed them, and entered home's back door into small vestibule with second door ajar. Shouted and

received no answer, then went back outside, searched arrestees and found 2 kitchen knives. Back door had pry marks. Neither arrestee had addresses for the house. More cops arrived, and then they all entered house, each saying to check "for additional perpetrators or victims." House owned by Found in marijuana and associated drug paraphernalia in plain view. Several more warrantless entries followed, then obtained search warrant and found 18,500 in cash and assorted drugs and paraphernalia. No charges ever filed against arrestees or Montanez apparently because cops couldn't figure out to whom the drugs belonged; the money was returned to Montanez after determination he lawfully owned it. Montanez and two arrestees sued in state court, removed, trial court granted summary judgment on claims by arrestees but denied summary judgment on claim by Montanez based on warrantless entry into home. Held that first two warrantless entries complied with fourth amendment exigent circumstances exception under broad rule – "we hold that if police have probable cause to suspect a residential burglary – whether they believe the crime is currently afoot or recently concluded – they may, without further justification, conduct a brief warrantless search of the home to look for suspects and potential victims." Cops had probable cause to suspect a burglary, additional perp wouldn't have answered shout, and neither would unconscious victim, so bingo – exigent circumstances and no fourth amendment violation. Later warrantless entries did not violate fourth amendment even though exigent circumstances had passed because homeowner already had lost any reasonable expectation of privacy in the areas already lawfully searched. And even if we're wrong, no clearly established law to contrary. Lesson – don't leave a joint in plain view even in any closed windowless room inside your house, apartment, trailer or boat.

Crocker v. Beatty, 886 F.3d 1132 (11th Cir. 2018) (per curiam by Tjoflat, Jill Pryor and Fay) In a rare opinion affirming the denial of summary judgment based on qualified immunity, the panel held that a deputy's warrantless seizure of a traffic accident scene bystander's cell phone then being used to record a video of the scene violated clearly established fourth amendment law notwithstanding the deputy's belief that it might contain evidence. The court held no reasonable officer could believe exigent circumstances justified an otherwise per se unlawful warrantless merely because the device was a cell phone even though no prior case applied the inapplicability of the exigent circumstances doctrine to cell phones based on the "obvious clarity" of the principle from prior exigent circumstances caselaw.

Gates v. Khokhar, 884 F.3d 1290 (11th Cir. 2018) Julie Carnes and Edmondson, district judge Williams dissenting) Plaintiff was arrested during a Ferguson shooting protest in Atlanta for violating Georgia's anti-mask statute after multiple warnings to remove a "V for Vendetta" full face mask. The arresting officers moved to dismiss on the basis of qualified immunity, the district court denied the motion, and the panel reversed, holding that the officers had actual probable cause, and if not, had arguable probable cause despite two Georgia supreme court

decisions limiting the statute's application to circumstances in which the wearer intended to conceal his identity and either intended to threaten or intimidate provoke violence or with reckless disregard for the reasonable foresight that his conduct would threaten, intimidate or cause the apprehension of violence, and holding that "it would be absurd to interpret the statute to prevent non-threatening political mask wearing." The panel majority reasoned that the mere fact the march took place at night and the mask covered the entire face might suffice to suggest an intent to intimidate, but that inference was reinforced by the repeated refusal to remove the mask -- "an objective officer could reasonably have interpreted Plaintiff's refusal to comply with multiple orders to remove the mask as a gesture intended to intimidate." Addressing the clearly established law prong of qualified immunity, the panel held the relevant inquiry was clearly established law under the particular circumstances Defendants encountered. (emphasis in original). Finding no case that clearly established "beyond debate" the unlawfulness of an arrest in the circumstances presented, the court held defendants entitled to qualified immunity even if they lacked probable cause to arrest. The court did not enter judgment and issue its mandate until July 16, so a petition for certiorari remains possible.

Shaw v. City of Selma, 884 F.3d 1093 (11th Cir. 2018) (Ed Carnes, Black, and district judge May) Officers called to the scene of a disturbance found a familiar mentally ill man in an abandoned laundromat. They attempted to coax him out, and he bent down and picked up a hatchet. He walked away from them, they followed him with weapons drawn, and when, after he repeatedly ignored commands to drop the hatchet and turned to walk toward them shouting "shoot it, shoot it" they were entitled to and did use deadly force by shooting him to death under current fourth amendment law. Accordingly, the court affirmed summary judgment for all defendants on the estate's excessive force claim.

Simmons v. Bradshaw, 879 F.3d 1157 (11th Cir. 2018) (District judge Robreno and Tjoflat, Wilson dissenting) A dashcam video shows that a sheriff deputy Lin stopped Dontrell Stephens for riding a bicycle on the wrong side of the street while clearly holding a cell phone to his ear, and that Stephens dismounted his bike, walked slowly toward Lin in a non-threatening and compliant manner with his cell phone still visible. Seconds later, Lin shot Stephens, who was unarmed, four times, including a final shot in the back that rendered him paraplegic. Stephens brought section 1983 claims against Lin individually for using excessive force and Sheriff Bradshaw in his official capacity asserting a *Monell* claim based on his alleged custom of tolerating and acting with deliberate indifference to claims of excessive force as well as Florida law claims. The trial court granted summary judgment for the defense on the *Monell* claim but denied Lin's summary judgment motion challenging the excessive force claim. Lin appealed the denial of qualified immunity and an earlier panel affirmed, concluding that a reasonable jury could find Lin used excessive force in violation of then clearly established law. On remand, Lin

moved for reconsideration of the earlier summary judgment ruling on the *Monell* claim, offering deposition testimony and expert reports from several other excessive force claims against the Sheriff in which district courts denied summary judgment on *Monell* custom and usage liability. The court denied reconsideration without written explanation. A jury trial on the claim against Lin followed, and the jury awarded 22,431,892.05 in damages. Both parties appealed, Stephens arguing that the trial court erred by granting summary judgment on the *Monell* claim and Lin arguing that he was entitled to a new trial because the trial court refused to give a special interrogatory asking whether Lin made an objectively reasonable mistake and because it refused to give a jury instruction that the jury must assess reasonableness "at the time of the events, not from hindsight." Although it found no error in either the denial of the special interrogatory or the requested instruction, the panel majority nevertheless ordered a new trial based on the failure of the district court to give jury instructions and special interrogatories that neither party requested and to whose absence neither party objected, and which Lin never argued in his brief, observing in a footnote that the errors were fundamental. The majority held that the trial court should have required the jury to decide potentially disputed historical facts that might have borne on qualified immunity even though there were no material facts in dispute about any of the historical facts the court identified as potentially disputed in a footnote; the only disputed historical fact, already decided by the jury, was whether Lin reasonably could have mistaken the cell phone visible in the dashcam video for a firearm. The panel majority also held the trial court properly granted summary judgment on the *Monell* claim and did not abuse its discretion in denying reconsideration of that ruling on remand. Judge Wilson dissented from both rulings. The panel withheld the mandate, and did not immediately rule on an early February petition for rehearing en banc. A judge in active service requested a poll, and the court did not rule for over seven months before denying the petition on September 10 for lack of a majority, one month after Judge Grant was sworn in as the twelfth voting member, triggering the requirement for seven rather than six votes to grant the petition.

