When Criminal and Civil Cases Collide

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Many attorneys have never served as a prosecutor or defended a client against criminal charges. For them, civil law is something "we" practice here on Earth, and criminal law is something "they" practice on Mars. But those worlds do collide. When an incident results in criminal charges and a civil lawsuit, counsel should stop and consider the advantages of *simultaneously* litigating the civil action and defending the parallel criminal prosecution. Yes, more often than not, the civil case will be stayed pending resolution of the criminal case, but there are exceptions to every rule. When the victim, the victim's family or a third party files a civil action in federal court *before* the state court criminal trial is held, they sometimes create an opportunity for the defense.

On August 8, 2008, the family of the late Baron Collins, Jr. (a.k.a. Baron Pikes) filed in the Western District of Louisiana a civil rights action against former Winnfield Police Officer Scott Nugent and a product liability action against TASER® International, Inc. ("TASER"), blaming both for Pikes' in-custody death.[1] Three days later, a Winn Parish Grand Jury indicted Nugent for the crime of manslaughter.[2] Because of the medical and scientific evidence involved, TASER chose to aggressively pursue civil discovery on earth *and* to send their counsel and experts to Mars.

Over the next five years, we learned through trial and error how to avoid and handle the motions to quash and motions to stay that were filed in the federal civil action. Every motion to quash or stay is unique, but here are thirty-five general questions that need to be asked when civil and criminal worlds collide.

Opposing Motions To Quash:

1. Does the principal claim arise out of federal law?

In *Thomas v. Winnfield, supra,* Plaintiff's principal claim arose out of the federal law established by 42 U.S.C. §§1983 and 1988. In the Complaint, Plaintiff specifically invoked the jurisdiction of the court based on that principal claim. Plaintiff invoked the supplemental jurisdiction of the court to consider claims arising under state law, including two "product liability" state claims brought against TASER, but the Plaintiff's principal claim arose out of federal law.

2. If the principal claim arises out of federal law, does the federal common law of privilege or state law of privilege govern discovery?

When elected coroner Dr. Randolph Williams, M.D., filed a Motion To Quash TASER's subpoena for his file, the threshold question was whether federal common law or Louisiana state law governed his Motion (Doc. No. 61). By then, it was established that whenever a principal claim in federal court arises under federal law, with pendent jurisdiction over a state claim, federal common law of privileges apply. *See Wilstein v. San Tropai Condominium Master Ass'n*, 189 F.R.D. 371, 375(N.D.Ill. 1999), *quoting in part, Memorial Hospital For McHenry County v. Shadur*, 664 F.2d. 1058, 1062 (7th Cir. 1981)("The principal claim. . . arises. . . a federal law. Because the state law does not supply the rule of decision as to this claim, the district court was not required to apply state law in determining whether the material sought ... is privileged. Instead, the question of whether the privilege asserted . . . should be recognized is governed by federal common law.").

In *Cormier v. Foti*, 2008 WL 4758660 (W.D. La. 10/28/08), United States Magistrate Judge Mildred E. Methvin had to determine whether federal common law or Louisiana law should govern a defendant's motion to compel non-party custodians to produce the plaintiff's medical records. Like Dr. Randolph Williams, the non-

1 *Thomas v. Winnfield,* Civil Action No. 08-1167, USDC, Western District, Louisiana.

2 *State v. Nugent*, Case No. 41476, 8th JDC, Winn Parish, State of Louisiana.

party custodian in *Cormier* also cited the exclusion established by Louisiana Revised Statute 44:3A(1) regarding pending criminal litigation. Magistrate Judge Methvin concluded that federal common law governed. Judge Methvin stated:

> "Furthermore, federal common law, not Louisiana law, governs respondent's discovery objections. Fed.R.Evid. 501. "When considering a federal claim, federal courts apply federal common law, rather than state law, to determine the existence and scope of privilege. Federal courts will, however, consider state policies supporting a privilege in weighing the government's interest in confidentiality."

Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991) (citing Fed.R.Evid. 501). Similarly, in *Thomas v. Winnfield, supra,* Magistrate Judge James Kirk found: "The case is governed by federal common law." *See* 9/25/09 Order, Doc. # 70.

3. Does federal common law of privilege govern discovery issues even when the evidence sought is relevant to a pendent state claim?

Even if plaintiff asserted claims under both federal and state law, "all of the circuits that have directly addressed this issue have held that the federal law of privilege governs on issues of discoverability and/or admissibility" even when the evidence sought is relevant to a pendent state claim. *Hinsdale v. City of Liberal,* 961 F.Supp. 1490, 1493 (D.Kan. 1997)(citing cases from Second, Third, Sixth, Seventh & Eleventh Circuits), *aff'd,* 981 F.Supp. 1378 (D.Kan. 1997); *accord Walters v. Breaux,* 200 F.R.D. 271, 273 (W.D. La. 2001)(Tynes, M.J.).

4. Does federal common law of privilege recognize a qualified privilege protecting investigative files in an ongoing (state) criminal investigation?

