No. _____

In The
Supreme Court of the United States

RODRICUS CARLTEZ HURST,

Petitioner,

versus

LEE COUNTY, MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a judge or a jury decide whether an employee's speech is within the scope of his job duties so as to be unprotected by the First Amendment?

2. Does the Seventh Amendment require that cases arising under the common law involving "ordinary principles of logic and common experience" be decided by a jury?

3. In deciding whether a judge or a jury decides an issue, how does a court distinguish a question of fact from a question of law?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Rodricus Carltez Hurst, Petitioner; and
2. Lee County, Mississippi, Respondent.

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The published opinion of the United States Court of Appeals for the Fifth Circuit is reported at 764 F.3d 480 (5th Cir. 2014), and is attached as Appendix 1-10. The unpublished Judgment in a Civil Case of the United States District Court for the Northern District of Mississippi is attached as Appendix 11. There is no written opinion of the United States District Court for the Northern District of Mississippi.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on August 21, 2014, by writ of *certiorari* under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendment VII provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Petitioner Rodricus Carltez Hurst (hereinafter "Petitioner") filed a complaint alleging that Respondent Lee County, Mississippi (hereinafter "Respondent") terminated him from his position as a shift sergeant at the Lee County Jail in violation of his First Amendment right to free speech. After a jury was impaneled and heard the proof, the district court granted Respondent's Rule 50 motion for judgment as a matter of law. The district judge ruled from the bench that Petitioner's speech was not protected by the First Amendment because it was not speech of public concern but was, instead, speech made as part of Petitioner's job duties. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, agreeing with the district court that, as a matter of law, Petitioner's speech was "ordinarily within the scope of [Petitioner's] duties," Appendix 9, and, therefore, outside the protection of the First Amendment.

Facts as Developed at Trial

Petitioner was a correctional officer/shift sergeant working at Respondent's jail. The jail houses pretrial detainees for several municipalities, including the City of Tupelo, Mississippi. Petitioner supervised eight (8) correctional officers. Petitioner testified that his job was to "make sure the officers were safe, make sure . . . the inmates are safe. . . ." Petitioner was unaware of any policy which prohibited his engaging

in "general conversation" with the media who come to the jail to view the docket book.

When Petitioner arrived to supervise his shift on New Year's Day 2012, he learned that Chad Bumphis, star football player for Mississippi State University, had been arrested the prior night by the Tupelo Police Department. Petitioner fielded telephone calls from numerous media representatives seeking information about Bumphis' arrest. Additionally, a sportswriter for a local newspaper came to the jail where he and Petitioner engaged in "general conversation" about Bumphis and his arrest. Petitioner told the reporter that he was not on duty when Bumphis was arrested, but that upon his arrival at the jail, Petitioner heard that a fight had broken out in which Bumphis had received a "cut on the neck." Petitioner directed the reporter to contact the Tupelo Police Department for further information, because that department was the arresting agency.

The next morning, the sportswriter authored a newspaper article in the *Northeast Mississippi Daily Journal*, which quoted Petitioner as having stated that "when the fight broke out they [the Tupelo Police Department] just started taking people to jail."

After verifying that Petitioner had talked to a newspaper reporter, the Respondent's chief jail administrator informed Petitioner that the sheriff "no longer wants you working at the Lee County Sheriff's Department. . . ."

Respondent's sheriff testified that he fired Petitioner because of the "elaboration that he gave the media about the case." According to the sheriff, Petitioner's talking to the reporter violated the sheriff's media policy.

Opinion of the United States Court of Appeals for the Fifth Circuit

Following the presentation of the evidence, the district court entered judgment as a matter of law, finding that Petitioner's speech was not protected by the First Amendment since it was unprotected employee speech, not citizen speech.

On appeal, the United States Court of Appeals for the Fifth Circuit agreed, holding, as a matter of law, that Petitioner's "general conversation" with the newspaper reporter was within the scope of his employment and, therefore, was not protected by the First Amendment. The Fifth Circuit stated:

> [W]e hold that Hurst's statements to the news reporter, *i.e.*, the speech at issue, was "ordinarily within the scope of [Hurst's] duties" and did not "merely concern those duties." *Lane*, 134 S. Ct. at 2379.[1] Thus, Hurst was not speaking as a citizen for First Amendment purposes, and consequently his communications were not constitutionally

[1] *Lane v. Franks*, ___ U.S. ___, 134 S.Ct. 2369 (2014).