Brand v. Casal, 877 F.3d 1253 (11th Cir. 2017), *judgment vacated* May 1, 2018. The panel held that officers who tased an unarmed woman for no reason during the execution of a warrant and who handcuffed her with her breasts exposed for over one hour and who left them exposed as she was taken to jail and booked were not entitled to qualified immunity. The court vacated the judgment when, after issuance of the opinion but before issuance of the mandate, the parties reached a monetary settlement, one more way in which all too rare good caselaw disappears. See *Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co.*, 828 F.3d 1331, 1336 (11th Cir. 2016).

Hammett v. Paulding County, 875 F.3d 1036 (11th Cir. 2017) (Black and Julie Carnes, district judge Wiliams dissenting) The court panel affirmed summary judgment for police officers in an excessive force claim who fired two shots at and killed an unarmed occupant of a house during the execution of a search warrant after entering a darkened house with guns drawn and seeing him move toward one of the officers despite forensic evidence showing that the fatal shot entered his back after an earlier shot ended any perceived threat. The court also rejected a substantive due process claim against the officer who shot at but missed the decedent. The dissenting judge objects to the majority's reliance on the absence of contradictory eyewitness testimony and its willingness to disregard inferences drawn from forensic evidence as incompatible with summary judgment practice, arguing that it establishes that "no matter how many inconsistent accounts of an incident an officer gives and no matter what viable theory is supported by forensic evidence, a fourth-amendment claim arising out of a deadly shooting will never survive summary judgment, unless a third party eyewitness can support Plaintiff's narrative or plaintiff survives the shooting." The conundrum Judge Williams identified was well summed up by a ninth circuit judge this way: "Nobody likes a game of "he said, she said," but far worse is the game of "we said, he's dead." *Cruz v. City of Anaheim*, 65 F.3d 1076 (2014) (9th Cir. 2014)(reversing summary judgment in fatal excessive force claim noting, "In the deadly force context, we cannot "simply accept what may be a self-serving account by the police officer") and requiring consideration of "whether the officer's story is internally consistent" and consistent with other known facts." Id.; see also *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794–95 (9th Cir.2014) (en banc). This includes "circumstantial evidence that, if believed, would tend to discredit the police officer's story.")

Qualified Immunity and the First Amendment

Gaines v. Wardynski, 871 F.3d 1203 (11th Cir. 2017) (district Judge Vinson, Jordan and Julie Carnes) Gaines, a public school teacher, was the daughter of a county commissioner who made critical comments about the city school board and the superintendent, Wardynski. Gaines alleged Wardynski denied her a promotion because of her father's statements in violation of her right to freedom of speech and intimate association under the first amendment. Wardynski moved to dismiss on the basis of qualified immunity, the district court denied the motion, and refused to stay the trial pending appeal. A previous panel granted a stay, and the panel reversed. After noting that it can be "particularly difficult" to overcome qualified immunity in the first amendment context, the court held that no clearly established law protected a public employee from retaliation based on a relative's speech. Although *Thompson v. North American Stainless*, 562 U.S. 170 (2011) extends Title VII protection from retaliation based on the protected activity of a fiancée, that cannot clearly establish first amendment retaliation protection since Title VII protection of public employees can and does exceed fourteenth

amendment protection. Similarly, the first amendment right of intimate association, though well recognized at a general level, has never before been applied in this circumstance. Judge Jordan, writing only for himself, concurred, concluding that the first amendment does indeed prohibit firing a public employee because of a relative's speech on a matter of public concern, but agreeing that no case previously had so held, entitling the defendant to qualified immunity.

Qualified Immunity and the DPPA

Baas v. Fewless, 886 F.3d 1088 (11th Cir. 2018) (Wilson, Black, and district judge Schlesinger) Sheriff's officers pulled driver license photos of motorcycle club members for use by lobbyist in apparent violation of Driver's Privacy Protection Act, in order that lobbyist could show them to legislative committee members considering open carry legislation. The court held that lobbying came within the governmental function exception to the DPPA, and alternatively that all defendants were entitled to qualified immunity since there was no clearly established law to the contrary. Judge Black concurred on qualified immunity grounds without reaching the DPPA question.

Section 1983 Claims and *Heck v. Humphrey*

Dixon v. Hodges, 887 F.3d 1235 (11th Cir. 2018) (Per curiam, Tjoflat, Marcus and Rosenbaum) Proceeding pro se, a prisoner sued a guard for violating the eighth amendment by slamming him to a concrete floor and repeatedly kicking him, causing fractured ribs, a bruised sternum, a concussion, a severely swollen face, impaired vision, and temporary inability to walk. Because in prison disciplinary proceedings the plaintiff was found to have committed battery on the guard by lunging at the officer with a closed fist and punished by loss of gain time, the district court dismissed the complaint on the basis *of Heck v. Humphrey*, 512 U.S. 477 (1994) and *Edwards v. Balisok*, 520 U.S. 641 (1997). It reasoned that a claim, if successful, would logically contradict with and necessarily imply the invalidity of the loss of gain time for assault. The panel reversed, holding that as a general rule, a finding of assault by the plaintiff and excessive force by the defendant in response can logically coexist. It therefore held dismissal on the pleadings is proper only in the narrow class of cases in which the allegations of the complaint "*both* necessarily implies the earlier decision is invalid *and* is necessary to the success of the section 1983 suit itself." (emphasis in original). The court noted that the claimed injuries were disputed.