Federal common law recognizes a qualified privilege protecting investigative files in an ongoing criminal investigation or information which would reveal the identity of confidential informants. *See Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

5. Does a blanket privilege exist for investigative files in ongoing (state) criminal investigations?

No blanket privilege exists under federal common law. *See Coughlin v. Lee*, 946 F.2d 1152, 1159-60 (5th Cir. 1991); *Wilson v. Martin County Hosp. Dist.*, 149 F.R.D. 553, 555 (W.D. Tex. 1993).

6. How will a federal court determine whether the qualified privilege bars discovery?

To determine whether the qualified privilege for investigative files bars discovery of given documents, the trial court will balance the government's interest in confidentiality against the litigant's need for the documents, considering the ten factors articulated in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973). *Coughlin,* 946 F.2d at 1159-60 (citing La.R.S. 44:1. 44:3).

7. What right does a civil defendant have to obtain discovery in an ongoing (state) criminal investigation?

A civil defendant has the right to obtain discovery by "depositions upon oral examination" pursuant to Federal Rule of Civil Procedure 26(a)(5); and the scope of that discovery includes "any matter, not privileged that is relevant to the claim or defense of any party." Federal Rule of Civil Procedure 26(b)(1). These discovery rules are accorded a broad and liberal treatment to affect their purpose of adequately informing litigants in civil trials. *Herbert v. Lando*, 441 U.S. 153, 176 (1979).

In *Thomas v. Winnfield, supra,* TASER's subpoena to depose Dr. Williams regarding the cause and manner of Baron Pikes' death and TASER's *subpoena duces tecum* for Dr. Williams' records were demands for relevant evidence. On April 15, 2009, Plaintiff Latrina D. Thomas, Tutrix on behalf of her minor child, Ka'daryan Da'shun Thomas ("Plaintiff"), produced Initial Disclosures listing Dr. Williams as an individual "likely to have discoverable information relevant to this matter." Plaintiff specifically represented: "Dr. Williams will testify with respect to his examinations and findings of Baron D. Pikes as the coroner." Further, Plaintiff specifically identified as relevant documents: (1) the death certificate; (2) "all coroner's autopsy reports"; and (3) all medical reports.

8. Is there a presumption in favor of discovery in civil cases?

In civil cases, there is a strong presumption in favor of discovery, and a federal or state agency must overcome that presumption when attempting to stay discovery. *See United States v. Gieger Transfer Servs.,* 174 F.R.D. 382, 385 (S.D. Miss.

1997). Consequently, "[a] district court should stay the civil case only upon a showing of "special circumstances," so as to prevent the defendant from suffering substantial and irreparable prejudice." *See Alcala v. Texas Webb County*, 625 F.Supp.2d 391, 398 (S.D. Tex. 6/1/09)(underline added) *quoting SEC v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 666-667 (5th Cir. 1981) (citing *United States v. Kordel*, 397 U.S. 1, at 11-13, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970); *and citing SEC v. Dresser Industries, Inc.,* 628 F.2d 1368, 1377 (D.C.Cir. 1980)(en banc), *cert. denied,* 559 U.S. 993, 101 S.Ct. 539, 66 L.Ed.2d 289 (1980).

9. Who bears the burden of proof?

The non-party resisting discovery bears the burden of demonstrating the existence of a federal common law privilege, which is a federal exception to the demand for relevant evidence. *See Cormier v. Foti*, 2008 WL 4758660 (W.D. La. 10/28/08), p. 3 ("The Center at Stuller Place, as a non-party resisting discovery, bears the burden of demonstrating the existence of any privilege."), *citing Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 721 (5th Cir. 1985).

In *Thomas v. Winnfield,* Dr. Williams failed to demonstrate a federal common law privilege that exempted him from responding to TASER's discovery demand. Instead, Dr. Williams assumed that Louisiana state law governed, and was content to argue that Louisiana Revised Statute 44:3 exempted a coroner from producing records pertaining to a "pending criminal litigation." In so doing, Dr. Williams failed to satisfy his burden of demonstrating the existence of a federal common law privilege.

10. What is the burden of proof for the non-party resisting discovery?

The non-party resisting discovery bears the burden of making a (threshold) "substantial showing" that specific harms are likely to result from disclosure. *See Cormier v. Foti*, 2008 WL 4758660 (W.D. La. 10/28/08), p. 3 ("Here, respondent has made no showing, much less a substantial showing, that specific harms are likely to result from disclosure of information contained within the files.").

In *Thomas v. Winnfield,* Dr. Williams failed to make a substantial showing that specific harm was likely to result from his answering questions regarding Baron Pikes' death and from his producing the records in his possession. Incredibly, Dr. Williams filed a seven page Memorandum (Doc. No. 62-2) in which he failed to discuss or identify even one specific harm that was likely to result from the completion of his deposition or the production of the records in his possession.

11. How do I prove no harm will result from disclosure?

You should always start by collecting available documents, and scouring those documents to determine whether the relevant information has already been disclosed. You should also search the internet, public records, and transcripts of television/radio interviews, to find out whether the an expert has already disclosed his opinion (whether or not the expert has disclosed the basis for that opinion or his methodology).

