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# Constitutional Civil Law

Albert Sidney Johnson

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by Albert Sidney Johnson*

During the 1994 survey period, the United States Court of Appeals for the Eleventh Circuit experienced a period of consolidation and clarification in constitutional civil law. The application of the clearly established law test in qualified immunity determinations has become more consistent, favoring a fact-specific, circuit-based precedent rather than the more generalized test sometime applied by individual panels.

Several cases with constitutional implications were revisited *en banc* during the survey period producing a variety of results. In public employment cases and land use cases involving state created property rights, the Eleventh Circuit has retrenched and virtually abandoned any recognition of the Substantive Due Process Clause of the Fourteenth Amendment. Fourth Amendment seizure issues continued to be refined during the survey period. The output of the court in terms of civil constitutional law appeared to be less voluminous compared to other survey periods, however, that result is partially attributable to the consolidation process which 1994 represented.

## I. PRELIMINARY ISSUES

### *A. Immunity*

**Qualified Immunity.** A government official has immunity to an action for civil damages unless the plaintiff can establish that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights

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* Partner in the firm of Johnson & Montgomery, Atlanta, Georgia. Mercer University (B.A., 1956); Walter F. George School of Law (J.D., 1959). DeKalb County, Georgia Attorney (1984-1993); Past President, National Association of County Civil Attorneys, National Association of Counties; Past President, County Attorney's Section, Association County Commissioners of Georgia.

of the [plaintiff]."[1] In *Anderson v. Creighton*,[2] the Supreme Court determined that the constitutional right alleged to be violated must be sufficiently established to inform the official that his conduct violated the law, when viewed in light of the information available to a reasonable official.[3] The Court in *Anderson* warned that the viability of an "objective reasonableness" standard in preserving immunity depended on the "level of generality at which the relevant 'legal rule' is to be identified."[4] The Eleventh Circuit has moved toward a more consistent application of the bright line test resulting in greater specificity of the underlying clearly established law.

The Eleventh Circuit made a prompt decision to revisit *Swint v. City of Wadley*.[5] The case presented a complex factual situation compounded by a complex legal analysis of claims arising under the Fourth and Fourteenth Amendments. This action resulted from two raids on a nightclub suspected of harboring illegal drug activity.[6] The raids were the culmination of a preliminary investigation[7] and commenced upon the signal of an undercover officer who purchased drugs from a patron of the club.[8] Based on the state of the record, the court of appeals held that the contours of the Fourth Amendment claim and the Fourteenth Amendment equal protection claim were clearly established, preventing the qualified immunity defense.[9] On the other hand, the law was not clearly established that excessive force in connection with a search violated not only the Fourth Amendment but also the Due Process Clause.[10] The modified opinion refined the factual analysis of the several defendants' participation in the raid reversing the denial of summary judgment for all defendants on the due process claims,[11] and for the sheriff on the equal protection claims.[12]

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1. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1974)).
2. 483 U.S. 635 (1987).
3. *Id.* at 641-42.
4. *Id.* at 639.
5. 11 F.3d 1030 (11th Cir. 1994) *modifying opinion* at 5 F.3d 1435 (11th Cir. 1993), *cert. granted*, 114 S. Ct. 2617.
6. 5 F.3d 1435, 1439-40 (11th Cir. 1993), *cert. granted*, 114 S. Ct. 2617.
7. 5 F.3d at 1439.
8. *Id.* at 1440.
9. *Id.* at 1443.
10. *Id.* at 1448.
11. 11 F.3d at 1031.
12. *Id.*

The court also revisited *Harris v. Coweta County*.[13] The case considered whether a county sheriff was entitled to qualified immunity under Eighth and Fourteenth Amendment claims alleging denial of proper medical treatment. Acknowledging that there was no question that a prisoner's right to medical treatment was clearly established at the time of the sheriff's conduct,[14] the court of appeals affirmed the district court's denial of immunity because there existed a factual dispute as to precisely what the sheriff knew and when, and how this caused delay in the plaintiff's medical treatment.[15] On rehearing, the panel made a more critical analysis of the clearly established law and concluded that at the time of Harris' incarceration it was clearly established that knowledge of the need for medical care and intentional refusal to provide that care constituted deliberate indifference,[16] that delay in treatment of serious and painful injuries was clearly recognized as rising to the level of a constitutional claim,[17] that pre-existing law clearly gives officials a sense of what amount of time constitutes actionable delay,[18] and that it was clearly established that the right to medical care may include diagnostic tests known to be necessary.[19] The court concluded there was no factual issues on the qualified immunity issue and the sheriff was not entitled to qualified immunity. The court did point out that a finding of no immunity under the circumstances did not render the sheriff liable for deliberate indifference *a fortiori*, that issue remaining for the jury.[20]

The question of clearly established law in a factual setting arose where a county Department of Family and Children Services took custody of a child whose condition officials deemed to be life threatening.[21] Against competing principles of clearly established law, that is, a parent's interest in the custody of a child[22] and the state's right to temporarily deprive a parent of custody where there is an objectively reasonable

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13. 21 F.3d 388 (11th Cir. 1994) *reh. granted & opinion* at 5 F.3d 507 (11th Cir. 1993) withdrawn.

14. 5 F.3d at 508.

15. *Id.* at 509.

16. Mandel v. Doe, 888 F.2d 783, 788 (11th Cir. 1989).

17. Brown v. Hughes, 894 F.2d 1533, 1537 (11th Cir.), *cert. denied*, 496 U.S. 928 (1990); Washington v. Dugger, 860 F.2d 1018, 1021 (11th Cir. 1988).