Statutory Antidiscrimination Law – Title VII and Equal Pay Act

Hornsby-Culpepper v. Ware, (10/19/18) (Branch, William Pryor, and Anderson) The panel affirms summary judgment for an employer in Title VII race and sex wage discrimination claim, an equal pay act wage claim, and a retaliatory refusal to hire and discharge claim. Plaintiff served as Clerk of Court for Fulton County Juvenile Court until she was terminated. Her male replacement earned $90,000, but the position soon became vacant again, and she reapplied and was hired with an offer letter indicated a salary of $99,744 pending approval by the county manager. Because the budgeted rate was only $71,172, the court administrator sought but the county manager denied approval for the higher salary, later explaining that, even though he had approved unbudgeted higher salaries for three white employees and her male predecessor, he denied her request because she previously had been fired. Plaintiff sued based on the wage disparity. She also applied for but was not hired as a Juvenile Court judge, and was later terminated following an external review of the clerk's office.

Relying on *Chapman v. AI Transp*., 229 F.3d 1012) (11th Cir. 2000) (en banc), the panel held plaintiff failed to offer sufficient evidence that each nondiscriminatory reason offered by defendants was pretextual. Her pretext evidence on the wage claim was the existence of sufficient operating funds to pay the higher offer letter salary and her assertion that her prior termination was not for cause; the court held those were merely disagreements with the wisdom of the manager's decision, not evidence of pretext. Three pending sexual harassment suits against the manager afforded no inference of sex based discriminatory animus since she did not claim to have suffered sexual harassment. The court applied a similar analysis to her Equal Pay Act claim. The panel acknowledged that plaintiff had established a prima facie case, shifting the burden of persuasion to the employer to prove the fourth affirmative defense of a factor other than sex. But despite the different Title VII and Equal Pay Act burdens, the court held plaintiff bore the burden to show evidence that the proffered explanation was pretextual, apparently establishing that, in Equal Pay Act claims, a jury must credit the interested party testimony of an employer with the burden of persuasion unless plaintiff can produce evidence of pretext. With regard to the hiring claim, the panel held she failed to produce evidence that the employer's articulated reason, the superior interview performance of the individual hired, was pretextual. And for her retaliatory discharge claim, she failed to show the employer's assertion that she was no longer a "good fit" and lacked leadership skills were pretextual by offering as evidence evaluations of her work by other non-supervisory employees.

Gogel v. Kia Motors Manufacturing of Georgia, Inc. (9/24/18) (Matin, Julie Carnes, Visiting Judge O'Scannlain) In an important retaliation claim, the panel reversed summary judgment for an employer who fired Gogel, a human resources employee whose job responsibilities include

investigating and attempting to resolve internal complaints of harassment and discrimination. Gogel had herself repeatedly and unsuccessfully complained of sexism at Kia but her supervisor ordered her not to investigate. Another employee complained to Gogel, and her supervisor again ordered her not to investigate further. Gogel then gave the complaining employee the name of her attorney, and both Gogel and the complaining employee later filed charges of discrimination with EEOC. Noting that the same attorney represented both parties, Kia fired Gogel for interfering with and disrupting the company's internal grievance system by soliciting the coworker's charge. Kia argued that, although ordinarily encouraging complainants to file EEOC charges is protected activity under the opposition clause, the violation by an HR employee of job duties to solicit a charge is an unreasonable form of opposition unprotected by Title VII. Concluding that a blanket rule stripping HR employees from opposition clause protection would violate Title VII, the court applied a balancing test to differentiate protected opposition from unprotected opposition. It held that although Gogel deviated from company policy for the resolution of internal complaints of discrimination in violation of her job duties, because she did so only after the company directed her not to further investigate the complaining employee's grievance her conduct was protected by the opposition clause. Judge Juulie Carnes dissented in forceful language, suggesting rehearing en banc may loom.

Smelter v. Southern Home Care Services, Inc., (9/24/18) (Jill Pryor, William Pryor, Anderson) Reversing summary judgment for an employer in a racially hostile work environment claim, the panel held that two months of verbal racial abuse, culminating in calling the plaintiff "a dumb black nigger," is sufficient to create a triable issue of fact in a hostile work environment claim even absent evidence of physical threats or an impact on job performance. The panel rejected the employer's argument that *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999) (en banc), foreclosed a claim absent evidence of threatening behavior. The panel held that *Mendoza* required evidence that conduct was "physically threatening *or* humiliating" (emphasis in original) and that the particular epithet, used in a derogatory fashion and directed at plaintiff rather than merely said in her presence, sufficed to create a racially hostile environment, especially when accompanied by many other alleged instances of racially derogatory speech. Although plaintiff never complained until the day she was discharged for nondiscriminatory reasons not shown to be pretextual, there was sufficient evidence that her employer had actual knowledge of the harassment and failed to take remedial action, so her claim goes to a jury.

Bostock v. Clayton County Board of Comm'rs, 894 F.3d 1335 (11th Cir. 2018) (denying rehearing en banc, Rosenbaum and Jill Pryor dissenting), Petition for certiorari filed, No. 17-1618 (June 1, 2018). The court refused to reconsider en banc *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (Title VII does not protect gay and lesbian individuals from discrimination) decided ten years before *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and despite two recent en banc

decisions in other circuits, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), petition for certiorari filed, No. 17-1623 (May 25, 2018) and *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc). In addition to the cert. petitions pending in *Bostock* and in *Zarda*, *EEOC v. R.G. and G.R. Funeral Homes, Inc*., 884 F.3d 560 (6th Cir. 2018) (petition for certiorari filed, No. 18-107, July 24, 2018) challenges the application of Title VII's prohibition against sex discrimination to transgender employees.

Lewis v. City of Union City, 877 F.3d 1000 (11th Cir. 2017), judgment vacated and rehearing en banc granted,893 F.3d 1352 (2018) This circumstantial evidence employment discrimination wrongful discharge case arose from a police officer's refusal to be tasered in taser training, asserting claims of race and disability discrimination. The district court granted summary judgment for failure to establish a prima facie case, the panel reversed, and the en banc court directed the parties to brief this question for en banc review: "To make out prima facie case under Title VII and the equal protection clause, plaintiff must prove, among other things, she was treated differently from another "similarly situated" individual. What standard does "similarly situated" impose on plaintiff: (1) "same or similar," (2) "nearly identical," or (3) some other standard."