In *Thomas v. Winnfield,* TASER argued that no harm could result from the disclosure of the requested information because the civil litigants: (1) had already obtained the 119 records in Dr. Carney's possession; (2) had already deposed Dr. Carney, who actually performed the autopsy; (3) had already obtained a copy of the death certificate, on which Dr. Williams identified and certified the cause and manner of death; and (4) had already obtained proof Williams had stated his opinion on CNN. Because Dr. Williams' opinion was already disclosed, TASER was able to argue that it was impossible for Dr. Williams to satisfy his burden of proving that "specific harm" would result from his disclosing his methodology or the basis for his opinion.

12. Did the non-party resisting discovery identify a federal common law privilege?

It is well-established that "[d]etermining privilege is a 'particularistic and judgmental task' of balancing the 'need of the litigant who is seeking privileged investigative materials. . . against the harm to the government if the privilege is lifted.'" *Cormier v. Foti*, 2008 WL 4758660 (W.D. La. 10/28/08), p. 3, *quoting In re U.S. Dept. Of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006), *citing Dellwood Farms v. Cargill, Inc.,* 128 F.3d 1122, 1125 (7th Cir. 1997). When the non-party resisting disclosure fails to identify the federal common law privilege, it is impossible for the court to balance or weigh the government's interest in confidentiality because the plaintiff failed to articulate that interest.

In *Thomas v. Winnfield,* Magistrate Judge Kirk found that "mover has failed to identify any applicable privilege. No potential harm has been shown by release of the information and the investigative privilege (which has not been specifically asserted) is not applicable." 9/25/09 Order, Doc. # 70.

13. Did the non-party resisting discovery provide a privilege log & explain how the privilege applied to each document in that privilege log?

The non-party resisting disclosure should provide a privilege log and explain how the investigatory privilege applies to each document. In *Thomas v. Winnfield,* Dr. Williams failed to provide a privilege log, and failed to explain how the investigatory privilege applied to each document identified in that privilege log. TASER argued that Dr. Williams' failure to support his Motion (Doc. 62-1) with that privilege log required denial of that Motion.

14. When does a court consider the 10 Frankenhauser factors?

When a non-party resisting discovery asserts the qualified privilege protecting investigative files, the court is still required to consider the ten factors first announced in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa. 1973) to determine whether the government's need to keep confidential Dr. Williams' information outweighed the needs of TASER and the other civil litigants. *See Cormier v. Foti*, 2008 WL 4758660 (W.D. La. 10/28/08), p. 3, *citing Coughlin v. Lee,* 946 F.2d 1152, 1159-1160 (5th Cir. 1991).

15. Will disclosure thwart governmental processes by discouraging citizens from giving the government information?

The first *Frankenhauser* factor requires the court to determine the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information. Take a look at federal and state opinions defining confidential informant. *See Fryar v. Guste*, 371 So.2d 742 (La. 1979)(clarifying that a confidential informant is an individual who is only willing to give information to a law enforcement agency provided their identity is kept secret or in confidence).

Make certain disclosure will not reveal any confidential informants. Make certain you make it clear in the discovery that opposing counsel can redact the documents to conceal and protect the names and addresses of any confidential informants. If disclosure will not compromise the identity of a confidential informant, this *Frankenhauser* factor will favor disclosure.

16. How will disclosing the identity of a citizen who has given information impact that citizen?

See analysis of first *Frankenhauser* factor, *supra.*

17. To what degree will governmental self-evaluation & consequent program improvement be chilled by disclosure?

The third *Frankenhauser* factor requires the court to determine whether the disclosure will compromise the effectiveness of law enforcement like the disclosure of police interrogation tactics does.

18. Is the discovery seeking disclosure of factual data or an evaluative summary?

The fourth *Frankenhauser* factor requires the court to determine whether the information sought is factual data or an evaluative summary.

19. Is the party seeking the discovery an actual or potential defendant in any criminal proceeding?

The fifth *Frankenhauser* factor requires the court to determine whether the party seeking discovery is an actual or potential defendant in any criminal proceeding: In some instances, a criminal defendant will file a frivolous civil lawsuit because the scope of civil discovery is broader than criminal discovery.

In *Thomas v. Winnfield, supra,* TASER was the party seeking the discovery, and TASER was not an actual or potential defendant in any criminal proceeding. If co-defendant Scott Nugent had sought the same discovery, then the court would have been more likely to grant the motion to quash.

20. Has the investigation been completed?

The sixth *Frankenhauser* factor requires the court to determine whether the investigation has been completed. In *Thomas v. Winnfield, supra,* the grand jury had already indicted Officer Nugent on August 13, 2008, and TASER argued that the disclosure of the information relied upon by Dr. Williams on June 4, 2008, could not interfere with that completed investigation.

21. Have any interdepartmental disciplinary proceedings arisen?

The seventh *Frankenhauser* factor requires the court to determine whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation. In *Thomas v. Winnfield, supra,* Officer Nugent had already been fired and indicted for manslaughter.