> insulated from employer discipline. *Garcetti*, 547 U.S. at 421.[2]

Appendix 9 (footnote in quote omitted).

There is a conflict in the Circuits as to whether the scope of an employee's job duties is a question of law for the court or a question of fact for the jury. Additionally, the Fifth Circuit's decision, by restricting what a jury may decide, diminishes the Seventh Amendment right to a jury trial. Therefore, Petitioner requests this Court accept the case for review.

REASON FOR GRANTING THE WRIT

THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER A JUDGE OR A JURY SHOULD DETERMINE THE SCOPE OF AN EMPLOYEE'S JOB DUTIES. THE FIFTH CIRCUIT'S HOLDING VIOLATES THE SEVENTH AMENDMENT RIGHT TO HAVE A JURY DECIDE ISSUES OF FACT.

The United States Court of Appeals for the Fifth Circuit acknowledged Petitioner's claim "that his job duties were limited to supervising his subordinate officers and keeping the officers and inmates safe." Appendix 8. Rather than allow the jury to decide whether or not to credit Petitioner's claim about the nature of job duties, the Fifth Circuit held, as a

[2] *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

matter of law, that "Hurst's statements to the news reporter, *i.e.*, the speech at issue, was 'ordinarily within the scope of [Hurst's] duties' and did not 'merely concern those duties.' *Lane*, 134 S. Ct. at 2379." Appendix 9 (footnote omitted). The Fifth Circuit credited the sheriff's claim that his "media policy" means that even "general comments" about sports or about a star athlete's being taken to jail are within the scope of a correctional officer's job duties.

In this scenario – where the evidence is conflicting as to whether Petitioner's speech was or was not within the scope of his job duties – there is a deep division in the Circuits as to whether the judge or jury is the appropriate decision-maker. *See* Sarah L. Fabian, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee – Who Decides?*, 43 U.C. Davis L. Rev. 1675 (June 2010); and *see* William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. Rev. 1695, 1699 (2001), "[t]he first important right is the right to have a jury decide whether the defendant's conduct violated or conformed to the applicable legal standard, rather than the more basic factual questions about 'what happened.'"

Other Circuits hold the issue is a mixed issue of law and fact,[3] requiring it to be submitted to a jury.

[3] According to Dorsaneo, one of "the most important attributes of the right to trial by jury [is] . . . the right . . . to have the jury decide mixed questions of law and fact, ..." Dorsaneo, 54 SMU L. Rev. at 1698.

Posey v. Lake Pend Oreille School Dist. No. 84, 546 F.3d 1121 (9th Cir. 2008), like the instant case, involved a conflict in the evidence as to the scope of plaintiff's job duties. *Posey* details the conflict in the Circuits as follows:

> But in *Garcetti* there was no dispute that Ceballos's internal memorandum had been written in execution of Ceballos's official employment responsibilities. *Id.* [*Garcetti*] at 424, 126 S.Ct. 1951 ("[T]he parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties."). Thus the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.*
>
> Here there is room for precisely such debate regarding whether Posey wrote and delivered his letter in execution of his official employment duties. Given the factual disputes presented in the record, we must therefore determine whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*,[4] or if instead *Garcetti* has transformed it into a mixed question of fact and law.
>
> Our sister circuits are split over the resolution of this question. In *Charles v. Grief*, 522 F.3d 508 (5th Cir. 2008), for example, the

[4] *Connick v. Myers*, 461 U.S. 138 (1983).

magistrate judge had concluded that the question whether Charles's statements were made in his capacity as a citizen or an employee presented a genuine issue of material fact requiring trial. *Id.* at 513 n. 17. On appeal, however, the Fifth Circuit disagreed, concluding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment." *Id.*

The Tenth Circuit has also concluded that "[all] three steps" of the inquiry into the protected status of speech, including the "determin[ation] whether the employee [has spoken] pursuant to [his] official duties," "are to be resolved by the district court [and not] the trier of fact." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202-03 (10th Cir. 2007). There, despite a dispute among the parties, the court found at summary judgment that some of the plaintiffs' speech had been made pursuant to their employment duties and some had not. *Id.* at 1204.

