Bar Association of the Fifth Federal Circuit
2019 Appellate Advocacy Seminar

Summary of Issues to be Orally Argued
On Tuesday, October 8, 2019

En Banc Courtroom

United States v. Stephen E. Stockman (No. 18-20780)

From 1995 to 1997 and again from 2013 to 2015, Stephen Stockman served as a member of the U.S. House of Representatives representing the 36th Congressional District of Texas. In 2017 he was charged with four counts of mail fraud, four counts of wire fraud, one count of conspiracy to make conduit campaign contributions and false statements, two counts of making false statements on Federal Election Commission filings, one count of causing prohibited excessive campaign contributions in the form of coordinated expenditures, eleven counts of money laundering, and one count of filing a false tax return. The government alleges that for more than four years Stockman orchestrated a sophisticated fraudulent scheme to steal over $1.2 million from charitable foundations and the individuals who ran them and then secretly diverted the funds through a web of sham nonprofit organizations to finance his personal expenses and his election campaigns.

The government contends that his scheme proceeded in four general stages (1) fraudulently obtaining $285,000 in charitable contributions from The Rothschild Art Foundation, Inc. in 2010; (2) fraudulently obtaining $165,000 from The Rothschild Charitable Foundation, Inc. and the Rothschild Art Foundation, Inc. in 2011-12; (3) fraudulently obtaining $350,000 from the Ed Uihlein Family Foundation in 2012; and (4) fraudulently obtaining $450,571.65 from Richard Uihlein in 2014. Two congressional staffers, co-defendants Thomas Dodd and Jason Posey, pleaded guilty and subsequently testified at Stockman's trial. At the conclusion of the three-week jury trial, Stockman was convicted on all counts except one count of wire fraud. The District Court denied his motions for judgment of acquittal before and after the verdict, sentenced him to 120 months in prison and 3 years of supervised release, and ordered restitution and forfeiture of more than $1 million. Stockman appealed.

On appeal, Stockman argues that the District Court erred in issuing jury instructions on non-profit organizations under 26 U.S.C. §§ 501(c)(3) and 501(c)(4) because the instructions were incomplete statements of law, unnecessary, and confusing to the jury. He also argues that the District Court erred by issuing jury instructions that failed to limit the definition of "expenditure" under federal campaign finance law only to communications that contain "express advocacy" as

required by *Buckley v. Valeo,* 424 U.S. 1 (1976). Stockman also takes issue with the fact that the District Court failed to give good faith instructions and argues that the government failed to prove essential elements of the mail and wire fraud and campaign finance counts.

American Target Advertising and 28 individuals filed an amicus curiae brief in support of Stockman's argument that *Buckley v. Valeo* and its "express advocacy" requirement applied to and was not met by printed communications at issue in the appeal.

Shandell Marie Bradley v. Louis M. Ackal (No. 18-31052)

In March 2014 two African-American men, Victor White, III and Isaiah Lewis, were walking home from a convenience store in New Iberia, Louisiana, when they were stopped by Deputy Justin Ortis of the Iberia Parish Sheriff's Office. Ortis proceeded to search the men and allegedly found marijuana and cocaine in White's pockets. White was handcuffed behind his back, patted down, placed into the patrol car, and transported to the police station. When he arrived at the station, White allegedly protested that he did not want to go back to jail, produced a gun, and fatally shot himself. Unusually, he was handcuffed in the back of the patrol car at the time he allegedly shot himself. An investigation by the Louisiana State Police found White had committed suicide by gunshot wound from his own .25 caliber handgun that had not been detected during the pat down. In the months preceding White's death, several Iberia Parish deputies had pled guilty to excessive force and physical abuse of pre-trial detainees at the parish jail. The sheriff's office found itself in a flood of controversy, and White's death was a matter of significant public interest.

In February 2015 Shandell Marie Bradley, on behalf of herself and her minor child, filed suit against Iberia Parish Sheriff Louis Ackal, Deputy Ortis, and others. Bradley asserted civil rights and excessive force claims as well as wrongful death and survival actions under both federal and state law. The parties ultimately settled the matter at a conference before the Magistrate Judge. The settlement was read into the record and confirmed. The docket sheet reflects only a minute entry sealing the settlement conference.