22. Is the plaintiff's civil lawsuit non-frivolous and brought in good faith?

The eighth *Frankenhauser* factor requires the court to determine whether the civil lawsuit is frivolous or brought in bad faith. In some instances, a criminal defendant will file a frivolous civil lawsuit because the scope of civil discovery is broader than criminal discovery. In *Thomas v. Winnfield, supra,* TASER addressed this factor by stating: "Unless Plaintiff stipulates that this lawsuit is frivolous, and dismisses it, this factor favors disclosure."

23. Is the information sought available through other discovery or from other sources?

The ninth *Frankenhauser* factor requires the court to determine whether the information sought is available through other discovery of from other sources. In *Thomas v. Winnfield,* TASER called the court's attention to the fact that the *only* way TASER could obtain the coroner's file and discover the basis for the coroner's opinion was to subpoena the records from Dr. Williams and depose Dr. Williams.

24. How important is the information sought to the plaintiff's case?

The tenth *Frankenhauser* factor requires the court to determine the importance of the information sought to the Plaintiff's case. In *Thomas v. Winnfield, supra,* TASER argued that the plaintiff could not prove their "product liability" against TASER without *first* proving that a TASER device caused or contributed to the death of Baron Pikes.

25. Is there any privacy interest in the information?

It is important to remind the court of the big picture. In *Thomas v. Winnfield, supra,* TASER argued that the family of the deceased waived any privacy interest (if any existed) when it chose to file a wrongful death action alleging that the civil defendants in the above-captioned case caused or contributed to the death of Baron Pikes. In its Opposition to the Motion To Quash, TASER noted that plaintiff specifically alleged that Pikes was repeatedly shocked by a TASER ECD, and that the TASER ECD caused Pikes' death.

26. What is the real reason why the non-party resisting disclosure?

Always put the skunk on the table. Tell the court the *real* reason why the non-party is resisting disclosure of the documents or refusing to appear for a deposition. In *Thomas v. Winnfield,* TASER told the court in no uncertain terms:

> "Dr. Williams does not want to be deposed because he is concerned that the transcript of his civil deposition (by an experienced TASER attorney) will be used by Officer Scott Nugent's criminal defense attorneys to impeach him during Officer Nugent's criminal trial. That is the real reason why Dr. Williams "has advised counsel that the documents requested can and will be produced once the state and criminal proceedings concerning the death of Mr. Collins are 'finally adjudicated.' Needless to say, coroners are not entitled to delay their production of public records, or to delay their deposition in civil cases, because they (or any prosecutor) would prefer to keep his evidence and methodology a secret. In *State v. Burgess*, 482 So.2d 651 (La.App. 4 Cir. 1985), the court specifically recognized that the disclosure of an expert's foundation does not prejudice the State's case; to the contrary, it is actually required by "fundamental fairness." The court stated:
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> > "Fundamental fairness and due process require that the defense be given the opportunity, prior to trial, to examine the basis from which an expert reaches his conclusion. Certainly when the expert testifies he must lay the proper foundation before he gives his opinion. We find no reason why that foundation should not be disclosed to the defendant prior to trial, nor would it afford an opportunity to raise false or specious defenses."

27. What true story can you tell the court about the non-party resisting disclosure that will explain why "equity" requires disclosure?

The Introduction to your Memorandum In Opposition to a Motion To Stay may be as important as your Argument section.

The court almost certainly knows the *real* reason why the non-party is resisting disclosure. In your Introduction, you must tell the story in a candid and concise way that makes the court *feel* that equity requires disclosure. Toward that end, in *Thomas v. Winnfield,* we dedicated our Introduction to telling the following story about Dr. Randolph Williams which (hopefully) helped the court picture Dr. Williams and focused the court's attention on the fundamental unfairness of Dr. Williams refusing to be deposed about his opinion *after* going on CNN and telling it to the world:

> "Dr. Randolph Williams is the elected coroner for Winn Parish, who keeps a gun holstered at his waist even while sitting at his desk, and who recently shot himself by accident.[3] He is not a forensic pathologist, and he does not perform autopsies.[4] Instead, Dr. Williams hires forensic pathologists to perform autopsies for him, and then he types and signs the official death certificate. Since 1976, Dr. Williams has only once sent an autopsy report to another doctor for a second opinion; that one time was when he received Dr. Joel Carney's autopsy report, which did not blame a TASER® electronic control device ("ECD") for the death of Baron "Scooter" Collins, Jr., a/k/a Baron Pikes.[5]
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> "On June 4, 2008, Dr. Randolph Williams became the first coroner in Louisiana history to sign a death certificate suggesting that a criminal suspect's death was the result of drive stuns (not even probe shots) by a TASER ECD. To become the first, Dr. Williams had to reject the autopsy report issued by Dr. Joel Carney, the forensic pathologist he paid to perform the autopsy of Baron Pikes. Dr. Williams had to intentionally omit the two causes of death identified by Dr. Carney in his autopsy report, and he had to change the manner of death from "undetermined" to "homicide." The death certificate Dr. Williams signed did not resemble Dr. Carney's autopsy report, but it did satisfy angry protestors, and it did gain the attention of the national media.
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> "Dr. Williams got his fifteen minutes of fame. He appeared on the Cable News Network ("CNN").[6] He gave interviews quoted in the Chicago Tribune and the Los Angeles Times. He openly discussed the incident, and facts contained in police reports.[7] He told everyone that the death was a "homicide," and he openly blamed Officer Nugent for causing that homicide.[8] Following Dr. Williams' interviews, and his (suspected) testimony before a grand jury, Officer Nugent was indicted for (manslaughter) based on scientifically unsupportable allegations regarding his TASER ECD.
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> "Dr. Williams now insists that he is legally exempt from answering any questions regarding the cause and manner of death he listed and certified on Baron Pikes' official death certificate (even during a civil deposition), *and* from producing the public records in his possession, *until* the conclusion of Officer Nugent's criminal trial.
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> "There is no legal or logical basis for Dr. Williams' refusal to disclose this information, and his Motion (Doc. 62-1) should be denied. It is time for Dr. Williams to explain the factual and medical basis for his decision to reject the autopsy findings of Dr. Carney, and to sign a death certificate that led to the indictment of a police officer and this lawsuit."