18. 21 F.3d at 393-94 (citing Carswell v. Bay County, 854 F.2d 454 (11th Cir. 1988); Ancata v Prison Health Servs., Inc., 769 F.2d 700 (11th Cir. 1985)).

19. *Id.* at 394 (citing H. C. by Hewett v. Jarrard, 786 F.2d 1080, 1086 (11th Cir. 1986)).

20. *Id.*

21. Bendiburg v. Dempsey, 19 F.3d 557 (11th Cir. 1994).

22. *Id.* at 560.

basis to believe the child's life, safety or welfare are threatened,[23] the district court submitted special interrogatories to the jury to determine whether a reasonable basis for temporary deprivation of custody existed.[24] The Eleventh Circuit approved this procedure, observing that prior precedent suggests that submission of the factual component of a qualified immunity defense to the jury through a special interrogatory, without mentioning the term "qualified immunity," is proper.[25]

*Hansen v. Soldenwagner*[26] applied the bright line test to an action alleging a First Amendment violation where disciplinary action was taken against a police officer whose deposition in a criminal case was crude, obscene and critical of the police department.[27] The court upheld qualified immunity in that it was not clearly established that it was unconstitutional for police officials to investigate and suspend an officer for making vulgar, insulting and defiant criticisms of the department while giving deposition testimony pursuant to subpoena.[28]

In a Fourth Amendment seizure context, *Mendel v. City of Atlanta*[29] presented a fact intense analysis of seizure *vel non*. In reversing the district court's denial of qualified immunity, the court found no precedent which requires officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used.[30]

A bright line issue found the Court divided *en banc* in *Lassiter v. Alabama A & M University Board of Trustees*.[31] The case arose when a vice president of the university was fired without being offered a hearing.[32] A seven judge majority found that the district court properly upheld the individual defendants' qualified immunity defense[33] since it was not clearly established in Alabama law that the vice president's contract nor the University policy manual supported employment property right for the vice president[34] or that he was due a hearing.[35] Taking an opportunity to reinforce the specificity of the clearly

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23. *Id.*
24. *Id.* at 561.
25. *Id.* (citing Stone v. Peacock, 968 F.2d 1163, 1166 (11th Cir. 1992); Ansley v. Heinrich, 925 F.2d 1139, 1348 (11th Cir. 1991)).
26. 19 F.3d 573 (11th Cir. 1994).
27. *Id.* at 574-75.
28. *Id.* at 575.
29. 25 F.3d 990 (11th Cir. 1994).
30. *Id.* at 996.
31. 28 F.3d 1146 (11th Cir. 1994).
32. *Id.* at 1148.
33. *Id.*
34. *Id.* at 1151.
35. *Id.* at 1151-52.

established component of qualified immunity, the court said for qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about) the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.[36]

*Spivey v. Elliott*[37] involved the qualified immunity defense asserted by officials of a state-run school for deaf children.[38] An eight year old residential student was sexually assaulted by a thirteen year old schoolmate.[39] Alleging the existence of a special relationship, the mother of the student brought action based on violation of his Fifth and Fourteenth Amendment substantive due process rights to liberty, privacy, and personal security.[40] Again, the court found that there was no clearly established law that a special relationship was created by enrollment at a voluntary residential state-run school,[41] notwithstanding its speculation that the claim was probably sufficient to allege a violation of a constitutional right which was not clearly established at the time.[42]

In an Eighth Amendment claim arising from a jail suicide, *Belcher v. City of Foley*,[43] based the complaint against a chief of police on deliberate indifference because of his failure to provide sufficient written policies to deal with potential suicides[44] and failure to train staff in management of potential suicides.[45] Additional allegations against the chief's employees raised the issue of deliberate indifference to the victim's medical and psychiatric needs and to his safety from self-harm.[46] Again the plaintiff failed the bright line test, the court holding that it was not clearly established that a police chief's failure to have a written policy for handling suicidal inmates constituted deliberate

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36. *Id.* at 1150.
37. 29 F.3d 1522 (11th Cir. 1994).
38. *Id.* at 1523.
39. *Id.*
40. *Id.* at 1523-24.
41. *Id.* at 1527. Justice Cox concurred in part and dissented in part, stating that he would decide the case not on the clearly established prong of the qualified immunity analysis, but on a failure of the plaintiff to allege a violation of constitutional law. Upon *sua sponte* reconsideration, Spivey v. Elliott, 41 F.3d 1495 (11th Cir. 1995), the court agreed with the dissent, limited its holding to the absence of clearly established law and withdrew its speculation as to the existence of a constitutional right. *Id.* at 1498.
42. 29 F.3d at 1523.
43. 30 F.3d 1390 (11th Cir. 1994).
44. *Id.* at 1397.
45. *Id.* at 1398.
46. *Id.* at 1395.

indifference[47] nor was it clearly established that a police chief's failure to training his officers in the handling of suicidal inmates amounted to deliberate indifference.[48] As to the claims against the chief's employees, the court analyzed the authorities advanced by the plaintiff and concluded that all the authorities were insufficient or distinguishable.[49] The court clarified that non-legally enforceable standards are not the law and cannot clearly establish it.[50]

In *Jordan v. Doe*,[51] a *Bivens*[52] action was filed by a pretrial detainee against officials of the United States Marshals Service alleging that he was placed in local "contract" jails where the marshals knew unconstitutional conditions existed.[53] The court agreed that the complaint was sufficient to raise a constitutional claim.[54] However, the court upheld the qualified immunity defense saying a reasonable government official, having the information the marshals had about the local jails, would not have understood that contracting to place the detainee in the local jails and transporting him to those jails would violate his constitutional rights because the conditions in those jails would deprive him of at least one human need.[55]

Qualified immunity was upheld when college officials were sued incident to the fatal shooting of a student by a fellow student.[56] Against a Fourteenth Amendment substantive due process claim,[57] the court held that the plaintiff failed to point to pre-existing law which "dictates" and "compels" the conclusion that, in 1989, university officials

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47. *Id.* at 1397 (citing Schmelz v. Monroe County, 954 F.2d 1540 (11th Cir. 1992) (a sheriff who had an unwritten policy that "made an effort to identify and protect potentially suicidal inmates from self-harm" was not guilty of deliberate indifference)).