News outlets Capital City Press, L.L.C., d/b/a *The Advocate,* and KATC Communications, L.L.C. intervened solely to gain access to the sealed amount of the settlement. The Magistrate Judge denied their motion to vacate the order sealing the amount of the settlement, concluding that the minor child's privacy interests outweighed the public's right to know the amount paid to settle the case. On appeal of the collateral order, intervenors argue that they are entitled to have access to the amount of the settlement under Louisiana's Public Records law, the First Amendment right of access, and the common law right of access. Several news media organizations, publishers, and organizations dedicated to protecting the First Amendment interests of journalists and authors filed an amici curiae brief in support of public access to the amount of the settlement.

Indigo Williams v. Phil Bryant (No. 19-60069)

Plaintiffs are parents of African-American children in Mississippi and allege that their children attend some of the State's worst public schools in its worst public school districts. They filed this suit against officers of the State of Mississippi under 42 U.S.C. § 1983 to enforce the Mississippi Readmission Act, enacted in 1870 to restore Mississippi's representation in Congress after the Civil War. The Act provided in part "[t]hat the constitution of Mississippi shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State." Plaintiffs complain that in 1870 the Mississippi Constitution required its legislature to "establish[] a uniform system of free public schools," Miss Const. of 1868, art. VIII § 1, but that the uniformity requirement has since been removed and that the "shockingly disuniform" public school system that exists greatly disadvantages African-American students.

The State filed a motion arguing that dismissal was warranted because (1) the Eleventh Amendment barred the suit, (2) the Readmission Act was not privately enforceable, (3) the matter presented a nonjusticiable political question, and (4) plaintiffs lacked standing. The District Court did not reach the merits of the case but instead dismissed on Eleventh Amendment sovereign immunity grounds.

On appeal, plaintiffs argue that the case presents an exception to sovereign immunity as a straightforward application of *Ex parte Young,* 209 U.S. 123 (1908). The State urges that the claim is barred by sovereign immunity and, alternatively, that the Fifth Circuit should affirm dismissal because the Readmission Act does not create a private right of action, enforcement of the Act presents a political question, and plaintiffs lack standing.

East Courtroom

United States v. Justin Harrington Darrell (No. 19-60087)

On September 13, 2017, Officer Mike Billingsley and Deputy Shane Latch arrived at the home of Brandy Smith to execute a warrant for her arrest. According to Deputy Latch, Smith's residence was a "known drug house," and he had made previous arrests there. The officers pulled their marked cars into the driveway directly behind a black Camaro. Justin Darrell immediately exited the driver's side of the Camaro and began walking toward Smith's residence. Officer Billingsley called out an order for Darrell to stop, but Darrell instead increased his pace toward the rear of the house. When Officer Billingsley called out a second time, Darrell stopped, turned around, and walked back toward the officers. Deputy Latch asked Darrell to identify himself and noticed two knives in sheaths attached to Darrell's belt. Deputy Latch took the knives. When he patted Darrell down, Deputy Latch found a gun and drugs in Darrell's pocket.

Darrell was charged with possession of a firearm by a convicted felon, pursuant to 18 U.S.C. § 922(g). He moved to suppress the evidence based on a lack of reasonable suspicion to justify the initial seizure. The District Court denied the motion. It noted that the officers were at a known drug house, that when they arrived Darrell started walking away, and that he walked away faster when ordered to stop. The District Court stated that the officers had reasonable grounds to suspect that Darrell "was up to no good." In its written order, the District Court relied on concerns for officer safety and cited to Mississippi Code § 97-9-103, which criminalizes warning another person of apprehension. Darrell conditionally pleaded guilty to the firearm charge, reserving his right to appeal the denial of the motion to suppress. He was sentenced to 36 months in prison.

On appeal Darrell argues that because there was no reasonable suspicion that he was committing criminal activity, the officers violated his Fourth Amendment rights, and the District Court should have suppressed the evidence. He asks the Fifth Circuit to reverse the denial of his motion to suppress and to vacate his conviction and sentence. The government urges the Court to affirm, arguing that reasonable articulable suspicion existed to justify the *Terry* stop of Darrell.

Sharonda L. Johnson v. BOKF National Association (No. 18-11375)

Sharonda Johnson had a checking account at a national bank, BOKF National Association. According to the deposit agreement, BOKF would charge Johnson $32.50 if she overdrew her account. If BOKF elected to pay the item and the balance remained overdrawn for more than five business days, Johnson would be charged an "Extended Overdraft Charge" of $6.50 per business day. Johnson overdrew her account several times. Each time, she was charged the initial overdraft charge of $32.50, and she was charged the $6.50 daily charge on multiple days when her account remained overdrawn for more than five business days.