The District of Columbia Circuit has also held, following *Garcetti*, that the question whether a plaintiff "ha[s] spoken as a citizen on a matter of public concern" is a "question[ ] of law for the court to resolve," and not a "question[ ] of fact ordinarily for the jury." *Wilburn v. Robinson*, 480 F.3d 1140, 1149

(D.C. Cir. 2007) (internal quotation omitted) (going on to affirm summary judgment because, on review of the evidence of plaintiff's alleged but apparently disputed employment duties, the speech "easily" fell within the plaintiff's job responsibilities).

In conflict with the Fifth, Tenth, and D.C. Circuits, the Third Circuit has "held that 'whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law.'" *Reilly v. City of Atlantic City*, 532 F.3d 216, 227 (3d Cir. 2008) (quoting *Foraker v. Chaffinch*, 501 F.3d 231, 240 (3d Cir. 2007)). In *Foraker*, the Third Circuit considered a First Amendment retaliation case that had already gone to trial. The court applied "clear error" review to the factual finding that the plaintiffs' speech had been "made pursuant to employment duties." *Foraker*, 501 F.3d at 250 (Pollak, J., concurring).

The Seventh Circuit has implicitly sided with the Third Circuit, concluding in *Davis v. Cook County*, 534 F.3d 650 (7th Cir. 2008), that summary judgment was appropriate because "no rational trier of fact could find" that Davis's speech had been made in her capacity as a private citizen. *Id.* at 653. And, prior to *Garcetti*, the Eighth Circuit had already concluded (with respect to the second element, requiring the balancing of interests between the individual and the state) that "any underlying factual disputes concerning whether the speech at issue [is] protected

> should [be] submitted to the jury." *Casey v. City of Cabool*, 12 F.3d 799, 803 (8th Cir. 1993) (citing *Shands v. City of Kennett*, 993 F.2d 1337, 1342 (8th Cir. 1993)).

Posey, 546 F.3d at 1127-1128 (footnotes omitted).

Contrary to the Fifth Circuit's view that the scope of an employee's job duties is a legal issue, the Ninth Circuit in *Posey* reached the opposite conclusion, holding:

> Generally, facts that can be found by application of ordinary principles of logic and common experience are entrusted to the finder of fact at trial, rather than determined as a matter of law on summary judgment.
>
> In determining whether plaintiff's speech was spoken as public employee or private citizen, as required to analyze First Amendment protected status of speech, the scope and content of the plaintiff's job responsibilities are questions of fact that can and should be found by a trier of fact through application of principles of logic and common experience.

Posey, 546 F.3d at 1129.

Similarly, *Fox v. Traverse City Area Public Schools Bd. of Educ.*, 605 F.3d 345, 350 (6th Cir. 2010), acknowledged that "the circuits are divided over 'whether . . . *Garcetti* has transformed [the issue of the scope of job duties] into a mixed question of fact and law.'"

Posey's holding, that disputes about the scope of an employee's job duties are questions of fact, is correct. Tedious workplace issues involving the actual job duties which an employee must perform are not matters for which judges have any particular expertise or experience. It is "assumed that twelve men know more of the common affairs of life . . . , that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657, 664 (1873).

Recently, this Court observed that "[t]he witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. . . . [G]enuine disputes are generally resolved by juries in our adversarial system." *Tolan v. Cotton*, ___ U.S. ___, 134 S.Ct. 1861, 1868 (2014). This case involved a conflict in testimony about job duties. Petitioner testified that his job duties were limited to supervising the inmates and correctional officers and assuring that both were kept safe. Petitioner was aware of no media policy which prohibited a correctional officer from having general conversation about a local football star or prohibited him from making a comment about an arrest by another law enforcement agency.

Respondent's contention, on the other hand, is that under the sheriff's broad media policy even an employee's conversation about sports or about an arrest by another law enforcement agency is within the scope of the employee's job duties. Logically, it was for a jury to decide which of these views was

more credible. *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), cert. denied, *City of Burbank, Cal. v. Dahlia*, ___ U.S. ___, 134 S.Ct. 1283 (2014), observed that "the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties. . . ." *Dahlia*, 735 F.3d at 1075.