Wilcox v. Corrections Corp. of America, 892 F.3d 1283 (11th Cir. 2018 (Visiting Judge Branch, Tjoflat, and Rosenbaum) The panel affirmed JMOL for employer overturning a jury verdict for plaintiff in coworker sexual harassment claim under Title VII. Coworker slapped plaintiff on her ass twice on July 10, she filed a formal complaint with employer on the same day, and employer told coworker not to be around or associate with plaintiff. He engaged in intimidating behavior towards her but did not touch her, and she filed a second complaint two weeks later. After an investigation completed on September 9, employer fired coworker on September 14. Employee sued under Title VII, the district court first granted summary judgment for employer on the basis that the harassment was not severe or pervasive, and the 11th Circuit previously reversed on the basis that a triable issue of fact remained on that question because she alleged he had before her complaint hugged her daily for months and harassed other coworkers. A jury trial followed and the jury awarded 4K compensatory and 100K punitive damages, but the district court entered JMOL for employer. Respecting the pre-complaint harassment, the court held the employer was not liable; an employer is charged with knowledge of coworker harassment only if 1) employee complains or 2) she proves constructive knowledge. The panel held that the employer cannot be charged with constructive knowledge of pre-complaint harassment if it has an "antidiscrimination policy that is comprehensive, well-known to

employees, vigorously enforced, and provides alternative avenues of redress." With regard to whether the company policy was vigorously enforced through prompt remedial action after her July 10 complaint, the panel held that since the instruction to the harassing coworker to refrain from touching was effective to stop the touching, the only remaining issue was whether the 6 week delay from the initial complaint to his firing was too long. Because the investigation uncovered lots of other harassment and had lots of moving parts, as a matter of law 6 weeks not too long.

Jefferson v. Sewon America, Inc., 891 F.3d 911 (11th Cir. 2018) (William Pryor, Julie Carnes and district judge Corrigan) Plaintiff, a full-time probationary clerk in the finance department who was taking IT classes, applied for a transfer to the employer's IT department. Although her department manager initially was supportive, a higher level manager informed her he wanted someone with five years' experience and "that he wanted a Korean in that position." Plaintiff then complained of discrimination to the HR manager, received a poor evaluation, and was fired a week later. She sued under Title VII for race and national origin discrimination in the denial of transfer and for retaliatory discharge. Reversing summary judgment for her employer, the court reaffirmed the rule that direct evidence of discriminatory intent generally forecloses summary judgment for an employer, and that denial of a transfer to a more prestigious position at the same pay can be an adverse employment action, while offering some interesting other doctrine. Mincing no words, the court characterizes as "Nonsense" the argument made by amicus Professor Suja Thomas that summary judgment practice violates the seventh amendment right to a jury trial. Although it does not affect the outcome of the case, the court also opines that individual claims of discrimination can proceed only under section 703(a)(1) of Title VII, reserving section 703(a)(2) for claims targeting policies of general applicability, otherwise known as disparate impact or pattern and practice claims. Again, without affecting the outcome, the court upheld the exclusion of so much of an affidavit submitted by plaintiff in which one of the employer's HR specialists opined that plaintiff's termination was retaliatory because the affidavit indicated the affiant did not participate in the termination and failed to offer any basis that his conclusion was based on personal knowledge, but reversed the district court's conclusion that plaintiff's complaint of discrimination that triggered her allegedly retaliatory termination was not protected conduct even if she was not qualified for the promotion. The short seven day interval between her complaint of discrimination and her discharge was sufficient to create a jury question on whether the poor evaluation, a legitimate nondiscriminatory reason for her discharge, was a pretext for retaliation. Finally, the court held that plaintiff's characterization in briefs of her direct evidence as circumstantial evidence did not deprive her of the benefit of the favorable treatment of direct evidence claims, noting that "parties cannot waive the application of the correct law or stipulate to an incorrect legal test."

EEOC v. Exel, Inc., 884 F.3d 1326 (11th Cir. 2018) (Jill Pryor, district Judge Moody concurring, Tjoflat dissenting) EEOC won a jury trial on behalf of a plaintiff who claimed to have been denied a promotion because her sex, recovering monetary relief including punitive damages. Defendant moved for JMOL; the district court denied it except for striking the punitive damages award. Both EEOC and the employer appealed. On liability and the inevitable issue of the sufficiency of the evidence of pretext, the majority held circumstantial evidence of the decisionmaker's bias was sufficient to support the jury verdict. The concurring judge agreed although indicating he would have decided for the employer were he the factfinder, but that his view was not the only reasonable view of the evidence possible. Judge Tjoflat predictably dissented, arguing that circumstantial evidence of the decisionmaker's bias against women was insufficient to show pretext (even though he wrote *Smith v. Lockheed-Martin Corp*., 644 F.3d 1321 (11th Cir. 2011) finding sufficient evidence of pretext based on circumstantial evidence of decisionmaker's bias). In an important ruling affirming the striking of the punitive damages award, all three panel members joined in Judge Pryor's opinion holding that *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1423 (11th Cir. 1999) (higher management made or countenanced the discriminatory decision) was not displaced by *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (decisionmaker acted in a managerial capacity with discriminatory intent). Since the discriminating supervisor was not a member of high management, and since no higher ranking employees were aware of the denied promotion, plaintiff could not recover punitive damages. On a better record, or in an alternate universe with a Justice Garland, the circuit conflict over the *Dudley* standard for punitive damages that effectively insulates large businesses from punitive damages awards and that conflicts with decisions in other circuits would be worthy of en banc review or a certiorari petition.

Bowen v. Manheim Remarketing, Inc., 882 F.3d 1358 (11th Cir. 2018) (Wilson, Jordan and Rosenbaum) The panel reversed summary judgment for an employer in a Title VII and Equal Pay Act claim for sex based unequal pay. Although the employer sought to justify the higher pay for a comparable male employee on the basis of prior salary and experience, it bore the burden of persuasion under the Equal Pay Act and a jury could find that those factors alone did not account for pay differences because an HR Manager's affidavit showed the employer set a male predecessor's salary at the midpoint of the compensation range while setting the plaintiff's at the bottom, and because the HR Manager reported sex based pay disparities to higher management who failed to act. Treating the plaintiff's Title VII claim as a mixed motive claim, the court found that a jury could reasonably find that that sex was a motivating factor in the identified pay disparity.

Hicks v. City of Tuscaloosa, Ala., 870 F.3d 1253 (11th Cir. 2017) (Wilson, Newsom, and district judge Wood). After plaintiff won a jury verdict in a Pregnancy Discrimination and FMLA reassignment and constructive discharge case, the panel affirmed denial of the city's post-trial motions. Although plaintiff had received positive performance reviews before taking FMLA leave to give birth, upon her return a new supervisor referring to her as "that bitch" and "that stupid cunt" because she had taken 12 weeks of leave and recommended her transfer from the narcotics division, where officers were not required to wear a ballistic vest all day, to patrol where she would be required to wear one, lose the use of her vehicle and weekends off. The department refused her request for a desk job that would permit her to take breaks to breastfeed, and offered her the choice of going without a vest or wearing a vest that was too large, leaving gaping holes exposed to gunfire. She resigned. The court held the evidence sufficient to show pregnancy discrimination even though she offered no comparator evidence, reasoning that once a case has been fully tried, consideration of prima facie case requirements gives way to whether there was enough evidence to permit the jury to infer discrimination. The court also held that lactation is encompassed by the PDA, and that while employers do not have to provide special accommodations to breastfeeding mothers, they must treat them equally, and since other employees with temporary injuries were given alternate duty, the city was obliged to treat her equally by giving her alternate duty. The court also held the evidence sufficient to support the jury's constructive discharge finding.