Johnson filed a class-action complaint. She did not contest the initial overdraft fees but argued that the daily extended overdraft charges were payments compensating BOKF for a loan and violated the usury statute, 12 U.S.C. § 85, in the National Bank Act of 1864. The District Court ultimately dismissed her claim with prejudice. It disagreed that an overdraft was a loan or extension of credit under the Act, citing two regulatory authorities as persuasive. It also held that the definition of "interest" in 12 C.F.R. § 7.4001(a) was not broad enough to encompass extended overdraft fees.

On appeal, Johnson asks the Fifth Circuit to first determine that BOKF's payment of an overdraft is a loan under the Act and, second, to determine that the daily extended overdraft charges are interest. She seeks reversal of the motion to dismiss or, alternatively, remand for factual development of the record. BOKF argues that the Office of the Comptroller of the Currency and all courts except one to address the issue have found that the extended overdraft charges do not constitute interest under the Act.

Mark Gyves v. City of Houston (No. 18-20783)

In December 2017 Mark Gyves, a commercial airline pilot employed by Republic Airlines, sponsored by United Airlines, had flown into Houston's George H.W. Bush Intercontinental Airport Gate A-8. The passengers exited the plane, and the jetway was secured. Gyves remained on the plane because he was communicating with the airline's maintenance department. Desiring to use the restroom in the terminal, he exited the secured jetway and entered the terminal at Gate A-8 by breaking the emergency tape and activating an emergency door release marked "Life Safety Emergency Only." When he activated the door release, Houston Airport Systems Operations was notified of the security issue and sent representative Robert Losack and other personnel to respond and begin an administrative investigation. About an hour after exiting the jetway, Gyves returned to the gate area and was approached by Losack. Gyves provided his airport identification but then refused to answer any of Losack's questions. Gyves maintains that Losack was belligerent, that Gyves indicated he would not answer any questions without the presence of counsel, and that Losack did not state that Gyves had any obligation to answer Losack's questions.

Weeks later, Losack issued a notice of violation to Gyves alleging a violation of Rule 41 of Houston Airport System's OI 05-03, which sets forth a duty to cooperate with Houston Airport System investigations. Gyves contends that at that point he had never heard of Rule 41 or received a copy of OI 05-03. In February 2018 the case was tried before an adjudication hearing officer with the City of Houston Municipal Courts Department. The hearing officer sustained the violation of Rule 41 and imposed on Gyves a permanent lifetime ban from conducting business at any Houston Airport System facility.

Gyves filed suit against the City of Houston under 28 U.S.C. § 1983, alleging violations of his Eighth and Fourteenth Amendment rights. The District Court granted summary judgment for the City, and Gyves appealed.

West Courtroom

United States v. Eric Beverly (No. 18-20729)

A series of bank robberies occurred in the Houston area between July 2014 and May 2015. The robberies involved the same vehicles, suspects with the same physical description, and the same general method of robbery. Two or three armed robbers would enter a bank and hold up the lobby while one or two would jump behind the counter and demand money from the tellers. They took money only from teller drawers, did not go into vaults, and got out quickly. The robbery crews used cell phones to communicate with each other via three-way calling during the robberies.

The agents got a break in the case when they recovered a latent palm print from a teller counter after a January 2015 robbery. The print matched Jeremy Davis. He admitted to participating in a total of 21 robberies and disclosed that 5 other people had been involved, including Eric Beverly. The agents obtained subscriber information, toll records, and cell site location information (CSLI) for Davis's phone number after obtaining a May 2015 court order under 18 U.S.C. § 2703(d). In July 2015 they obtained another § 2703(d) order for subscriber information, toll records, and CSLI for phone numbers believed to be used by Beverly. Analysis of the records showed that during several of the robberies the phones belonging to Beverly (and the other accomplices) were at or near the banks that were robbed. Beverly was arrested in August 2015.