Mislabeling fact questions as legal questions is a sure way to avoid the Seventh Amendment command that juries decide fact issues arising under the common law. R. Jack Ayers, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 Baylor L. Rev. 377, 479 (Spring 2008), points out that "the late Professor Charles Alan Wright and his distinguished co-authors stated that recharacterizing questions of fact as law questions is really an obvious subterfuge" for avoidance of the Seventh Amendment right to trial by jury.[5] Of course, "[t]he marginalization of the jury undermines the democratic vision of full participation and may discourage citizen respect for the legal system in general." Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception and Politics of the Civil Jury*, 80 Cornell L. Rev. 325, 328 (Jan. 1995).

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[5] Ayers' citation is to 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2819, at 202-03 (2d ed. 1995) (citations omitted).

This Court has long condemned any procedure which diminishes the Seventh Amendment right to trial by jury. *Dimick v. Schiedt*, 293 U.S. 474 (1935), emphasized that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick*, 293 U.S. at 486.

Mischaracterizing fact questions as legal questions and thus avoiding a jury decision on a matter of common experience and logic strikes at the heart of principles that are an established part of our country's heritage. Stephan Landsman, *Juries as Regulators of Last Resort*, 55 Wm. & Mary L. Rev. 1061, 1072 (2014), quotes 3 William Blackstone, "Commentaries" by stating that "[a] competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice."

This Court quoted the same Blackstone Commentaries in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580 (1990), in noting that the right to trial by jury was "crucial in the eyes of those who founded this country," was "the glory of the English law," and is "the most transcendent privilege which any subject may enjoy." *Chauffeurs, Teamsters and Helpers, Local No. 391*, 494 U.S. at 580.

Unlike *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), a case involving construction of technical documents litigated in a patent infringement case, a case deciding the scope of an employee's job duties, will involve "a jury's capabilities to evaluate demeanor, cf. *Miller*, *supra*, at 114, 117, 106 S.Ct., at 451, 453,[6] to sense the 'mainsprings of human conduct,' *Commissioner v. Duberstein*, 363 U.S. 278, 289, 80 S.Ct. 1190, 1198, 4 L.Ed.2d 1218 (1960), or to reflect community standards, *United States v. McConney*, 728 F.2d 1195, 1204 (C.A.9 1984) (en banc), ..." *Markman*, 517 U.S. at 389-90.

The Fifth Circuit's view, that a judge, not a jury, decides common sense issues about the "mainsprings of human behavior," such as the scope of a correctional officer's job duties, diminishes the Seventh Amendment right to trial by jury so beautifully expressed by former United States Court of Appeals for the Fifth Circuit Judge Richard Rives, dissenting in *Boeing Co. v. Shipman*, 411 F.2d 365, 387 (5th Cir. 1969):

> This is no occasion for an old common-law lawyer to indulge in a panegyric on the virtues of jury trial; how in our fallible system of human justice it is the best instrument yet devised for the determination of facts, how even its imperfections operate to rub the rough edges off of technical principles of law when they would result in unjust verdicts,

[6] *Miller v. Fenton*, 474 U.S. 104 (1985).

> how it is constantly improving with the progress of our jurisprudence and with the advance of education and enlightenment, how it gives the citizen a proud and rightful place in the administration of justice, and tends to make real our utopian dream of a "government of the people, by the people, and for the people." There are many who do not agree with my almost reverential attitude toward jury trial, but this is no occasion for a debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases.

CONCLUSION

By deciding for itself the scope of Petitioner's job duties, rather than allowing a jury to decide this issue, the Fifth Circuit Court of Appeals seriously overstepped its role in violation of the Seventh Amendment. "[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are

jury functions, ..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60540

RODRICUS CARLTEZ HURST,

Plaintiff-Appellant,

v.

LEE COUNTY, MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

(Filed Aug. 21, 2014)

Before STEWART, Chief Judge, and WIENER and COSTA, Circuit Judges. CARL E. STEWART, Chief Judge:

Plaintiff-Appellant Rodricus Carltez Hurst filed suit in federal district court alleging that Defendant-Appellee Lee County, Mississippi – acting through its Sheriff – terminated Hurst's employment in violation of his First Amendment right to free speech. The district court granted judgment as a matter of law in favor of Lee County. We affirm.