EEEOC v. Catastrophe Management Solutions, 852 F.3d 1018 (11th Cir. 2016) (Jordan, Julie Carnes, and district judge Robeño), petition for rehearing en banc denied, 876 F.3d 1273 (11th Cir. 2017) (Jordan concurring, Martin, Rosenbaum and Jill Pryor and dissenting), Motion to Intervene denied, 136 S. Ct. 2015 (mem) (2018). Jones applied for and was hired at CMS, only to have her job offer rescinded because she wore her hair in dreadlocks, a hair style about which the company representative said "they tend to get messy, although I'm not saying yours are, but you know what I'm talking about." Suing on her behalf, EEOC alleged race discrimination through the application of a company policy requiring professional hairstyles and forbidding "excessive hairstyles." The district court dismissed the case on the pleadings, and the eleventh circuit affirmed, reasoning that Title VII's prohibitions only extend to immutable characteristics of race, that dreadlocks are only a "cultural practice" that Jones could alter. The panel also reasoned that under Twombly/Iqbal, EEOC had failed to allege a plausible basis in fact for inferring that the policy did not apply equally to hairstyles of all races. After the court denied rehearing en banc, the Solicitor General declined to file a petition for certiorari on behalf of EEOC, and the Supreme Court denied Ms. Jones' motion to intervene in order to file a petition for writ of Certiorari on May 14, 2018, bringing the case to a close. Nota bene – Under Title VII and other statutory antidiscrimination statutes, individuals represented by EEOC have a statutory right to intervene, but that right can be lost as it was here if not timely exercised.

Statutory Antidiscrimination Law – ADA and Section 504

Sierra v. City of Hallandale Beach, FL. ((9/27/18) (Tjoflat, Marcus, and Rosenbaum) The panel reversed dismissal of an ADA / Section 504 claim arising from the city's alleged failure to caption certain websites by deciding only that the court has subject matter jurisdiction to hear them. Specifically, the panel held that the Twenty-First Century Communications and Video Accessibility Act of 2010 neither imposes an exhaustion requirement on failure to caption claims nor consigns those claims to the primary jurisdiction of the FCC. Because the city moved below only to dismiss under Rule 12(b)(1) for those two reasons, the court refused to consider its argument, raised for the first time on appeal, that the complaint failed to state a claim for relief. See footnotes 6 and 9.

A.L. v. Walt Disney Parks and Resorts U.S., Inc., (8/17/18) (Hull, Newsom, and district judge Royal) Does Title Three of the ADA require the Disney theme parks to offer on request accommodations passes that allow individuals who have severe autism spectrum disorder and their accompanying families to bypass ride waits at the busiest rides as often as they wish? Disney defended both on the ground that the proposed accommodation was unnecessary, and that it would constitute an undue burden and fundamental alteration. The district court granted summary judgment to Disney, ruling that plaintiffs, whose children had endured travel for hours in cars and airplanes to reach the park, had failed to offer sufficient evidence that such accommodations were necessary to provide access to a like experience of the park. The trial court did not separately rule on the Disney affirmative defense of undue burden and fundamental alteration. The court of appeals reversed summary judgment on the narrow question of whether any individual plaintiff could prove necessity, leaving for another day the factual determination of whether such accommodations were necessary, and if so, whether they would fundamentally alter the park experience or impose an undue burden on Disney. However, the panel affirmed summary judgment for Disney, rejecting a challenge to the current Disney accommodation system as unlawful. That system permits visitors with a disability immediate access to all rides with less than a fifteen minute wait time and also permits them to book in advance three specific and likely busy rides each day with a guarantee of less than a fifteen minute wait time. However, that system does not permit an individual with autism to bypass lines to ride repeatedly the same busy ride. Disney insisted that its earlier experience

with a more permissive system of accommodation led to widespread fraud, with large numbers of individuals marketing their services to families who wished to avoid wait times, making the accommodation the plaintiffs sought an undue burden and fundamental alteration. But the panel refused Disney's invitation to affirm on that alternative ground, reasoning that the trial court should first consider it.

Batson v. The Salvation Army, 897 F.3d 1320 (11th Cir. 2018) (Jill Pryor, Rosenbaum and district judge Ripple) Plaintiff worked for more than a decade, earning promotions and positive evaluations until she developed multiple sclerosis. She requested FMLA leave and minor accommodations, and in addition, a reduced travel schedule and the ability to occasionally telecommute. The employer granted the minor accommodations, but told her that it would not offer her a reduced travel schedule and telecommuting. When she returned from FMLA leave, her employer informed her that it had eliminated her job, required her to apply for a position she had previously held and for which she was qualified, and questioned her repeatedly during her interview about her doctor's appointments and ability to travel, and hired someone else because of a poor interview and poor job performance. She filed a charge of discrimination marking disability discrimination failure to accommodate, and an EEOC intake also stating retaliation. She later sued claiming a violation of the ADA's reasonable accommodation requirement and the ADA and FMLA prohibitions against retaliation, and interference with her right to return to her previous position after taking FMLA leave. The district court granted summary judgment for the employer on all claims. The panel analyzed the claims separately, first affirming summary judgment on the failure to accommodate claim because the plaintiff had never needed either the reduced travel schedule or the opportunity to telecommute; the court reasoned that because the employer never denied any specific request when needed, she could not establish a failure to accommodate claim based on its intention to do so. Turning to the ADA retaliation claim, the panel reversed summary judgment based on the employer's refusal to rehire, holding that her failure to accommodate EEOC charge was sufficient to cover her retaliation claim since it was sufficiently related to retaliation and was inextricably linked to it. Turning to the merits of both retaliation claims, the panel held the plaintiff offered sufficient evidence that the employer's reasons for declining to hire her were pretextual; there was evidence the employer decided not to hire her before her interview, expressed concerns about her health before the interview, asked repeated questions about her health, and had regularly given her good performance reviews. Finally, the court held that her FMLA interference claim entitled her to judgment unless the employer proved affirmatively that it would have eliminated her previous job regardless of her request for or use of FMLA leave.