48. *Id.* at 1398.

49. *Id.* at 1399-1401. The plaintiff's allegations in this case appear to be well-pleaded in terms of the burden to bring the claim within the ambit of clearly established law. With respect to custodial liabilities arising out of deliberate indifference, the plaintiff offered Waldrop v. Evans, 871 F.2d 1030 (11th Cir. 1989), Popham v. City of Tallageda, 908 F.2d 1561 (11th Cir. 1990), Edwards v. Gilbert, 867 F.2d 1271 (11th Cir. 1989) and several cases from other circuits.

50. 30 F.3d at 1399 (referring to National Commission on Correctional Health Care's 1987 "Standards for Health Services in Jails" and the Commission on Accreditation for Law Enforcement Agencies).

51. 38 F.3d 1559 (11th Cir. 1994).

52. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

53. 38 F.3d at 1562.

54. *Id.* at 1565.

55. *Id.* at 1566-67 (citing Hamm v. DeKalb County, 774 F.2d 1567, 1572 (11th Cir. 1985) and Wilson v. Seiter, 501 U.S. 294, 305 (1991)).

56. Alexander v. University of N. Fla., 39 F.3d 290, 291 (11th Cir. 1994).

57. *Id.*

had a duty to protect the student from the violent acts of another student.[58]

*Rodgers v. Horsley*[59] illustrates the specificity with which the court articulates the clearly established law component of qualified immunity in many of its cases. The court's statement of the issue, which it answered in the negative, was whether in May 1991, was it clearly established in this circuit that it was unconstitutional for a mental institution to fail to supervise a patient for fifteen minutes in the smoking room, when she was on close watch status for a health problem, when the institution had a history of some "sexual contact" involving patients other than plaintiff but no history of rape for the past twelve years, where a previous patient who was to be similarly monitored disappeared, apparently escaped through a bathroom window, and fell to her death on a ledge below, and where the plaintiff had never before complained of unwanted sexual contact from either the patient accused, any other patient, or any member of the staff.[60]

**Eleventh Amendment Immunity.** The Eleventh Amendment[61] prohibits suits in federal court against an unconsenting state, even where brought by citizens of the state.[62] To determine whether the state is the "real, substantial party in interest"[63] in an action brought against a state official or agency, the court considers the law of the state

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58. *Id.* (quoting Lassiter v. Alabama A & M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994)).

> [Q]ualified immunity for government officials is the rule, liability and trials for liability the exception .... "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances."

The plaintiff placed reliance on Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989). The court found the facts in *Cornelius* too different from the facts in *Alexander*. 39 F.3d at 291.

59. 39 F.3d 308 (11th Cir. 1994).

60. *Id.* at 311. The plaintiff attempted to align her case with Youngberg v. Romeo, 457 U.S. 307 (1982) which the Court found to contain materially dissimilar facts. 39 F.3d at 311.

61. The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI.

62. Carr v. City of Florence, 916 F.2d 1521, 1524 (11th Cir. 1990) (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

63. *Id.* at 1524 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)).

creating the entity.[64] If the state would pay any award of damages, it is the real party in interest.[65]

*Jackson v. Georgia Department of Transportation*[66] was a rerun of *Hobbs v. Roberts*.[67] To reach its conclusion that a voluntarily established trust fund does not make the state a real party in interest,[68] the court had to first determine whether the individual defendants were being sued in their official capacity or their personal capacity.[69] The court was obviously exasperated at having to make the capacity determination on appeal[70] and suggested that district court establish means by which the record would clearly reflect whether a case is brought against a defendant in an individual or official capacity.[71]

*Seminole Tribe of Florida v. State; Poarch Creek Indians v. State*[72] assesses the application of Eleventh Amendment immunity with respect to negotiation procedures provided under the Indian Gaming Regulatory Act ("IGRA").[73] IGRA provides that certain gaming activities would be lawful on Indian lands on condition, *inter alia*, the activities are conducted in conformance with a Tribal-State compact.[74] IGRA requires states to negotiate with tribes in good faith and gives United States district courts jurisdiction to order conclusion of a compact.[75] Florida and Alabama failed to reach compacts, respectively, with the Seminole Tribe and the Poarch Band of Creek Indians and asserted that federal jurisdiction under IGRA violates their Eleventh Amendment immunity.[76] Finding that Florida and Alabama did not consent to suit under IGRA[77] nor did they fall within the fiction of *Ex parte Young*,[78]

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64. *Id.* at 1525 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

65. *Id.* at 1524 (citing Edelman v. Jordan, 415 U.S. 651 (1974)).

66. 16 F.3d 1573 (11th Cir. 1994).

67. 999 F.2d 1526 (11th Cir. 1993) (holding that the existence of a voluntarily established liability trust fund does not make the state a real party in interest and does not extend Eleventh Amendment immunity to employees sued in their individual capacity). *See* Albert Sidney Johnson, *Constitutional Civil Law*, 45 MERCER L. REV. 1217, 1223 (1994).

68. 16 F.3d at 1578.

69. *Id.* at 1576.

70. *Id.*

71. *Id.*

72. 11 F.3d 1016 (11th Cir. 1994).