I. FACTS & PROCEDURAL HISTORY

Hurst became employed as a corrections officer with the Lee County Sheriff's Department ("the Department") in 2008 under Sheriff Jim H. Johnson, who was first elected in 2003. Specifically, Hurst worked as a shift sergeant in Lee County Jail ("the Jail") and supervised eight other correctional officers. The Jail provides jail space for several Lee County law enforcement agencies, including but not limited to the Tupelo, Mississippi Police Department. At the time, Sheriff Johnson's media relations policy, which was included in the Department's standard operating procedures, provided that only the Sheriff or his "designee" would be permitted to coordinate with the media with respect to crimes and investigations. Non-designees were permitted to reveal certain "public information" to the media which included the limited information entered on the Department's docket book and website. According to the record, Hurst had spoken with members of the media numerous times during the course of his employment with the Jail.

In 2012 on New Year's Day, Hurst arrived at the jail to begin his shift and learned that Chad Bumphis, a Mississippi State University football player, had been arrested the night before by the Tupelo Police Department. That day, numerous media representatives telephoned the Jail seeking information about Bumphis's arrest; Hurst fielded many of those calls. At one point during that day, Brad Locke, a sports writer for the *Northeast Mississippi Daily Journal (NMDJ),* travelled to the Jail and questioned

Hurst about the incident that happened the night before involving Bumphis. Later that day, Locke published an article in the *NMDJ* in print and online about the arrest of Bumphis, attributing certain quotes in the articles to Hurst. One article quoted Hurst as saying that "[w]hen the fight broke out, they *[i.e.,* the Tupelo Police Department] started taking people to jail."

Sheriff Johnson read the articles and directed that Hurst be interviewed by Department personnel with regard to the statements. Hurst acknowledged that he had talked to the reporter and wrote out a statement which provided in part: "I told the reporter from what I had heard a group fight had broke out and somehow he [Bumphis] got cut on the neck." Upon reading Hurst's written statement, Sheriff Johnson fired Hurst for violating the Department's media relations policy.

Following his termination, Hurst applied for and was denied unemployment benefits by the Mississippi Department of Employment Security ("MDES").[1] The MDES determined that Hurst was discharged after wrongfully releasing information to the media without authorization from the Sheriff. Hurst appealed and an Administrative Law Judge ("ALJ") also held that Hurst had wrongfully released information to the media without authorization from the Sheriff in

[1] Also known as the Mississippi Employment Security Commission. *See* Miss. Code Ann. § 71-5-101.

violation of the Department's media relations policy. Hurst then brought suit in the United States District Court. Lee County filed a motion for summary judgment on the grounds that the findings of the MDES and the ALJ should have a preclusive effect on the district court proceedings. The district court denied the motion in part and granted the motion in part and held that "[t]he MDES factual determination is entitled to preclusive deference; however, the facts established by the ALJ are not dispositive [of] the question of whether Lee County Sheriff's Department policy on communication with the media by employees is constitutionally valid under the First Amendment."

The case proceeded to jury trial and, at the close of Hurst's case in chief, Lee County filed a Rule 50 motion for judgment as a matter of law. FED. R. CIV. P. 50(a). Relying primarily on this court's holding in *Nixon v. City of Houston,* 511 F.3d 494 (5th Cir. 2007), the district court ruled from the bench and granted the motion in favor of Lee County. The court's ruling stated that: (1) Hurst spoke to the reporter as an employee of the Sheriff's Department as part of his official job duties; and (2) any part of the speech Hurst engaged in with Mr. Locke that would not be considered part of his official job duties – therefore speech engaged in as a private citizen – was nevertheless unprotected because it was not of "public concern." Hurst appeals herein.

II. STANDARD OF REVIEW

"We review the district court's grant of judgment as a matter of law de novo, applying the same legal standards as the district court." *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 474 (5th Cir. 2012). Judgment as a matter of law may be granted when "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1). In reviewing the district court's grant of judgment as a matter of law, we "consider all of the evidence in the light most favorable to the nonmovant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts to the jury." *Gonzalez,* 689 F.3d at 474-75.