Durbrow v. Cobb County School District, 887 F.3d 1182 (11th Cir. 2018) (Marcus, Newsom and district judge Moore) A public school student with a disability cannot repackage as a section 504 or ADA disability discrimination claim to avoid the IDEA exhaustion requirement if the gravamen or essence of the complaint is that he was denied a FAPE. Accordingly, the district court properly dismissed on the pleadings the disability discrimination claims. The panel affirmed the judgment below for the school district on the administratively exhausted IDEA claims of a student with ADHD because the school district found that his overall academic performance did not demonstrate a need for special education, and because his failure to complete some work was attributable neglect of studies rather than ADHD. The panel observed that "special education is generally ill-suited for students who are making academic progress while neglecting to complete their work."

J.S. III v. Houston County Bd. Of Educ., 877 F.3d 979 (11th Cir. 2017) (Per Curiam, William Pryor, Jordan and visiting judge Ripple) Reversing summary judgment for a public school board, the panel held that a claim for damages for disability discrimination under Title II of the ADA and Section 504 of the Rehabilitation Act by a cognitively impaired and physically disabled child removed by a teacher's aid from a classroom for discriminatory reasons unrelated to his education is a claim cognizable under the ADA and section 504 as a form of segregation and not merely a claim for denial of a FAPE under IDEA. Borrowing from Title IX caselaw, the court held that to establish the requisite deliberate indifference by the board, the plaintiff must identify an official with actual notice and authority to remedy the discrimination, and among those identified by plaintiff with that notice and power were the school principal. More importantly, the panel also held that two teachers with supervisory authority over the aid can serve as an appropriate person, and that they could be found to have acted with deliberate indifference. Respecting a related claim arising from the aid's physical abuse of the plaintiff, the court held the evidence, though sufficient to show teachers or the principal knew of the improper removal, was insufficient to apprise them with notice that the aid was physically abusing the child.

Boyle v. City of Pell City, 866 F.3d 1280 (11th Cir. 2017) (Fay, Julie Carnes, and Court of international Trade judge Goldberg) After plaintiff suffered a back injury that prevented him from continuing to work as a heavy equipment operator, the city permitted him to work as a street department foreman, albeit at the lower heavy equipment operator rate, while it continued to pay the incumbent foreman a foreman's rate. A new superintendent removed plaintiff from the foreman position, replaced him with the incumbent foreman, and reassigned plaintiff to two other jobs, neither of which he could perform. Plaintiff's physician opined that he was totally incapacitated for both jobs, and that no accommodation would permit him to

perform either job. Plaintiff demanded to be returned to the foreman position, the superintendent refused, and he resigned. He sued under the ADA and the Rehabilitation Act, the district court granted summary judgment to the city, and the panel affirmed, reasoning that he could not satisfy his burden to identify a reasonable accommodation that would permit him to perform either job, and that although the city was not required to continue to carry two employees to perform the foreman job or to discharge or demote the other foreman to create a position for the plaintiff. The court characterized the past practice of carrying both employees as a foreman as an act of kindness not required by law.

Fair Labor Standards Act

Rodriguez Asalde v. First Class Parking Systems LLC, 898 F.3d 1136 (11th Cir. 3018) (Jordan and Jill Pryor, district judge Duffey dissenting) Reversing summary judgment for employer in FLSA claim by valet parking attendants, the court held that FLSA coverage extends to valet parking attendants under enterprise prong of FLSA if they handle goods or materials that moved in interstate commerce. Circuit precedent excludes cars from the handling clause under the "ultimate consumer" exception since the car owner, not the employer is the ultimate consumer of cars. Nevertheless, valet tickets (and perhaps other items that originate out of state) may be found by a jury to be materials within the meaning of the FLSA that, based on the label language, may be found by a jury to have originated outside of Florida and therefore to have moved in interstate commerce. Hence, plaintiffs are entitled to go to trial on minimum wage and overtime claims. Earlier withdrawn opinion reached same conclusion regarding uniforms, but no comparable reference in superseding opinion, suggesting problem with summary judgment record.

Class Actions

Muransky v. Godiva Chocolatier, Inc., (10/2/18) (Martin, Jordan and visiting judge Ginsburg) Plaintiff bought chocolate at a Godiva store, paid with a credit card, and received a receipt that included too many digits of his credit card number. He brought a class action for damages under the Fair And Accurate Credit Transactions Act, which prohibits printing more than the last five digits of the card. The parties negotiated a settlement class creating a $6.3 million fund out of which the named plaintiff could seek an incentive award not to exceed $10,000 and class counsel could seek fees to be determined by the court and not to exceed one-third of the fund. Five class members objected to the settlement. Counsel moved for one-third of the fund as a

fee award two weeks after the deadline for filing objections to the settlement passed. The court awarded the named plaintiff the $10,000 incentive award, and awarded one third of the total fund in fees to counsel, leaving the remainder for the 47,000 class members who filed claims, or, per the court, $87.21 for each class member. Objectors appealed, arguing that counsel should have moved for fees before notice of the settlement was sent so that class members could evaluate whether to object, and that both the incentive award and fee award were excessive. The panel held the timing of the fee award deprived class members of the opportunity to object, but was harmless since those who did object objected to the fee award as excessive, giving the district court the opportunity to consider the question. Turning to the merits, the panel held both awards were within the district court's discretion and affirmed.

Truesdell v. Thomas, 889 F.3d 719 (11th Cir. 2018) (William Pryor, Jill Pryor, and Visiting Circuit Judge Clevenger) As a sergeant in the Marion County sheriff's office, Thomas unlawfully accessed the driver license database for personal information concerning Truesdell, also accessed the database for information on thousands of other people. Truesdell brought a class action for injunctive relief, statutory, compensatory and punitive damages under the Drivers Privacy Protection Act and under section 1983 against both Thomas and the sheriff. Truesdell moved to certify a class of some 42,000 individuals, but the district court denied the motion on commonality and typicality grounds both because Thomas may have had different reasons for accessing each individual's information and because each class member would be tasked with litigating his/her individual damage claim. The case went to trial, and the jury denied Truesdell compensatory damages, but awarded $5,000 in punitive damages against the sheriff in his official capacity and $100 in punitive damages against Thomas individually. The district court also assessed $5,000 in liquidated damages against the two defendants jointly and severally for their two violations at the statutory rate of $2500. Truesdell then moved for class wide liquidated damages, and a new trial on punitive damages, and the court denied both motions. The defendants moved to reduce the liquidated damages to $2500 arguing that liquidated damages should not be awarded for each violation, but rather only for each injured party, and to strike the official capacity punitive damages award. The panel affirmed all rulings, reasoning that it was not an abuse of discretion to refuse class certification on commonality and typicality grounds given that Thomas may have accessed some of the individuals' information for lawful reasons, and that the DPPA authorizes punitive damages against governmental entities.

