THE JOLLY JUDGE

*Judge Edith H. Jones**

Judge Jolly and I see eye to eye on a number of things: that he revels in lunch at the Bon Ton in New Orleans; that he has a gimlet eye for politics; that he is the (currently) best dressed male member of the Fifth Circuit Court of Appeals; that his "sport model" cars are the finest he can afford; that he is well read in English and American literature and poetry; that he is an experienced European traveler; and that his appointment to the Fifth Circuit was based purely on his legal acumen, accomplishments and overall merit. But to adapt brother Judge Rhesa Barksdale's quip, "Enough of what he thinks about himself, what do I think about him?" Actually, having known Judge Jolly since I arrived on the court in June 1985, I think rather well of him. He is an immensely talented judge who thinks and writes with clarity based on traditional legal principles and values. The following reminiscence is based not just on what has gone before, but on our friendship that I assume will continue for a long time following his assumption of senior status.

From the outset of my acquaintance with fellow Fifth Circuit judges, I found Judge Jolly one of the most approachable. His outrageous sense of humor spared no one among us. He even joked at the expense of our revered Chief Judge Charles Clark, who epitomized the appearance and sober demeanor of a judge. But he has been almost as frequently the butt of his own jokes and he can take a ribbing. So we have not only tolerated, but have been amused by the "affronts" to our dignity. From the perspective of a Texas judge, Judge Jolly made the most of his Mississippi background. He acquainted us with his youthful college scrapes and low-level political involvement. He spoke affectionately about the state's small towns and its colorful people. He told tales about Oxford, a university town beloved by all Ole Miss grads. He offered frequent references to Mississippi's famed writers—

* United States Court of Appeals for the Fifth Circuit.

Faulkner, Welty, Walker Percy, John Grisham—some of whom he knew and one of whose great-nieces (Farish Percy) became his law clerk. His anecdotes from the Weaver Gore Coffee Club, an informal men's group, were almost mythical, but always funny. Despite all this good humor, Judge Jolly never papered over the state's segregationist past; he and his wife Bettye supported equal rights from the start.

While a decided raconteur, Judge Jolly also asks penetrating questions of his listeners and has a way of drawing people out about themselves. Judge Jolly, in sum, exhibits traits that have made Southerners, notably Southern politicians, both popular and effective. Disarming others with wit and charm, he achieved camaraderie with people of diverse backgrounds and far different views. It is unsurprising that he was chosen one of the early presidents of the Federal Judges' Association and remained a popular board member for over a decade.

As his sense of humor implies, Judge Jolly is no friend of vanity or triumphalism. In one of our first conversations, he admonished me: "the sun don't shine on the same dog's [backside] every day." That President Reagan had appointed a number of court of appeals and even Supreme Court judges, in other words, did not guarantee the permanence of the President's vision of judicial conservatism for the federal bench. More basically, the remark reminded me that even though each judge is bound to apply the law as he sees fit, other judges' views must be respected and accommodated on a collegial court. Sometimes, we must compromise for the sake of maintaining consistency and stability in the law.

Judge Jolly also detests intellectual preening and rarely hesitates to comment on what he calls "tendentiousness." While not a devotee of philosophy or arcane legal theory, Judge Jolly is very well read in history, politics, literature and the law, but he sees little purpose in talking down to others. I remember how he bristled at the performance of a well-known law professor at a Fifth Circuit Judicial Conference in Jackson, Mississippi. Dressed inappropriately in jeans and a velvet blazer, the professor stalked across the speaker's stage while advocating for Critical Legal Studies, a lightly-cloaked version of Marxist theory that has since been discredited. In conclusion, he let us judges know that "you

don't understand what you're doing when you're doing it." To use another of Judge Jolly's favorite expressions, it was "ironic" that he had invited this professor, no doubt to provoke debate, but he should have expected the blast of pomposity.

Notwithstanding this event, Judge Jolly delights in serious debate and in learning from others. In 1987, we both attended a seminar in Vermont organized to acquaint federal judges with the Framers' views about the Constitution through primary sources and discussion with eminent PhDs. This was the first of a number of seminars that Judge Jolly has attended, covering subjects from economics and the environment to Locke and Burke, from Churchill to Shakespeare, from Marshall to Holmes. Such seminars have been run by private groups and the Federal Judicial Center with the laudable purpose of broadening judges' liberal education in topics that underlie and frame the Anglo-American legal system. The benefits of these seminars manifest over time in judges' increasingly sophisticated decisionmaking and a deeper appreciation for the unique and blessed structure of our government. Judge Jolly has often remarked on how much he gained from these educational opportunities.

Parenthetically, during the Vermont seminar, I learned that Judge Jolly was surprisingly fit. Together with our colleague Judge Gene Davis, we rented bicycles to travel through the bucolic farmland. Both of them made it to the top of a steep hill astride their bikes. Although more than a decade younger, I had to walk, panting, for the last hundred yards.

In this forum, I would be remiss not to comment on Judge Jolly's accomplishments on the bench. Most judges come to understand that our names will not eventually be enshrined in the pantheon with federal appellate Judges Friendly, Hand, Wisdom and a very few others. Especially during Judge Jolly's and my careers, federal law has encroached into every crevice of life, and the more law, the less attention is paid to the judges than to the enforcers. Because federal law is everywhere, and litigation so costly, people can afford going to court in only a small portion of federal disputes. Settlements, mediations and arbitration often substitute for court processes even in cases of great moment. Rules of judicial deference overshadow the courts' law-declaring function in areas like qualified immunity of government officers

and review of administrative actions. Federal judges' influence is thus eclipsed from without and within. In the end, a realistic federal appellate court judge must hope to be evaluated as studious, incisive, and fair. The evaluation is enhanced if a judge is an excellent writer able to explain the law with panache and accuracy. Judge Jolly's body of work exemplifies these qualities.