III. DISCUSSION

A. First Amendment Speech

Hurst's first argument on appeal is that the district court erroneously granted Lee County's Rule 50 motion because Hurst's speech was not employee speech pursuant to his job duties and should have been considered citizen speech protected by the First Amendment. We disagree.

While government employees are not stripped of their First Amendment right to freedom of speech by virtue of their employment, this right is not without

exception. *Pickering v. Bd. of Educ. of Tp. High Sch. Dist. 205, Will Cnty., Ill.,* 391 U.S. 563, 568 (1968). A four-pronged test is used to determine whether the speech of a public employee is entitled to constitutional protection from employer discipline. *See Juarez v. Aguilar,* 666 F.3d 325, 332 (5th Cir. 2011). A plaintiff must establish that: (1) he "suffered an adverse employment decision"; (2) his "speech involved a matter of public concern"; (3) his interest in speaking outweighed the governmental defendant's "interest in promoting efficiency"; and (4) "the protected speech motivated the defendant's conduct." *Id.*

The Supreme Court noted in *Garcetti v. Ceballos* that, for an employee's speech to qualify for First Amendment protection, he must be speaking "as a citizen on a matter of public concern." 547 U.S. 410, 418 (2006). This court has characterized that requirement – that he be speaking as a citizen on a matter of public concern – as a "threshold layer" to the second prong of the retaliation test. *See Davis v. McKinney,* 518 F.3d 304, 312 (5th Cir. 2008). *Garcetti* further states that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti,* 547 U.S. at 421. In the past, we have acknowledged that *Garcetti* does "not explicate what it means to speak 'pursuant to' one's 'official duties.'" *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689,

692 (5th Cir. 2007) (quoting *Garcetti,* 547 U.S. at 424).

More recently, however, the Supreme Court expounded upon this issue in *Lane v. Franks,* 134 S. Ct. 2369, 2379 (2014). In *Lane,* the Court reasoned that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* The Court ultimately held in that case that the First Amendment "protects a public employee who provide[s] truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities." *Id.* at 2374-75.

When a court determines that an employee is not speaking as an employee, but rather as a citizen on a matter of public concern, "the possibility of a First Amendment claim arises." *Garcetti,* 547 U.S. at 418. To then determine whether the employee's speech is entitled to First Amendment protection, the court proceeds to the *Pickering* balancing test, which inquires as to whether the interest of the government employer "in promoting the efficiency of the public services it performs through its employees" outweighs the employee's interests, as a citizen, "in commenting upon matters of public concern." *Pickering,* 391 U.S. at 568. In performing this balancing test, the court looks at "whether the statement impairs discipline by

superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson,* 483 U.S. 378, 388 (1987).

Here, Hurst was an officer who, according to the Department's media relations policy, could have obtained authorization from his superiors to speak to the media about the event involving Bumphis that took place while Hurst was off duty the night before.[2] He chose, however, to make statements to the media without obtaining that authorization and was ultimately terminated for doing so. Hurst argues on appeal that his job duties were limited to supervising his subordinate officers and keeping the officers and inmates safe. However, Sheriff Johnson's media relations policy states that employees like Hurst were authorized to field calls from the media – such as the numerous calls Hurst fielded on January 1, 2012 – and to provide certain limited information when doing so. If Hurst was not authorized as a designee to

[2] We note herein that the fact that Hurst first learned of Bumphis's arrest upon arriving to begin his shift at the Jail is not dispositive of the question of whether his speech to the reporter about the arrest was employee speech. *See Lane v. Franks,* 134 S. Ct. 2369, 2379 (2014) (stating that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech.").

speak on a specific issue about an arrest, he was permitted to provide certain publicly available information to the media such as the name of the arrestee, the charge, the amount of the arrestee's bond, and whether the Department had released the arrestee. Further, the Sheriff at his discretion could have authorized Hurst as his designee to make other statements to the media. Hurst did not obtain that authorization before making the statements at issue to the news reporter.