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3 *See* Los Angeles Times Article, 7/20/08, Exhibit 1, p. 3 ("Williams is no stranger to controversy. He says he has been shot at 19 times by people upset with his investigations. . . He wears a gun holstered at his waist even while sitting at his desk."); *see* AP Report, 6/18/09, Exhibit 2 (reporting accidental gunshot).

4 *See* Williams Depo., 8/28/2009, Exhibit 3, p. 109, lines 9-15 ("I don't perform autopsies, number one, okay? I order them and contract them, but I do not perform them."); *See also* Williams' C.V., Exhibit 4.

5 *See* Williams Depo., 8/28/09, Exhibit 3, p. 129, line 19 to p.130, line 4.

6 *See* CNN Newsroom, 7/28/08 at 9:00, Exhibit 5, pp. 6 -7; *see also* CNN Anderson Cooper 360, 7/22/08, Exhibit 6, pp. 8-11.

7 *See* Los Angeles Times, 7/20/08, Exhibit 1, p. 2 ("Williams said police records showed. . ."); *see also* CNN Newsroom, 7/28/08 at 9:00, Exhibit 5, p. 7 ("The first shot was fired at 1:37 p.m. And you have six shots fired by 1:40.").

8 *See* CNN Newsroom, 7/28/08 at 9:00, Exhibit 5, p. 6 (responding "Well, it's a homicide" even though he was not asked the manner of death); *see also* CNN Anderson Cooper 360, 7/22/08, Exhibit 6, p. 9 ("A white officer armed with a taser, he says, violated every police procedure on taser use, ultimately killing a black man in handcuffs.").

Opposing Motions To Stay:

28. Is there a constitutional, statutory, or common law prohibition against the simultaneous prosecution of parallel criminal and civil actions?

There is no general constitutional, statutory, or common law prohibition against the simultaneous prosecution of parallel criminal and civil actions. *D'Angelo v. Pintado,* 2009 WL 4642009, p. 1 (E.D. La. 12/2/09), *citing SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 666-667 (5th Cir. 1981)(*citing United States v. Kordel*, 397 U.S. 1, 90 S.Ct. 763, 769-70, 25 L.Ed. 1 (1970)).

29. When may the State object to parallel civil and criminal proceedings?

"And in general, the rule is that parallel civil and criminal proceedings are not objectionable in the absence of substantial prejudice to the rights of the parties involved." *Whitfield v. Riley*, 2009 WL 1269243, at p. 1 (E.D. La. 5/6/09)(underlined added) *citing United States v. Kordel*, 397 U.S. 1, 11 (1970); *and Standard Sanitary Manufacturing Co. v. United States*, 226 U.S. 20, 52 (1912); *S.E.C. v. First Fin. Group of Texas*, 659 F.2d 660, 667 (5th Cir. 1981).

30. Can the State satisfy its burden of showing specific harm by making conclusory statements?

It is well-established that the State cannot satisfy its burden of showing specific harm by making conclusory statements. *See United States v. Banco Cafetero Intern.*, 107 F.R.D. 361, 365 (S.D.N.Y. 1985)(allegations of prejudice to criminal case from civil discovery are "conclusory and insufficient to warrant a stay of the civil forfeiture actions").

In *Thomas v. Winnfield, supra,* when the State eventually moved to stay the civil case, the District Attorney made no attempt to actually list or to describe what previously-undisclosed evidence would be disclosed during the depositions of Drs. Baden and Hawthorne. Instead, the State was content to make conclusory statements like the following:

- "The State asserts that its interests will be harmed if, prior to Nugent's criminal trial, Nugent and/or TASER. . . are permitted to obtain information through the civil discovery process. . . "
- "The injury that will result is that the State's prosecution of Nugent will be prejudiced because Nugent will gain access to information that he is simply not entitled to discover under the Louisiana Code of Criminal Procedure."
- "Not staying civil discovery, however, and allowing Nugent 'back door' access to expert and fact witnesses prior to his criminal trial that he is not entitled to have under the Louisiana Rules of Criminal Procedure, will cause incurable prejudice to the State's prosecution of Nugent."