Love v. Wal-Mart Stores, Inc., 865 F.3d 1322 (11th Cir. 2017) Plaintiffs first were part of an earlier certified class in litigation in which certification was later reversed. Plaintiffs next became part of a timely filed putative class action. The putative class was never certified, the

case settled only as to named plaintiffs, and the current plaintiffs did not move to intervene in the settled putative class action until more than 30 days after it was settled and by stipulation dismissed with prejudice. They appealed from both the dismissal and from the denial of their motion to intervene. The court held the appeal from the dismissal was untimely. It next held that although the appeal from the later denied motion to intervene was timely, it was an appeal from a case that no longer existed, and is therefore moot. To have preserved their individual rights, the absent putative class members in the subsequent class action must, at a minimum, have moved to intervene within 30 days of the entry of the stipulation of dismissal, and arguably even before dismissal. Note as well that the first class action tolled applicable statutes of limitations for absent class members until class certification was reversed, but that the second class action did not.

Prison Litigation Reform Act

Whatley v. Smith, 898 F.3d 1072 (11th Cir. 2018) (Rosenbaum, Jill Pryor, and district judge Ripple) The panel reversed for the second time the dismissal under the PLRA of a prisoner's eighth amendment claim for damages for failure to exhaust prison administrative remedies. The panel ruling illustrates how states have structured prisoner grievance procedures to keep prisoner suits out of court, yet still sometimes fail. Georgia has a three step grievance procedure, requiring 1) the filing of an informal grievance within 10 days, 2) request and file a formal grievance within 5 days of receipt of the form, and 3) appeal within 5 days of adverse result to commissioner's office and limits each grievance to a single complaint. Although plaintiff violated the procedural requirements for his formal grievance, the commissioner's office did not rely on that ground when it denied his appeal, and therefore the panel held he fully exhausted his grievance resolution process. The panel held the prison must explicitly rely on procedural grounds rather than address merits to preserve the PLRA exhaustion defense.

Federal Arbitration Act

JPay, Inc. v. Kobel, (9/19/18) (Marcus, Wilson, District Judge Graham) In a twist on the usual arbitration fight, defedants, users of a service that enabled money transfer to prison inmate accounts, sought to compel arbitration of their classwide claims against JPay for violations of FDUTPA and for breach of contract. Defendants made a demand for arbitration, to which JPay responded by suing in state court seeking a declaration of the parties' rights under their

arbitration agreement including a determination that the agreement did not authorize class arbitration. Defendants removed under CAFA and moved to compel arbitration on the classwide arbitrability question. The court of appeals reversed the district court's denial of the motion to compel. It held that whether an arbitration agreement authorizes class actions is a gateway question ordinarily for the courts rather than a merits question for the arbitrator. But, because SCOTUS has held that parties may agree to arbitration of gateway questions, the court examined the agreement, and held that it delegated gateway questions, including class determination, to arbitration. The panel found the requisite clear and unmistakeable intent in contractual language repeatedly incorporating AAA arbitration rules, rules that include the determination of whether arbitration should proceed on behalf of a class, and because the agreement directed arbitration of "any and all disputes." Accordingly, the panel ordered that arbitration go forward with class relief to be determined by the arbitrator.

Spirit Airlines, Inc. v. Maizes, (8/15/2018) (Martin, William Pryor, and district judge Wood) In a twist on the usual arbitration dispute, Maizes and others invoked class-wide arbitration to challenge certain practices of Spirit said to violate its 9$ Fare Club agreement. The agreement provided for arbitration pursuant to AAA rules, but said nothing about class-wide arbitration. Spirit sued the complainants for a declaratory judgment that the arbitration agreement prohibited class-wide arbitration and an injunction to prohibit class-wide arbitration from going forward. The district court dismissed, reasoning that the agreement's invocation of AAA rules committed the question of whether the agreement authorized class-wide arbitration to the arbitrator. The panel assumed the question went to whether the dispute was arbitrable, and, therefore under SCOTUS precedent, only "clear and unmistakable evidence" would establish that the parties agreed to submit the question of arbitrability arbitration. Because the AAA rules provide for a determination by the arbitrator of whether to permit class-wide arbitration, the court held that the adoption of AAA rules constituted the requisite "clear and unmistakable evidence to submit arbitrability, and therefore class-wide arbitration to the arbitrator, not the court. In so ruling, the court rejected the conclusion of four circuits that a heightened showing beyond the adoption of the AAA rules is necessary to satisfy the "clear and unmistakable evidence" standard for committing the question of arbitrability to the arbitrator. Watch to see whether this rare, albeit preliminary consumer victory on class-wide arbitration survives a likely petition for certiorari based on the circuit split.

Hernandez v. Acosta Tractors, Inc., (8/8/18) (Martin, William Pryor, and Hall) After plaintiff sued under the FLSA, defendant moved to compel and the court ordered arbitration. As arbitration proceeded, arbitration costs mounted, allegedly exceeding $100,000 in this and two related FLSA arbitrations. Defendant moved to reopen the litigation and lift the stay pending arbitration because of the excessive cost of arbitration it was obliged to pay; the court denied

the motion. Defendant refused to pay the arbitrator, who then formally terminated the arbitration. Defendant again moved to reopen the litigation; the court denied the motion and instead entered a default judgment for the $7,293 in unpaid overtime requested. The panel reversed and remanded for reconsideration of whether a default was an appropriate remedy for failure to pay the arbitrator, suggesting that the standard should be bad faith, and that a finding of bad faith might turn on whether the defendant could not afford the arbitration, and whether it may have abandoned the arbitration because of adverse rulings in an effort to forum shop. This is not the first case in which a defendant, having secured an enforceable employment arbitration agreement, came to rue its choice because of the cost or outcome of arbitration.