Accordingly, we hold that Hurst's statements to the news reporter, *i.e.,* the speech at issue, was "ordinarily within the scope of [Hurst's] duties" and did not "merely concern those duties." *Lane,* 134 S. Ct. at 2379.[3] Thus, Hurst was not speaking as a citizen for First Amendment purposes, and consequently his communications were not constitutionally insulated from employer discipline. *Garcetti,* 547 U.S. at 421. Moreover, because we have held Hurst's speech to be ordinarily within the scope of his duties and therefore not citizen speech protected by the First Amendment, we do not reach the issue of whether Hurst's speech involved "a matter of public concern." *Garcetti,* 547 U.S. at 418; *Juarez,* 666 F.3d at 332.

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[3] In another case involving a law enforcement official making an unauthorized comment to the media, we concluded that the statement was "not protected by the First Amendment because it was made pursuant to his official duties and during the course of performing his job." *Nixon v. City of Houston,* 511 F.3d 494, 498 (5th Cir. 2007).

B. Duty to Investigate

Hurst's second argument on appeal is that the Rule 50 motion was erroneously granted because the Sheriff violated his duty to conduct a reasonable investigation to determine whether Hurst had engaged in protected speech when speaking with the news reporter. *See Waters v. Churchill,* 511 U.S. 661, 677-80 (1994). In light of our foregoing conclusion that Hurst's speech to the news reporter was not protected First Amendment speech, we pretermit discussion of Hurst's argument that Sheriff Johnson violated his duty to conduct a reasonable investigation under *Waters* prior to terminating Hurst's employment. *See id.*

IV. CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court granted in favor of Defendant-Appellee Lee County, Mississippi.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI WESTERN DIVISION

RODRICUS CARLTEZ HURST PLAINTIFF

V. CAUSE NO.: 3:12cv027-SA

LEE COUNTY, MISSISSIPPI DEFENDANT

JUDGMENT IN A CIVIL ACTION

This action was decided by the undersigned judge on a Federal Rule of Civil Procedure 50 Motion for Judgment as a Matter of Law. Accordingly, judgment is hereby entered for the Defendant, and this action is dismissed on the merits.

SO ORDERED, this the 23rd day of July, 2013.

/s/ Sharion Aycock
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RODRICUS CARLTEZ HURST	PLAINTIFF
VS.	NO. 3:12CV27
LEE COUNTY, MISSISSIPPI	DEFENDANT

TRANSCRIPT OF JURY TRIAL
VOLUME III OF III

BEFORE HONORABLE SHARION AYCOCK
UNITED STATES DISTRICT JUDGE

Aberdeen, Mississippi
July 23, 2013

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[227] (COURT CALLED TO ORDER AT 9:05 A.M.)

(MR. CARNATHAN NOT PRESENT.)

* * *

[382] THE COURT: Okay. Let's take about a 15-minute break.

(RECESS TAKEN.)

THE COURT: A lot of case law, a lot of different outcomes, a lot of different scenarios. Frankly, not one that fits our facts here very closely, so we're having to look at this pretty closely to see if we can decipher under our case law what would be the correct outcome here.

And the Court is going to grant the directed verdict. The Court is of the opinion that Mr. Hurst was an employee when he uttered this speech, and I do so looking for guidance in the *Nixon* case, which is a Fifth Circuit 2007 case.

And it says, "Because the speech at issue in *Williams* was not required by Williams' job responsibilities, the Court went on to determine the extent to which under *Garcetti* a public employee is protected by the First Amendment if his speech is not necessarily required by his job duties but nevertheless

is related to his job duties. The Court ultimately concluded that activities undertaken in the course of performing one's jobs are activities pursuant to official duties."

Mr. Waide contends that there are different facts where the jury could infer the reason that he was terminated, [383] but I don't think that is the pertinent nor the first question that we've got to ask ourselves under this First Amendment claim.

The first question would be whether or not the plaintiff spoke as a citizen and not part of his official duties. And I believe he spoke as an employee of the sheriff's department, and I believe that he spoke as part of his official duties.

And that's true even if you understand that the sheriff takes the position that he was unauthorized to speak or that he was not the designated media person to speak, because what Mr. Hurst did in this case was what he had done on many other occasions.

And that was, as the jailer, he would speak with persons from the media. He would provide them information that he believed that he had the authority to provide, i.e., arrestee's name, date of arrest, whether or not that person had bonded out.

