

## **Bar Association of the Fifth Federal Circuit 2016 Appellate Advocacy Seminar**

### **Summary of Issues to be argued Tuesday, September 27, 2016**

#### **East Courtroom**

##### ***State of Texas v. Charles Kleinert*** (No. 15-51077)

In this appeal, the State of Texas challenges the District Court's dismissal of a state grand jury's indictment charging Charles Kleinert, a former police detective, with the state offense of manslaughter. The Travis County District Attorney sought to prosecute Kleinert, a specially deputized Federal officer, for allegedly acting "recklessly" while attempting to arrest a suspect who, according to Kleinert, committed Federal felonies in his presence. Kleinert theorized that in attempting to arrest the suspect, he acted under color of his Federal office and on account of authority claimed under an Act of Congress for the apprehension of criminals. Thus, Kleinert asserted a colorable Federal defense under the Supremacy Clause. In that connection, Kleinert removed the state criminal proceeding pursuant to 28 U.S.C. § 1442(a)(1). After denying the State's motions for remand, the District Court granted the Kleinert's motion to dismiss the indictment. The State's appeal first questions whether the District Court had jurisdiction. It next challenges whether the District Court correctly concluded, in granting Kleinert's Rule 12 motion to dismiss, that the Supremacy Clause forbade this prosecution.

##### ***Geophysical Service, Inc. v. TGS-NOPEC Geophysical Co.*** (No. 15-20706)

Geophysical Service Incorporated ("GSI") is a seismic data company based in Calgary, Alberta, Canada. TGS-NOPEC Geophysical Services ("TGS") is a Norwegian seismic data company based in Asker, Norway with an office in Houston, Texas. The companies are competitors in the business of licensing seismic data to the oil and gas industry for use in exploration. The Canada-Newfoundland and Labrador Offshore Petroleum Board ("CNLOPB") is a Canadian provincial board that regulates oil and gas exploration. Canadian law requires companies that conduct seismic surveying in offshore Newfoundland and Labrador to submit copies of their seismic data to the CNLOPB. After a period of confidentiality, Canadian law authorizes the CNLOPB to release copies of the seismic data to third-party requesters. In accordance with those

laws, GSE submitted copies of its seismic data to the CNLOPB. TGS requested and received copies of Geophysical's data. Geophysical asserted that TGS's act of requesting and receiving the data directly and contributorily infringed its copyrights. The District Court held that those claims were barred by the act-of-state doctrine, the first-sale doctrine, and by principles of extraterritoriality. GSI's appeal questions whether the District Court correctly dismissed its direct and contributory copyright infringement claims. GSI also argues that the District Court acted in abuse of its discretion when it awarded TGS its attorneys' fees based on the finding that GSI's lawsuit was unreasonable.

***Jose Luis Hernandez v. Results Staffing, Inc.*** (No. 15-10602)

Jose Hernandez brought suit against Results Staffing, Inc. seeking damages and relief for various violations of the United States Employment and Reemployment Rights Act of 1994. USERRA protects persons temporarily serving in the United States military from discrimination, retaliation, and adverse employment actions as a result of their absence from work for military service. USERRA requires employers to reemploy qualifying persons following military service and further prohibits discrimination against employees based upon military status. Hernandez was denied reemployment by Results after he returned from a brief period of military service. He claimed that he became entitled to reemployment rights under § 4312 of USERRA upon his arrival for work on Tuesday, July 16, and that his subsequent termination by Results later that day for failure to comply with company policy constituted a failure to reemploy him after military service in violation of the statute. According to Hernandez, the District Court erroneously denied relief to him based on its conclusion that Results' "impression" that he would return to work at an earlier time trumped his right to reemployment upon reporting to work within the statutory time frame. Hernandez's appeal argues that the evidence at trial demonstrated that he complied with the requisite requirements to secure his right to reemployment as set out in 38 U.S.C. § 4312. Results argues that Hernandez misconstrues the statutory reporting requirement and that even if Hernandez timely reported to Results on July 16, Results complied with § 4312 because the company reemployed him; paid him for his work on July 16; and his subsequent termination after this reemployment did not implicate § 4312.

## **En Banc Courtroom**

### ***United States v. Leighton Comrie*** (No. 15-31072)

Born and raised in Trenchtown, Kingston, Jamaica, Leighton Comrie “was reared participating in Rastafari religion.” In exercising his religious beliefs, “he grew up ‘smoking weed, reading the bible, and praising God.’” Indeed, those practices were “a way of life for his entire family and community,” a fundamental “component of the Rastafari religion and a part of his culture.” In accordance with his religious beliefs, Comrie used marijuana daily from a young age until the time of his arrest. Comrie pleaded guilty to being a felon in possession of a firearm and to possessing marijuana. His appeal presents the question of whether the District Court plainly erred in failing to consider, *sua sponte*, whether his conviction for possession of marijuana violated his right to the free exercise of religion under the Religious Freedom Restoration Act of 1993. The Government disagrees, and poses the question whether a felon in possession of a firearm with a prior conviction for possession with intent to distribute marijuana would have succeeded in a hypothetical religious freedom defense even if one had been raised.

### ***Byrd Telcom, Inc. v. OSHRC, Et Al.*** (No. 15-60917)

This case arose from an accident on May 28, 2013, resulting in the death of two of Byrd Telcom’s employees who were killed while working on a Verizon Wireless communication tower in Georgetown, Mississippi. Byrd Telcom, Inc., was issued citation by the Occupational Safety and Health Administration under 29 U.S.C. § 654 (a)(1) for two violations of the Occupational Safety and Health Act’s general duty clause. Byrd Telcom contested the citation, and the matter was heard before an Administrative Law Judge who affirmed the general duty clause violation and assessed a penalty of \$7000. The Occupation Safety and Health Review Commission did not grant Byrd Telcom’s petition for discretionary review of the ALJ’s decision. Byrd Telcom timely filed the instant petition for review with the Fifth Circuit, and presented the following issues: Whether the ALJ applied the correct legal test for establishing a violation of the general duty clause? Whether substantial evidence supports the ALJ’s finding that Byrd Telcom had constructive knowledge of its violation of the general duty clause when it failed to properly secure a gin pole where Byrd Telcom: (a) had no work rules on how to properly rig a gin pole; (b) failed to train its employees on how to rig a gin pole; (c) failed to adequately monitor its employees; and (d) failed to discipline employees when they worked unsafely.

*Alice Buckhanan v. Eric K. Shinseki, Etc., Et. Al.* (No. 15-60643)

In this Title VII case, the appeal of plaintiff, Alice Buckhanan, maintains that genuine facts exist within the record which demonstrate a *prima facie* claim that she was discriminated based on gender, and that similarly situated male employees were treated differently. Buckhanan argues that triable issues of fact exist and that those facts demonstrate that the termination of her employment as a Veterans Affairs Medical Center police officer was retaliation for having made claims of discrimination. Lastly, she argues that the record contains evidence to support her claim that the reason offered by her employer for her termination – that she failed to qualify with her firearm – was pretextual.