73. 25 U.S.C. §§ 2701-2721 (1988).

74. 11 F.3d at 1020.

75. *Id.*

76. *Id.*

77. *Id.* at 1021-23.

78. *Id.* at 1028-29 (analyzing the application of *Ex parte* Young, 209 U.S. 123 (1908) which allows an individual to obtain a federal injunction against a state officer to force the

the court's main focus was to determine whether Congress abrogated the states' immunity when it enacted IGRA.[79] Abrogation of Eleventh Amendment immunity involves a two-part inquiry: a determination of a congressional intent to abrogate immunity[80] and a determination whether Congress possessed constitutional power to abrogate immunity.[81] Congress did manifest an intent to abrogate immunity.[82] However, Congress possesses abrogation powers only when it enacts legislation under Section 5 of the Fourteenth Amendment or the Interstate Commerce Clause.[83] Congress enacted IGRA solely under the Indian Commerce Clause, which does not permit abrogation of immunity.[84] Other circuits have grappled with these same issues, reaching disparate results.[85] Accordingly, the United States Supreme Court granted certiorari to resolve the dispute.[86]

### *B. Subject Matter Jurisdiction*

**Standing.** Article III of the Constitution, addressing the federal court system, restricts federal court jurisdiction to "cases" or "controversies" and establishes the scope of matters which can be determined by federal courts.[87] The concept of standing, a party's right to have a federal forum decide matters, thus has constitutional dimensions. The essence of a standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional questions.[88] This principle is supplemented by three principles of judicial restraint: whether the plaintiff's complaint falls within the zone of interests protected by the statute or constitutional provision at issue, whether the complaint raises abstract questions amounting to generalized grievances which are more appropriately resolved by the legislative branch, and whether the plaintiff asserted his

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officer to comply with federal law).

79. *Id.* at 1023.

80. *Id.* at 1024 (citing Dellmuth v. Muth, 491 U.S. 223 (1989)).

81. *Id.*

82. *Id.*

83. *Id.* at 1025.

84. *Id.* at 1026.

85. *E.g.*, Spokane Tribe v. Washington, 28 F.3d 991 (9th Cir. 1994) (rejecting the Eleventh Amendment immunity claim of the State of Washington).

86. 115 S. Ct. 932 (1995).

87. U.S. CONST. art. III.

88. Saladin v. City of Milledgeville, 812 F.2d 687, 690 (11th Cir. 1987).

or her own legal rights and interests rather than those of third parties.[89]

The court revisited *Harris v. Evans*[90] and reversed an inmate's First Amendment victory on the basis of standing.[91] The inmate asserted on behalf of prison guards a First Amendment attack on a policy prohibiting prison employees from communicating directly with the parole board on behalf of prisoners.[92] The inmate did not suffer an actual or threatened injury,[93] had no substantial relationship with the guards whose rights he sought to assert,[94] and established no dilution or impediment to the guards right to assert their own claim absent the inmates assertion.[95]

In *Church v. City of Huntsville*,[96] a case in which a homeless class sought to enjoin the enforcement of certain city ordinances,[97] the defendants raised the standing issue for the first time on appeal.[98] Because standing is jurisdictional, the city's failure to raise the issue in the trial court does not bar the appellate court's consideration.[99] The precise issue under the circumstances is not the degree of evidence by which plaintiffs ordinarily must establish standing in order to obtain a preliminary injunction, but, instead, how much evidence a plaintiff must present to obtain a preliminary injunction when the defendant raises no standing issues.[100] The plaintiff's standing should be judged on the sufficiency of the allegations of the complaint, with any preliminary hearing evidence favorable to the plaintiff on the standing question treated as additional allegations of the complaint.[101]

**Ripeness.** The ripeness doctrine addresses constitutional and prudential concerns that a claim does not constitute a "case" or "controversy" within the meaning of Article III. In the land use context, because Fifth and Fourteenth Amendments prohibit the taking of

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89. Warth v. Seldin, 422 U.S. 490, 498 (1975).

90. 920 F.2d 864 (11th Cir. 1991), *vacated and reh'g en banc granted*, 999 F.2d 1424 (11th Cir. 1993). *See* Albert Sidney Johnson & Susan Cole Mullis, *Constitutional Law—Civil*, 43 MERCER L. REV. 1075, 1098 (1992).

91. 20 F.3d 1118 (11th Cir. 1994).

92. *Id.* at 1120.

93. *Id.* at 1122.

94. *Id.* at 1123-24.

95. *Id.* at 1124.

96. 30 F.3d 1332 (11th Cir. 1994).

97. *Id.* at 1335.

98. *Id.* at 1336.

99. *Id.*

100. *Id.*

101. *Id.*

property without just compensation, plaintiff asserting regulatory takings must obtain a final decision that he has been denied state court remedies for inverse condemnation before the takings claim is ripe.[102] The finality prong of the ripeness inquiry is required in order for the court to determine "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit [development]."[103]

The *Reserve, Ltd. v. Town of Longboat Key*[104] presented the issue of ripeness in the context of a permit revocation for failure to complete substantial work within a thirty-day period.[105] The issue revolve around the ripeness-futility exception debate and the district court construed the contentions as presenting a genuine issue of material fact.[106] The court found that the plaintiff did not obtain a final decision from the town regarding the revocation of the permit, but noted that the district court did not decide the futility issue.[107] Accordingly, the court declined to decide the futility issue and left that question for the district court to grapple with on remand.[108]

**Supplemental Jurisdiction.** When the court's action resulted in all federal claims being dismissed, it raised the question whether the district court should be ordered to dismiss the plaintiff's state law claims.[109] Noting that under the Judicial Improvements Act of 1990[110] supplemental jurisdiction (formerly referred to as ancillary and pendent jurisdiction) is discretionary with the district court.[111] While leaving the question to the discretion of the district court, the court strongly suggested that the state law claims should be dismissed.[112]

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102. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2906-07 (1992) (Blackmun, J., dissenting).