31. Have motion hearings been held in the parallel criminal litigation and are those hearings relevant to prove no prejudice?

In *Thomas v. Winnfield, supra,* TASER unsuccessfully argued that no harm could result from the depositions of Drs. Baden and Hawthorne because all of the documents in their possession had already been produced, and both doctors had already been examined under oath.

32. Does the broader scope of civil discovery always prejudice criminal prosecution and always require a stay?

The State must do more than (repeatedly) remind the district court that the scope of civil discovery is broader than criminal discovery. *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) ("In some situations it may be appropriate to stay the civil proceeding. In others it may be preferable for the civil suit to proceed – unstayed.")(citation omitted). In *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), the Fifth Circuit specifically reversed the trial judge's ruling because "the trial judge seemed to think that he had no discretion – once discovery was moved for in a civil suit." 307 F.2d at 478.

Nevertheless, in *Thomas v. Winnfield, supra,* the State interpreted the Fifth Circuit's act of freeing the hands of the district court to grant a stay as somehow tying the hands of the district court by requiring a stay whenever there is a parallel criminal proceeding. The State's interpretation was hard to understand. In *Campbell,* the Fifth Circuit began its analysis by agreeing with the general rule that there should be no need for a civil defendant to resort to discovery against the government before recognizing that the unique facts involved in *Campbell* warranted an exception to that general rule. The Fifth Circuit started its analysis of this issue by stating:

"In general, we agree with the view expressed by

> Williams D. Mitchell, former Attorney General, Chairman of the Advisory Committee that drafted the Federal Rules of Civil Procedure, in a statement often quoted: 'It ought not to be necessary to resort to discovery against the Government * * * (for) the Government litigates with its citizens and ought to be frank and fair and disclose all the facts.' There are times however when the Government must withhold or postpone full disclosure. This is such a time."

Campbell, 307 F.2d 478 at 485 (footnote omitted). The State omitted this quote from its Memorandum.

33. Is the public interest in law enforcement only relevant when a criminal defendant files a civil lawsuit to access civil discovery?

Courts have denied motions to stay when the civil lawsuit was not filed by a criminal defendant. In *Whitfield v. Riley*, 2009 WL 1269243 (E.D. La. 5/6/09), District Judge Kurt D. Engelhardt denied a defendants' motion to stay the civil action even though there was a parallel criminal investigation, stating: "However, in *Campbell*, that [public interest] in law enforcement was only relevant because the civil plaintiff filed the proceeding to obtain discovery that he would not otherwise be entitled to as a criminal defendant, in a case where a criminal proceeding was clearly imminent." 2009 WL 1269243, at 1.

For that reason, in *Thomas v. Winnfield, supra*, we (unsuccessfully) emphasized that the civil lawsuit was filed by the family of the deceased, and neither TASER nor any of the officers involved in the deceased's arrest filed the civil lawsuit to access civil discovery.

34. What is the real reason for the State's filing the motion to intervene and stay?

It is important to focus on the timing of the State's motion to stay. In *Thomas v. Winnfield, supra,* the State filed motions to intervene and stay only after TASER noticed the deposition of Dr. Hawthorne, who was not involved or listed as a witness in the civil case. The *real* reason for the State's sudden interest in staying the civil case was to protect Dr. Hawthorne from being subjected to a seven hour deposition.

Tellingly, the State failed to cite a single case in which the government filed motions to intervene and stay in order to prevent the taking of an expert deposition. Not one case. Instead, the State chose to cherry pick quotes from sixteen (16) federal court cases without actually explaining why the facts involved in any of those cases are applicable to stay expert depositions. A review of those sixteen (16) cases revealed that not even one of those courts granted a sixty (60) day stay to protect an expert witness from being deposed by civil litigants.

Three of the cases cited by the State involved motions to intervene and stay filed by the government to stop the deposition of a lay witness or civil litigant.[9] Three cases involved criminal defendants who filed civil actions against the government, forcing the government to file a stay to prevent disclosure of investigative files or privileged documents.[10]

Two cases cited by the State involved motions to stay seeking to prevent the deposition of a confidential informant or disclosure of information by a confidential informant. *See In re Eisenberg*, 654 F.2d 1107 (5th

9 *S.E.C. v. Treadway*, 2005 WL 713826 (S.D.N.Y., 3/30/05)(where the Office of the New York State Attorney General filed a motion to intervene and stay in order to stop the depositions of Noah Lerner and Edward Stern, two executives for Canary Capital Partners, L.L.C., who the OAG needed to call as lay witnesses in the criminal prosecution of Thomas Shiphol, a broker indicted for permitting Canary to use BAS facilities to engage in late trading); *Phillip Morris Inc. v. Heinrich*, 1996 WL 363156 (S.D.N.Y. 6/28/96)(where United States' filed a motion to intervene and stay primarily to stop the deposition of John E. Clemence, a salesman for Southern Container Corp. who was involved in a bid-rigging and bribery conspiracy); *Thornhill v. Otto Candies, Inc*., 1994 WL 382655 (E.D. La. 7/19/94)(where United States filed motion to intervene and stay to stop the depositions of Claudine Thornhill, and the other plaintiffs, which were noticed by the criminal defendant "to be taken in Guyana" and were only opposed by the criminal defendant).