In June 2017 the Supreme Court held in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), that CSLI information that the government had obtained from wireless carriers pursuant to § 2703 orders was the product of a search that required a warrant. *Carpenter* further held that the showing required to obtain a § 2703 order – reasonable grounds for believing the records were relevant and material to an ongoing investigation – fell short of the probable cause required for a warrant. The same day that *Carpenter* was issued, the government obtained a search warrant for Beverly's cell phone records "out of an abundance of caution." The following month, Beverly moved to suppress the cell phone data obtained from the orders, as well as the data obtained from the search warrant. The government argued that the CSLI was lawfully obtained long before *Carpenter* and that the good faith exception to the warrant requirement applied.

The District Court granted Beverly's motion to suppress, commenting that the government had defeated any claim of good faith by applying for a search warrant after it had already obtained the evidence. On appeal, the government argues that the District Court reversibly erred in suppressing CSLI obtained from an order issued long before *Carpenter* and in suppressing subscriber information and toll records because the Supreme Court excluded such data from the scope of *Carpenter.*

United States v. Richard Ben (No. 18-60378)

Richard Ben was indicted on a number of charges related to a robbery that occurred within the confines of the Pear River Community of the Choctaw Indian Reservations in the Indian Country. As part of a July 2012 plea agreement, Ben pleaded guilty to using and carrying a firearm during the commission of a violent crime in violation of 18 U.S.C. § 924(c)(1)(A)(ii), and the other charges were dismissed. The underlying crime of violence was robbery under 18 U.S.C. § 2111. Under the plea agreement, Ben waived all rights to appeal the conviction and sentence on any grounds, including any appeal based on 18 U.S.C. § 3742 or any motion brought under 28 U.S.C. § 2255, except as to ineffective assistance of counsel. He was sentenced to 84 months in prison and 5 years of supervised release.

In June 2016 Ben filed a petition for relief under § 2255 arguing that under *Johnson v. United States*, 135 S. Ct. 2551 (2015), § 2111 robbery is no longer a crime of violence and that his conviction should therefore be vacated. The government responded by arguing that Ben's petition was barred by the waiver in his plea agreement. The District Court concluded that the waiver should not be enforced, considered the merits of Ben's argument, and dismissed his claim. It then denied a certificate of appealability.

The Fifth Circuit subsequently granted a certificate of appealability as to (1) whether the post-conviction waiver in Ben's plea agreement barred him from seeking relief and (2) whether the District Court erred in its assessment of the merits of Ben's claim. In January 2019 Ben was released from prison, but he remains under supervisory release.

David McMahon v. Gregory L. Fenves (No. 18-50710) c /w Richard Brewer v. Ron Nirenberg (No. 18-50800)

These two matters were consolidated on appeal. The first involves the relocation of monuments on the University of Texas campus. Major George Littlefield was a Civil War veteran who made several gifts to UT in his 1918 will, including funding for statues to be displayed on campus. Six statues were made and placed alongside UT's south mall, including a statue of President Woodrow Wilson and statues of five Confederate soldiers, Jefferson Davis among them. In 2015 UT President Gregory Fenves formed a task force to study controversy regarding the statues. After considering the report of the task force, President Fenves decided to relocate the statues of Jefferson Davis and Woodrow Wilson. The Texas Division of the Sons of Confederate Veterans and two individual plaintiffs filed suit in Texas state court to enjoin the relocations. The Texas court dismissed for lack of standing. In 2017 President Fenves directed that the remaining four statues also be relocated and their inscriptions covered. This suit was filed against President Fenves by David McMahon, Steven Littlefield, and the Texas Division of the Sons of Confederate Veterans, seeking injunctive relief as to UT's 2015 and 2017 decisions. McMahon and Littlefield are descendants of Confederate veterans, and Littlefield is a descendant of Major Littlefield.

The second matter involves the removal of a Confederate monument from Travis Park, a public park in San Antonio. The monument had been erected with the City's permission by a chapter of the United Daughters of the Confederacy in 1899. In 1908 two cannons presented by the U.S. Congress to the City were added at the base of the statue. In August 2017 the San Antonio City Council enacted an ordinance for the removal of the monument. The monument, including the statue and cannons, was removed and is being maintained by the City. Richard Brewer and the Texas Division of the Sons of Confederate Veterans filed suit against the members of the San Antonio City Council, in their official and individual capacities, and the City.

Plaintiffs in these cases allege violations of their right to free speech and of the Texas Antiquities Code as well as claims for "rendering a charitable gift's purpose impossible" and conversion. The District Courts dismissed the federal claims for lack of standing and declined to exercise supplemental jurisdiction over the state law claims. Plaintiffs appealed.