So even if we take those portions of the speech that arguably exceeded his authority, comments like what was in the article, such as they were all taken to jail or the cut or any of that, if you take those comments, then still he was doing it as part of his official

duties. He was at the jail. He was on duty. He was in his uniform. He's doing what he's done in the past. He's met with persons from the media. He's providing [384] them information.

And he states that he was having a – with respect to some of this conversation, just a general conversation with the guys from the media, but he was doing – he was having that general conversation, in the Court's mind, because he was performing his official duty while at the jail providing this information.

So I don't think that he was a private citizen when he uttered any portion of the speech or all of the speech taken altogether, even those parts that he contends that he did not, you know, tell Mr. Locke.

But to the extent that any portion of his speech was outside of his official duties, then I don't think the speech that was outside his official duties – arguably outside his official duties – or even taking the speech as the entirety, I don't think it's a matter of public concern.

Looking at the *Branton,* B-R-A-N-T-O-N, *versus City of Dallas* case, which is a 2001 case where it talks about what constitutes matters of public concern, it says, "Matters of public concern are those which can be fairly considered as relating to any matter of political, social, or other concern to the community." And that is citing *Connick*.

There is a difference between matters of public concern and matters of public interest. So when I earlier indicated to you my real concern was, is a conversation – a [385] speech about a football player at Mississippi State, is that a matter of public concern?

But reviewing the Fifth Circuit cases that have been cited on the record, as quickly as we could do that during the break, and looking at those United States Supreme Court cases, first of all, I don't find any case that – where there is speech uttered about, I'll say, a celebrity that is protected, but I don't find any similar cases that talks about a similar scenario to this.

What I do find are those cases that consider a matter of public concern to be things like an employee speaking about corruption or jail abuse or misappropriation of funds or violence. And obviously – well, not obviously. I don't know that anything is obvious. Those are the types of circumstances that the Fifth Circuit in the past has deemed matter of public concern that is protected.

I think there is at least – this is the example that I would like to tell you as a distinction that I have drawn. This case might be a matter of public concern if the speech had been about a football player from Mississippi State being roughed up by jail employees while he was incarcerated.

Now, that would not be a matter of public concern because he was a football player for Mississippi State.

It would be a matter of public concern because it would expose alleged jail abuse.

[386] And if you think about matters of public concern, then it seems to me that it ought not be something that's regional. It ought to be something that would have an appeal to any person in the United States.

Whether they lived in Mississippi or not, i.e., if I talk to you and expose – if I expose matters about misappropriation of public funds, then a citizen in California ought to be just as concerned about that as a citizen in Mississippi. And I really doubt that a citizen in California could care less about a Mississippi State football player being arrested.

So it seems to me, for me to try to determine what degree one has to consider speech to be a matter of public concern, it ought to be something more than a regional issue. It ought to be something that doesn't just interest sports fanatics. It ought to be something that doesn't just interest Mississippians.

It ought to be something that has broad interest because they are of societal interest or they're the types of things that, as citizens, regardless of where we live, we would have a concern about. In other words, not just good gossip or something that makes newspapers sell, but something that is really exposing a reason or a concern where there ought to be almost a public outcry that we need to do something about what this employee, as a private citizen, is speaking about.

[387] I just don't think this is the kind of speech that raises – rises to the level of being of that concern. You know, if – another way I've tried to look at it is, if this type of speech – just taking it in its totality, if this type of speech was deemed a matter of public concern, then practically any information could be publicized upon an arrest just because the media expressed an interest in knowing about it.

If I got arrested, they'd probably be interested, but I don't know that that's a matter of public concern as it relates to corruption, misappropriation of funds, violence, jail abuse, the kind of thing that – at least to the extent that this court is looking for guidance, where there – those types of circumstances that have been cited in the past to be matters of public concern, I don't think this situation rises to that.

The Court determines as a matter of law that Hurst was a public employee undertaking official duties when he engaged in the subject speech. The Court finds that even if he was a private citizen, that he was not speaking on a matter of public concern for the reasons that I've stated. Therefore, his speech was not protected. Therefore, he's not entitled to a First Amendment claim. Therefore, the Court grants the defendant's directed verdict motion.

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