10 *Newman v. U.S.*, 1992 WL 115191 (N.D. Ohio 1/10/92)(where Newman, a criminal defendant charged with committing tax fraud, filed suit against the U.S. for a tax refund for the exact same years, and the U.S. filed a motion to stay the civil proceedings to stop the criminal defendant from reviewing all of the government's evidence.); *Saunders v. City of Philadelphia*, 1997 WL 400034 (E.D. Pa. 7/11/97)(where Calvin Saunders , a criminal defendant charged with stealing a car, filed a 1983 action against the City of Philadelphia alleging police brutality and false arrest, and the City filed a motion to intervene and to stay to prevent "the possible disclosure of its investigative files."); *Founding Church of Scientology of Washington, D.C., Inc. v. Kelley*, 77 F.R.D. 378 (D.D.C. 1977)(where the district court denied the plaintiffs' motion to compel because "the information sought by the interrogatories will interfere with the ongoing criminal investigation; therefore, the plaintiff/ movants' motion to compel is denied.").

Cir. 1981)(where Lance Eisenberg filed a petition pursuant to Rule 27 seeking leave to depose an "alleged government informant" in anticipation of civil litigation, and the 5th Circuit affirmed the district court's order vacation permission to depose); *See Twenty First Century Corp. v. LaBianca*, 801 F.Supp. 1007, 1009-1011 (E.D.N.Y. 1992)(where the government and a criminal defendant, Richard Redzinski, both filed motions to stay to prevent the "premature disclosure of the confidential [lay witness] information provided by Redzinski").

Two more cases cited by the State involved inapplicable laws or unusual criminal prosecutions.[11] Two cases involved motions to stay brought by criminal defendants seeking to stay the civil action based on their Fifth Amendment right against self-incrimination.[12] One case involved the "special circumstance" of the government seeking to stay civil discovery (which would include the deposition) of a convicted criminal defendant who had been found mentally incompetent. *Rosenthal v. Giuliani*, 2001 WL 121944 (S.D.N.Y. 2/9/01)(where District Attorney for New York filed motion to intervene and to stay in order to stop civil discovery but only as it related to Albert Diop, whose criminal case was stayed after a finding he was mentally unfit to proceed). The remaining two cases cited by the State did not involve a motion to stay seeking to prevent the depositions of expert witnesses.[13]

11 *See In re Royal Ahold N.V. Securities & ERISA Litigation*, 220 F.R.D. 246 (D. Md. 2004)(where the lead securities plaintiffs in this multidistrict securities and ERISA litigation have filed a motion seeking a limited reprieve from the discovery stay that applied by operation of the Private Securities Litigation Reform Act of 1995); *see also In U.S. v. Mellon Bank*, N.A. 545 F.2d 869 (3rd Cir. 1976) (where Milton Meissner unsuccessfully appealed the district court's order staying an action for levy and seizure of a safe deposit box pending the outcome of criminal proceedings against Meissner in New York that would never happen if the government did not extradite Meissner from Costa Rica, which was tantamount to permanently "seizing" the safe deposit box).

12 *See Springhill Tp. v. Kuss*, 1993 WL 430421 (E.D. Pa. 10/21/93)(where Robert J. Kuss, who was charged with interstate transportation of property obtained by fraud, filed a motion for protective order, and the district court granted Kuss' motion and relieved Kuss from having to comply with any discovery requests); *see also Cruz v. county of DuPage*, 1997 WL 370194 (N.D. Ill. 6/27/97)(where former indicted officers and Count of DuPage employees brought motion to stay).

13 *Javier H. v. Garcia-Botello*, 218 F.R.D. 72 (W.D.N.Y. 2003)(plaintiffs filed suit against growers and labor contractors seeking damages and/or injunctive relief under the Fair Labor Standards Act, the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and New York statutes); *United States v. One Cadillac Coupe DeVille*, 41 F.R.D. 352 (S.D.N.Y. 1966) (after Dennis Hamilton and Willie Spain were arrested for violating federal waging laws, and the U.S. brought a forfeiture action, the defendants served interrogatories on the U.S. that were " plainly directed toward securing information regarding the legality of the seizure of the automobile in light of Fourth Amendment criteria.").

35. What true story can you tell the court about the State that will explain why "equity" requires the denial of the State's motion to stay?

The State will always emphasize the disparity between civil discovery and criminal discovery, and will always paint the civil litigant as seeking an unfair advantage by engaging in discovery that is not allowed by criminal procedure. Instead of disputing that fact, embrace it. Discuss the flip side of that coin. Why *should* a criminal defense attorney be required to blindly cross-examine an expert witness? Why *is* the State trying to stop *anyone* from discovering the basis for an expert's opinion? Focus on the advantage that the State is seeking.