Gutierrez v. Wells Fargo Bank, NA, 889 F.3d 1230 (11th Cir. 2018) (Tjoflat, Jordan, and district judge Steele) The Federal Arbitration Act continues to wreak havoc, this time in consumer class action litigation. Plaintiffs, all of whom entered into consumer banking agreements with arbitration clauses in contracts that also included class action waivers, sued the bank for various claims arising from the bank's practice of processing debit card transactions to maximize overdraft fees. Believing its arbitration agreement with the individual plaintiffs to be unenforceable under the California supreme court's *Discover Bank* rule that treated all contractual waivers of the right to bring a class action as unconscionable, the bank did not move to compel arbitration of the individual claims, but reserved its right to compel arbitration as to absent class members. During class related discovery, SCOTUS held in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) that the FAA preempts state law insofar as it voids class waivers in contracts containing arbitration clauses, and the bank moved to compel the named plaintiffs to arbitrate their claims. The district court denied the motion, finding that by participating in litigation the bank had waived its right to compel the named plaintiffs to arbitrate, and in an earlier ruling, the court of appeals affirmed. On remand, the district court certified a (b)(3) class, and the next day the bank, which had opposed class certification, moved to compel absent class members to arbitrate. The district court denied the motion to compel arbitration, again finding the bank waived arbitration, and the bank appealed. The court of appeals reversed and ordered arbitration of the claims of absent class members, reasoning that the bank could not have waived arbitration as to absent class members before a class was certified because until certification, absent class members were not parties over whom the court had jurisdiction to compel arbitration. Thus, defendants who waive arbitration as to a named plaintiff and against whom a class is later certified can still enforce arbitration as to all absent class members as long as they move to compel promptly after class certification.

Pleading and Sanctions

Jackson v. Bank of America, (8/3/2018) (Tjoflat, Julie Carnes and district judge Bloom) Judge Tjoflat's two decade war against shotgun pleadings claims its first casualty. Plaintiff's counsel filed *in state court* various state and federal claims against several defendants arising from a foreclosure sale. The complaint alleged 14 claims in 109 paragraphs of allegations; the claims were not defendant specific and incorporated all previous allegations. Defendants removed and moved for a more definite statement, in part because the complaint was a shotgun pleading. After several extensions, counsel filed an amended complaint with 123 paragraphs, two additional counts, and identified for each count the defendant sued but again incorporated all previous allegations into each count. All but one defendant moved to dismiss; the motion was referred to the magistrate and the remaining defendant answered but included failure to state a claim as a defense. The magistrate's R&R addressed the merits of each claim and recommended dismissal for failure to state a claim, and the answering defendant moved for judgment on the pleadings. Plaintiff objected to the R&R, and moved to file a second amended complaint. The district court adopted the R&R and denied leave to amend and plaintiff stipulated to dismissal with prejudice as to the remaining defendant in order to obtain a final judgment from which to appeal. The panel affirmed dismissal with prejudice without considering the merits; instead it affirmed because the complaint was an impermissible shotgun pleading in violation of Rule 8. Writing for the panel, Judge Tjoflat opens "This appeal involves an abuse of process engineered to delay or prevent execution of a foreclosure judgment," explains that "[b]y attempting to prosecute an incomprehensible pleading to judgment, the plaintiffs obstructed the due administration of justice," notes in a footnote that "[w]ere we to parse the amended complaint in search of a potentially valid claim, we would give the appearance of lawyering for one side of the controversy and, in the process, cast our impartiality in doubt" and asserts: "Tolerating such behavior constitutes toleration of obstruction of justice." Instructing district courts, the panel writes that when faced with a shotgun pleading, the district court "should strike the pleading" "even when the other party does not move to strike the pleading" and if the offending party fails to comply "by filing a repleader with the same deficiency – the court should strike his pleading, or, depending on the circumstances, dismiss the complaint and consider the imposition of monetary sanctions." The court reiterates that a district court must give the plaintiff one opportunity to plead properly before dismissing with prejudice, but that no more is required, and that dismissal with prejudice then will not be an abuse of discretion. Rejecting counsel's explanation during oral argument that his pleading would have been deemed sufficient in state court, the court ordered him to show cause under FRAP 38 for why he should not be required to pay appellees double costs and their expenses, including attorney's fees. Judge Bloom concurred, emphasizing that the reason for the court's ruling was "his plainly deficient pleading, refiled and appealed, that marshalled substantial unnecessary resources and that leads to the Court's finding today."

Silva v. Pro Transport, Inc., (8/10/18) (per Curiam) (William Pryor, Jill Pryor, Anderson) The panel reversed Rule 11 sanctions imposed jointly on counsel and plaintiff for filing a Fair Labor Standards Act claim after having previously failed to disclose it in a bankruptcy proceeding, reasoning the claim was frivolous. The trial court first held the failure to disclose the claim as an asset before the bankruptcy court barred the lawsuit on the ground of judicial estoppel and dismissed it. Defendants then moved for Rule 11 sanctions, and while the sanctions proceedings were ongoing, the court of appeals decided *Slater v. United States Steel Corp*., 871 F.3d 1174 (11th Cir. 2017) (en banc), overruling prior panel decisions that mandated a finding of judicial estoppel for failure to disclose, holding instead that the failure to disclose only triggers dismissal for judicial estoppel if the district court finds it was "calculated to make a mockery of the judicial system," not when the result of "inadvertence or mistake," and therefore that district courts invoking judicial estoppel must make a factual finding on whether the nondisclosure in bankruptcy proceedings reflected a deliberate intention to mislead. Because Silva sought and obtained leave to correct his bankruptcy filing based on confusion and lack of sophistication, the panel held the finding below that Silva took a frivolous position with no chance of success left them with a definite and firm conviction that the district court made a mistake in concluding Silva had no reasonable chance to avoid judicial estoppel. Accordingly, the panel reversed rather than vacated and remanded the order imposing sanctions.

AEDPA Second Petition Denials Establish First Panel Substantive Law Precedent

In re Williams 898 F.3d 1098) (per curiam, Wilson, Martin and Jill Pryor; Wilson, Martin and Pryor concurring, Martin, Wilson, and Pryor concurring) AEDPA requires a prisoner seeking leave to file a second habeas petition to obtain permission from the court of appeals by making a prima facie showing that he satisfies the limited grounds for such a filing. The panel denies leave to file, but all three members join in two concurring opinions objecting to the holding in *U.S. v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018) that published orders denying leave that construe the underlying merits of the claim establish binding precedent on all subsequent panels, including those reviewing direct appeals even though orders denying leave to file cannot be reviewed by SCOTUS and cannot be the subject of a petition for en banc rehearing and are made based on pro se filings limited to space provided on a single page form. No other circuit accords first panel precedential status to orders denying leave to file a second piub9hnv btrgfffffffetition.