103. *Id.* at 2891 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986)).

104. 17 F.3d 1374 (11th Cir. 1994).

105. *Id.* at 1376.

106. *Id.* at 1381.

107. *Id.* at 1383.

108. *Id.*

109. Eubanks v. Gerwen, 40 F.3d 1157, 1161 (11th Cir. 1994).

110. 28 U.S.C.A. § 1367(c) (1990).

111. 40 F.3d at 1161.

112. *Id.*

## II. ATTORNEY'S FEES

Section 1988 of the United States Code[113] provides that a district court may award attorney's fees to the "prevailing party" in civil rights actions brought pursuant to section 1983 and related civil rights statutes. In prior cases, the Supreme Court has indicated that a plaintiff who wins nominal damages may be designated as a "prevailing party" for purposes of section 1988. The Court has defined the prevailing party as one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"[114] and who establishes a "material alteration of the legal relationship of the parties."[115]

*Loranger v. Stierheim*[116] presented a fact intensive study of the grim realities of proper bookkeeping where a fee request is anticipated. After protracted and complex litigation resulted in a plaintiff's verdict for $20,000,[117] the plaintiff's attorney filed a fee award motion for $944,-775 plus costs in excess of $9,000.[118] The attorney "bombarded the district court with a vast array of documents" supporting the motion.[119] The district court struggled with the project and awarded fees of $50,000 and costs of $3,181.50, finding only 800 hours of the 2907 hours claimed were properly related to the case and only 560 hours were properly compensable.[120] The appeal contended that the district court used an improper hourly rate, inadequately explained the reduction in claimed hours, failed to enhance the award and failed to award all costs claimed.[121] The plaintiff's attorney failed to submit sufficient information to enable the district court to make a proper determination of allowable and non-allowable time and the district court should have

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113. 42 U.S.C. § 1988 provides, in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

114. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

115. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989).

116. 10 F.3d 776 (11th Cir. 1994).

117. *Id.* at 779.

118. *Id.*

119. *Id.*

120. *Id.* The district court first awarded only $35,000 and costs. On motion for *en banc* review of the award and for recusal of the trial judge, the district court held a hearing. *Id.*

121. *Id.*

required him to refashion his request.[122] The district court is not required to make an hour-by-hour examination of voluminous documentation, but it must provide a clear explanation of the process of arriving at compensable hours and any reduction that may be applied.[123]

## III. SUBSTANTIVE ISSUES

### A. *First Amendment*

**Prior Restraint.** *Redner v. Dean*[124] represented the continuing effort of some jurisdictions to be tough on adult entertainment and public nudity. The issue before the Eleventh Circuit was the constitutionality of a county licensing ordinance regulating adult entertainment establishments.[125] The ordinance was analyzed against the standards announced in *FW/PBS, Inc. v City of Dallas*[126] and was found deficient.[127] Although the forty-five day limit on the decision to grant or deny the license was reasonable,[128] other provisions of the ordinance made the time limit illusory.[129] Furthermore, while the ordinance provided for an appeal to the board of commissioners, there was no specific time frame for the board to schedule a hearing or reach a decision.[130]

**Government Regulation Impacting Speech.** *Speer v. Miller*[131] brought into focus a state statute[132] which prohibited inspecting or copying records of law enforcement agencies for commercial solicitation.[133] A Georgia attorney, primarily practicing criminal law, obtained most of his clients through inspecting public records and sending advertisements to persons likely to need his services.[134] Upon enact-

122. *Id.* at 782.
123. *Id.* at 783.
124. 29 F.3d 1495 (11th Cir. 1994).
125. *Id.* at 1497.
126. 493 U.S. 215 (1990) (holding that a licensing ordinance must contain, at a minimum, a specified brief period of restraint to preserve the status quo and the availability of an avenue for prompt judicial review of the censor's decision) (citing Freedman v. Maryland, 380 U.S. 51 (1965)).
127. 29 F.3d at 1497.
128. *Id.* at 1500.
129. *Id.* at 1500-01.
130. *Id.* at 1503.
131. 15 F.3d 1007 (11th Cir. 1994).
132. O.C.G.A. § 35-1-9 (1991).
133. 15 F.3d at 1009.
134. *Id.*

ment of the statute, law enforcement agencies would not permit the attorney to inspect records which were otherwise open to public inspection.[135] He challenged enforcement of the statute on First and Fourteenth Amendment grounds.[136] The district court denied a preliminary injunction on the ground that the attorney failed to show a substantial likelihood of success on the merits.[137] Applying the rule that statutes restricting commercial speech must directly advance a substantial government interest,[138] the court found that a "mere reading" of the statue indicates that it probably impinges on the attorney's commercial speech.[139]

Similarly, *McHenry v. Florida Bar*[140] involved rules of The Florida Bar[141] prohibiting law from using direct mail to solicit personal injury and wrongful death clients within thirty days of an accident.[142] Against the plaintiff-lawyer's First Amendment attack that the ban is an unconstitutional restriction on commercial speech,[143] The Florida Bar contended that the thirty-day ban served a substantial state interest by protecting the personal privacy and tranquility of person (or their loved ones) who were recent victims of personal injury or death.[144] Alternatively, The Florida Bar argued that the Rules were a reasonable time, manner, and place restriction on speech having no content implications.[145] The court rejected both claims and held that the Rules were "unambiguously content-based" because The Florida Bar would necessarily need to examine the content of a letter in order to determine whether the Rules apply to the circumstances in a given instance.[146]