In *Thomas v. Winnfield,* we learned that the State had failed to provide any written or oral report of Dr. Hawthorne's opinion before calling Dr. Hawthorne to the stand during a Daubert hearing in the parallel criminal prosecution, and we (unsuccessfully) tried to focus the court's attention on the State's strategy. In our Opposition Memorandum, we argued:

> "Actions speak louder than words. The State did not object to the depositions of Dr. Joel Carney or Dr. Randolph Williams, nor did the State object when the Defense filed those depositions into the record in these criminal proceedings. What is so different about the depositions of Drs. Baden and Hawthorne?
>
> "[The State] is seeking an advantage with regard to staying Dr. Hawthorne's deposition. Incredibly, the State never provided Officer Nugent's criminal defense attorneys with a written or oral report by "Dr. Hawthorne before calling Dr. Hawthorne to the stand on May 7, 2010. During that hearing, the Defense proved that [the District Attorney] never requested a written report from Dr. Hawthorne, and Dr. Hawthorne admitted that [the DA]… did not take any notes while he was giving [him] an oral

report for 45 minutes to an hour. Consequently, [the DA] succeeded in ambushing the Defense on May 7, 2010.

"At the start of that hearing, Officer Nugent's [local criminal defense] counsel… noted his objection, and expressed his surprise and frustration by [the DA's] tactics:

> 'Well, his excuse is… that why I don't have to provide you with written reports if they're not made? But the problem with that argument is he fails to read the rest of the law and that's that you have to give me any oral reports made by expert witnesses. You can't tell me that he just showed up today. You can't tell me that they haven't had conversations dealing with this case...
>
> We can't question this doctor without knowing what he's gonna say. . . we don't have anything. Uh, this is so elementary. I have never had a homicide case anything like this done. I have never had – I'm trying to think of any case where an expert witness is being called and I get nothing...'

"This Motion To Stay is nothing less than an attempt by the State to make certain that Dr. Hawthorne is not questioned by the civil litigants because they: (1) can spend more time questioning Dr. Hawthorne; (2) have more experience handling ECD cases; and (3) have the benefit of knowing Dr. Hawthorne's opinion before having to question him. After all, what is the point of ambushing criminal defense attorney on May 7, if the civil litigants get to depose Dr. Hawthorne on July 28?"

About Jerry Glas

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John Jerry Glas is a partner and a member of the Civil Litigation Department. He is an Adjunct Professor at Loyola University Law School, where he has taught a Trial Practice core curriculum class every spring semester since 2009. Mr. Glas has tried more than seventy jury trials to verdict, and he has lectured locally and nationally on cross-examination and jury selection.

Mr. Glas has significant experience handling traumatic brain injury (TBI) cases and jury trials. His previous lectures on the topic include: Irresistible Impulses & Disinhibition: Siren Songs in Civil Cases (2011); Crushin' A Concussion: Attacking Claims of Impairment Following Mild TBI (2009); Attacking Medical Studies & Statistical Associations (2007 & 2008); The Neuropsychologist: A Trojan Horse In Brain Injury Cases (2006); and Testimony Of Neurologists, Neurosurgeons, & Neuropsychologists (2004, 2005, & 2007.

Before joining the firm in 1999, Mr. Glas served as a Senior Assistant District Attorney for the Parish of Orleans. Mr. Glas tried more than fifty jury trials to verdict, including six murder trials, four rape trials, six burglary trials, seven robbery trials, and fourteen drug distribution trials. While serving in the Appeals Division, Mr. Glas authored more than forty appellate briefs and writs, including the State's brief in fifteen published opinions. He successfully argued cases before the Louisiana Fourth Circuit Court of Appeals and before the Louisiana Supreme Court.

Representative Work

- Mr. Glas represents a multinational oil and gas corporation, and has handled cases involving catastrophic plant failures, chemical releases, product liability, station accidents, disputed royalty and gas interests, personal injury actions, possessory actions and petitory actions.
- Mr. Glas represents the leading manufacturer of Electronic Control Devices (ECDs), and has defended law enforcement officers throughout Louisiana against claims filed by suspects and prisoners. In 2010, Jerry provided pro bono representation to a 22 year-old Winnfield Police Officer who was indicted for manslaughter after using an ECD on a criminal suspect. After a three-week jury trial, and about three hours after Jerry's closing argument, the Officer was found "not guilty."
- Mr. Glas represents a Louisiana freight shipping and trucking company, and has handled numerous automobile accidents involving tractor trailer rigs, tie-down accidents, and unloading accidents.
- Mr. Glas represents a Louisiana restaurant chain, and has defended restaurants and clubs against premises defect claims, negligent security claims, slip and fall claims, and other personal injury actions.
- Mr. Glas has defended the manufacturers and owners of equipment against claims their machinery was unreasonably dangerous under the Louisiana Products Liability Act, including mobile container ramps, cranes, bucket trucks, and historic New Orleans streetcars

Education

- J.D., Louisiana State University, 1996
- M.A., Philosophy, University of Toronto, 1992
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