*Blackston v. State*[147] attacked a committee decision prohibiting two citizens from tape recording a meeting considering the public interest

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135. *Id.*
136. *Id.*
137. *Id.* at 1010. The district court limited its consideration to the Fourteenth Amendment equal protection issue and granted the state's motion to dismiss the First Amendment claim. The court exercised discretion to reach the merits of the First Amendment issue because it is so closely related to the interlocutory order actually appealed. *Id.*
138. *Id.*
139. *Id.*
140. 21 F.3d 1038 (11th Cir.), *cert. granted*, 115 S. Ct. 42 (1994).
141. Florida Bar Rules 4-7.4, 4-7.8.
142. 21 F.3d at 1038, 1040.
143. *Id.* at 1041.
144. *Id.* at 1043.
145. *Id.* at 1044.
146. *Id.* at 1044-45.
147. 30 F.3d 117 (11th Cir. 1994).

issue of child support.[148] The refusal of tape recording is a time, place, and manner restriction which is permissible only if it is supported by a substantial governmental interest and does not unreasonably limit alternative avenues of communication.[149] If it were proved that the ban on tape recording was affected by sympathy or hostility for the point of view being expressed by the communicator, the ban would be invalid unless it were narrowly tailored to serve a compelling state interest.[150]

A leafleteer attacked Florida's trespass after warning statute[151] enforced against him on housing authority property in *Daniel v. City of Tampa*.[152] Because housing authority property is a nonpublic forum, restrictions on access need only be content-neutral and reasonable.[153]

**Public Employment.** The Eleventh Circuit continued to addressed the scope of public employee's rights of free speech in his role as a citizen on several occasions during the survey period. A governmental employer's restrictions or actions violate the First Amendment if the employee was sanctioned for speaking out on a matter of public concern in his role as a citizen and the employee's interest in the speech is not outweighed by the employer's interest in providing orderly and efficient government services.[154] The "public concern" element is determined on a case-by-case basis by determining whether the content, form and context of the speech indicate that the speech was a matter of general public concern.[155] These principles were applied in two noteworthy cases during the survey period.[156]

*Hansen v. Soldenwagner*[157] was brought by a police officer who claimed he suffered retaliation for providing testimony under subpoena. A public employee may enjoy the protections of the First Amendment, but the act of providing testimony does not, by itself, absolutely shield the public employee from further scrutiny by his superiors.[158]

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148. *Id.* at 120.
149. *Id.*
150. *Id.*
151. FLA. STAT. ch. 810.09 (1994).
152. 38 F.3d 546 (11th Cir. 1994).
153. *Id.* at 550.
154. Bryson v. City of Waycross, 888 F.2d 1562, 1565-66 (11th Cir. 1989); *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
155. Rankin v. McPherson, 483 U.S. 378, 384 (1987).
156. Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994); Tindal v. Montgomery County Comm'n, 32 F.3d 1535 (11th Cir. 1994).
157. 19 F.3d 523 (11th Cir. 1994).
158. *Id.* at 576.

In *Tindal v. Montgomery County Commission*,[159] a sheriff's employee testified by affidavit and verbal testimony in a race and sex discrimination case brought against the sheriff.[160] The trial judge admonished the sheriff about retaliation.[161] The witness attempted suicide, was hospitalized and later returned to work with a doctor's certificate supporting her physical and emotional capacities.[162] The sheriff refused to accept the doctor's evaluation and requested an independent mental evaluation.[163] The employee met with the designated psychiatrist but refused to divulge any private information.[164] She later recanted and offered to visit another independent psychiatrist.[165] The sheriff rejected her offer and requested the disciplinary review board advise him as to appropriate disciplinary measures.[166] The review board recommended termination, which was approved by the sheriff and upheld by the personnel board.[167] The employee was terminated in retaliation for her testimony in the discrimination suit against the sheriff.[168] Applying the four-part Bryson[169] test, the court concluded that the speech was on a matter of public concern,[170] inhibited neither her work nor the work of the office,[171] was largely the cause of the sheriff's decision to terminate her,[172] and that the reason for the termination was pretextual.[173]

The court considered two cases[174] in which public employees claimed violation of associational rights. The United States Constitution grants special protection to two different forms of association, "intimate association" and "expressive association."[175] Intimate association is the freedom to choose to enter into and maintain certain intimate human

159. 32 F.3d 1535 (11th Cir. 1994).
160. *Id.* at 1537.
161. *Id.* at 1537-38.
162. *Id.* at 1538.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1539.
169. Bryson v. City of Waycross, 888 F.2d 1562, 1565-66 (11th Cir. 1989).
170. 32 F.3d at 1540.
171. *Id.*
172. *Id.*
173. *Id.*
174. McCabe v. Sharrett, 12 F.3d 1558 (11th Cir. 1994); Cummings v. DeKalb County, 24 F.3d 1349 (11th Cir. 1994).
175. Roberts v. United States Jaycees, 468 U.S. 609 (1984).

relationships that attend the creation and sustenance of a family.[176] Expressive association is the freedom to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, petition for the redress of grievances, and the exercise of religion.[177]

In *McCabe v. Sharrett*,[178] the plaintiff was the secretary to the chief of police who was transferred to a less desirable job because of her marriage to a police officer.[179] She suffered a demotion, her salary was frozen, she was ineligible for raises for a period of time, she had less responsibility and more menial tasks to perform.[180] The parties conceded that the secretary suffered adverse employment action.[181] The secretary contended that she suffered adverse employment action solely because she exercised her fundamental intimate association right to be married.[182] The court identified three potential bases on which the issue could be analyzed: the *Pickering*[183] balancing test; the *Elrod-Branti*[184] analysis; and strict scrutiny.[185] After extensive discussion of the alternatives, the court concluded that it was not necessary to decide which of the three analyses applied because the transfer was justified under any of the three legal standards.[186]

The second associational rights case was *Cumming v. DeKalb County*.[187] The plaintiffs were discharged in the elimination of a branch of a county department pursuant to a reduction in force.[188] The plaintiffs claimed the reduction in force was a pretext to terminate

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176. *Id.* at 617-20.
177. *Id.*
178. 12 F.3d 1558 (11th Cir. 1994).
179. *Id.* at 1559.
180. *Id.* at 1560.
181. *Id.*
182. *Id.* at 1564.
183. Pickering v. Board of Educ., 391 U.S. 563 (1968) (Requiring a balancing of the interest of the employee, as a citizen, and the interest of the State in promoting the efficiency of the public services it performs through its employees).
184. Elrod v. Burns, 427 U.S. 347 (1976) (Political patronage firings burden employees' First Amendment rights to freedom of belief and association, and such firings must survive exacting scrutiny.); Branti v. Finkel, 445 U.S. 507 (1980) (Political patronage dismissals are justifiable only when the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.).
185. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) (When governmental action or regulation burdens fundamental constitutional rights, the action or regulation is subjected to strict scrutiny and is deemed to infringe those rights unless shown to be narrowly tailored to serve a compelling government interest.).
186. 12 F.3d at 1569.
187. 24 F.3d 1349 (11th Cir. 1994).
188. *Id.* at 1351.

the branch supervisor and violated their right to associate with him.[189] The complaint and evidence established no existence of an association between the plaintiffs and the supervisor which is entitled to special constitutional protection.[190]

**Free Exercise and the Establishment Clause.** A city's anxiety about homeless persons produced enforcement of a zoning ordinance in *First Assembly of God v. Collier County*.[191] The church was located in a residential zone which permitted "customary accessory uses."[192] The church's former day care center was converted into a homeless shelter.[193] A county official charged the church with violated the zoning ordinance in maintaining the shelter.[194] Administrative appeals failed and the church was required to close the shelter.[195] The ordinance was facially neutral and of general applicability, therefore, it need not be justified by a compelling governmental interest even if it has the incidental effect of burdening a particular religious practice.[196]

*B. Fourth Amendment*

*Menuel v. City of Atlanta*[197] presented a fact situation in which a mentally disturbed person was killed by police who responded to an emergency call.[198] After an altercation,[199] the individual fled to her bedroom.[200] Believing the individual to be unarmed, the officers rushed the room and were greeted with gunfire.[201] In the next few seconds, three of the officers responded defensively by firing a total of eight simultaneous shots, six of which hit the individual and killed her.[202] The ensuing action posed Fourth Amendment issues requiring analysis of the facts under the holdings of *California v. Hodari D.*[203] and *Graham v. Connor*.[204] Under the *Hodari D.* analysis, where an

189. *Id.* at 1354.
190. *Id.*
191. 20 F.3d 419 (11th Cir. 1994).
192. *Id.* at 420.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 423.
197. 25 F.3d 990 (11th Cir. 1994).
198. *Id.* at 991-92.
199. *Id.* at 992.
200. *Id.*
201. *Id.* at 993.
202. *Id.*
203. 499 U.S. 621 (1991).
204. 491 U.S. 386 (1989).

individual, surrounded by overwhelming force and capture is a mere eventuality, neither yields to physical force nor submits to a display of authority, no seizure occurs prior to the shooting.[205] Under the *Graham* analysis, the officers actions were objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[206]

Another analysis of the totality of circumstances was presented in *Brown v. City of Hialeah*.[207] In a reverse sting operation, an undercover officer planned to sell cocaine to a suspect.[208] The suspect attempted an armed drug rip-off, prompting the officer's backup to rush the hotel room where the transaction was taking place.[209] The suspect was subdued, but the officer shouted a number of racial slurs, repeatedly shouting to the other officers to "kill him" and "kill the son of a bitch."[210] Following the *Graham* rationale, the question in an excess force case is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.[211] In focusing on the totality of circumstances confronting the officers at the time of an arrest, the facts and circumstances surrounding the arrest include the full atmosphere at the time.[212] The fact that a police officer yelled racial epithets while urging fellow officers to kill the arrestee is one such circumstance that a jury should be allowed to consider when assessing the objective reasonableness of force applied by the officers.[213]

### C. *Eighth Amendment*

In *Hudson v. McMillan*,[214] the Supreme Court clarified that excessive force claims brought by inmates under the Eighth Amendment, unlike cases alleging deliberate indifference to medical needs[215] or prison conditions,[216] need not allege a significant injury.[217] The

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205. 25 F.3d at 995.
206. *Id.* at 996.
207. 30 F.3d 1433 (11th Cir. 1994).
208. *Id.* at 1434.
209. *Id.*
210. *Id.*
211. *Id.* at 1436.
212. *Id.*
213. *Id.*
214. 112 S. Ct. 995 (1992).
215. 112 S. Ct. at 1000 (A claim of deliberate indifference to medical needs requires that the deprivation of medical care be "serious.").
216. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (In cases alleging unconstitutional jail conditions, only the deprivation of "minimal civilized measure of life's necessities" are

difference in treatment of claims was based on the "'due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.'"[218] Because the Eighth Amendment was violated whenever prison officials "maliciously and sadistically use force to cause harm," the presence of an injury resulting from the cruel and unusual conduct was not required.[219]

An application of these general principles was the focus of *Sims v. Mashburn*.[220] For disciplinary reasons, an inmate's cell was stripped of his mattress, personal property, blankets and all clothing except his undershorts.[221] Water to his toilet was cut-off.[222] This condition remained in effect from the morning of one day until 2:30 p.m. on the following day.[223] During that time, the inmate's only clothing was his undershorts and he slept on the concrete floor of his cell.[224] An Eighth Amendment claim has two components, an objective component, which inquires whether the alleged wrongdoing is objectively harmful enough to establish a constitutional violation, and a subjective component, which inquires whether the officials acted with a sufficiently culpable state of mind.[225] The court concluded that there was a failure of proof of the subjective component.[226] Once the initial application of force is determined to be justified, the courts give great deference to the actions of prison officials in applying preventative measures intended to reduce the incidence of riots and other breaches of prison discipline.[227]

### *D. Fourteenth Amendment*

**Property Interest.** A substantive due process analysis, within the deprivation of a property interest context, involves two queries.[228] First, was the plaintiff deprived of a constitutionally protected property

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sufficient to state an Eighth Amendment claim.).

217. 112 S. Ct. at 1000.

218. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

219. *Id.* However, the court noted that the analysis of whether conduct was cruel or unusual "necessarily excludes from constitutional recognition de minimus uses of physical force, provided that the use of the force is not of a sort 'repugnant to the conscience of mankind.'" *Id.* (quoting Whitley v. Albers, 475 U.S. at 327) (emphasis in original)).

220. 25 F.3d 980 (11th Cir. 1990).

221. *Id.* at 981-82.

222. *Id.* at 982.

223. *Id.*

224. *Id.*

225. *Id.* at 983 (citing Hudson v. McMillan 112 S. Ct. 995, 999 (1992)).

226. *Id.* at 984.

227. *Id.* at 984-85.

228. Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1577 (11th Cir. 1989).

interest?[229] Second, assuming a property interest, was the deprivation of that property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and without any rational basis?[230]

The Eleventh Circuit revisited *McKinney v. Pate*[231] to analyze the place of substantive due process claims in aid of state-created property interests.[232] It was observed previously[233] that, but for the binding precedent rule,[234] the panel would have reached a different result in *McKinney I*. In this public employee case,[235] the court held *en banc* that areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution.[236]

In the land use context, a constitutionally protectible property interest in a building permit was found to exist under Florida law.[237]

**Substantive Due Process.** In *Wright v. Lovin*,[238] the plaintiff's son was killed in an automobile accident that occurred when he and a friend left a voluntary summer school session in violation of school rules.[239] The action was predicated on violation of the son's substantive due process rights under the Fourteenth Amendment by intentionally failing to enforce policies designed to protect the health, safety, and well-being of students.[240] Relying on *McKinney II*,[241] the court found no constitutional duty to protect the student.[242]

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229. *Id.*

230. Hearn v. City of Gainesville, 688 F.2d 1328, 1332 (11th Cir. 1982).

231. 985 F.2d 1502 (11th Cir.) *opinion vacated*, 994 F.2d 772 (11th Cir. 1993) ("McKinney I").

232. McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

233. *See* Johnson, *supra* note 67, at 1238.

234. Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981).

235. 20 F.3d at 1554.

236. *Id.* at 1556.

237. The Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379-80 (11th Cir. 1994). To the extent that the panel's decision relied on Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982), the result may be suspect in light of McKinney II which clearly held that state-created property rights are not protectible under the Due Process Clause.

238. 32 F.3d 538 (11th Cir. 1994).

239. *Id.* at 539.

240. *Id.*

241. 20 F.3d 1550, 1556 (11th Cir. 1994) (The substantive component of the Due Process Clause protects only those rights that are fundamental; substantive due process rights are created only by the Constitution, not by state laws; tort law remains largely outside the scope of substantive due process jurisprudence.).

242. *Id.* at 1540.

**Liberty Interest.** The court also revisited *Sultenfuss v. Snow*[243] which held that Georgia's parole system creates a liberty interest protected by the Due Process Clause.[244] Analyzing the three factors in determining the existence of a liberty interest,[245] the court *en banc* concluded that no liberty interests were implicated in the Georgia parole system.[246]

## IV. CONCLUSION

The Eleventh Circuit Court of Appeals does not appear to have achieved any greater degree of unanimity than previous survey periods indicated. However, the divisions are clearly more reflective of philosophical differences than confusion about direction. It is now clear that qualified immunity is the rule absent some clearly established fact-based circuit precedent which would specifically inform a public official that his or her conduct was unlawful. The court has also served notice that the Substantive Due Process Clause of the Fourteenth Amendment is reserved for deprivation of fundamental constitutional rights. Due process claims arising from state law property rights are unquestionably limited to procedural due process examination after completion of state level proceedings. The court appears to be willing to accept *en banc* consideration of a variety of issues in order to alleviate the strictures of the binding precedent rule. The future of civil constitutional law in the Eleventh Circuit is expected to see a continuing clarification of cloudy jurisprudence attended by sharp philosophical debate.

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243. 7 F.3d 1543 (11th Cir. 1993), *vacated and reh'g en banc granted*, 14 F.3d 572 (11th Cir. 1994).

244. 7 F.3d at 1545.

245. Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979). The three factors are stated as (1) whether the system placed substantive limitations on the discretion of the decision makers; (2) whether the system mandates the outcome that must follow if the substantive predicates are met; and (3) whether the relevant statutes and regulations contain explicitly mandatory language dictating the procedures that must be followed and the result that must be reached if the relevant criteria are satisfied.

246. Sultenfuss v. Snow, 35 F.3d 1494, 1495 (11th Cir. 1994).