There is not time to examine the hundreds, probably thousands of cases that Judge Jolly has decided during thirty-five years as an active judge. Many of his panel decisions might be commented upon, and many are significant. It is enough here to sample the expanse of his work by focusing primarily on en banc cases in which he spoke for majorities of our court's judges. These cases exhibit the range of his expertise and his ability to turn a colorful phrase. Chronologically, the en banc decisions begin with *Equilease Corp. v. M/V Sampson,* 793 F.2d 598 (5th Cir. 1986) (en banc), *cert. denied,* 479 U.S. 984 (1986), in which Judge Jolly's majority opinion concluded that vessel insurance is a "necessary" covered by the Federal Maritime Lien Act. Although decided over thirty years ago, Equilease remains good law and has been repeatedly referenced to interpret this important maritime commercial statute. Three years later, the judge spoke for a court majority in *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.-Airline Div. & Teamsters Local 19 v. Sw. Airlines Co.*, 875 F.2d 1129 (5th Cir. 1989) (en banc), *cert. denied*, 493 U.S. 1043 (1990), which held that Southwest Airlines did not violate federal labor law by requiring employee drug testing. Shortly before this decision was finalized, the Supreme Court confirmed Judge Jolly's approach in a similar decision. *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299 (1989). *See Int'l Bhd. of Teamsters*, 875 F.2d at n.* (noting the Supreme Court's discussion in *Consolidated Rail Corp.* supports the 5th Circuit's analysis and conclusion).

Constitutional standing to sue was at issue in *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174 (5th Cir. 1993) (en banc), which sought an interpretation of the transition rules for the Tax Reform Act of 1986. The hitch was that the taxpayers who sued were not themselves among the "very very favored few" covered by the transition rules. As Judge Jolly's opinion put it, they had "brought this suit to scotch the wheels of the greased

wagon." 987 F.2d at 1175. Lacking the elements of standing to sue, the taxpayers had no justiciable federal claim, no matter how appealing, and the courts could not hear it.

Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443 (5th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 815 (1994), represents one of the judge's most significant civil liberties opinions. The plaintiff had been seduced by a teacher/coach while rumors of this and his earlier improper relationships with young female students swirled through the school. Eventually, the young woman's parents sued the school principal and school district for damages pursuant to 42 U.S.C. § 1983, asserting their daughter's constitutional substantive due process right to bodily integrity. Judge Jolly's opinion entailed three novel rulings. First, he wrote, "[i]f the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse...by a public schoolteacher." 15 F.3d at 451. Second, his majority opinion concluded that the principal, who had allegedly been aware of the rumors for several years, could be held liable for the abuse if he had learned of a pattern of inappropriate sexual behavior toward students; was "deliberately indifferent" to the student's rights by failing to take necessary action; and thus "caused" the student's constitutional injury. *Id.* at 454. Finally, Judge Jolly asserted that the student's rights and the principal's obligations were "clearly established" by 1987 when the events occurred, hence, the defense of qualified immunity was unavailable to the principal. *Id.* at 454-56. Three lengthy dissents were based on separate analytical difficulties perceived in Judge Jolly's opinion. Judge Jolly departed from nearly all of his judicially conservative colleagues, myself among them. He wrote with conviction and force, despite our criticisms. This opinion proved a watershed in Fifth Circuit jurisprudence and has been cited over 2,200 times.

Only a year later, speaking on behalf of another court majority, Judge Jolly rejected the substantive due process claim of a student who had been voluntarily placed in the Mississippi School for the Deaf, only to be sexually molested by a fellow classmate. *Walton v. Alexander*, 44 F.3d 1297 (5th Cir. 1995) (en banc). Despite a superficial similarity, this decision was not inconsistent with *Doe v. Taylor Indep. Sch. Dist.* Indeed, the judge

quoted his prior opinion for the "important" proposition that "section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Id.* at 1301 (quoting *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 815, 115 S. Ct. 70 (1994). The plaintiff had not been harmed by "the acts of the state or by a state actor." *Id.* at 1299. The constitutional question, therefore, was "whether the state created a 'special relationship' with Walton, as a resident student under its custodial care, so that it owed some duty—[arising under the Due Process Clause]—to protect Walton's bodily integrity from third party non-state actors." *Id.* at 1301-02. The court concluded that unlike the plaintiff in the *DeShaney* case,[1] Walton did not have that "special relationship" because he had not been held involuntarily, or against his will, by the state. *Id.* at 1305.

The court majority also went along with Judge Jolly in a Fourth Amendment search and seizure case, in which police gained information from a neighbor that provided probable cause to search a suspected "crack" house. Judge Jolly's opinion held that "absent specific reasons for police to doubt his or her truthfulness, an ordinary citizen, who provides information to police at a crime scene or during an ongoing investigation, may be presumed credible without subsequent corroboration." *United States v. Blount*, 123 F.3d 831, 835 (5th Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1138, 118 S. Ct. 1101 (1998). Further, because the neighbor's tip and other circumstances furnished probable cause, the warrantless search of the house was justified by the exigent circumstances doctrine. *Id.* at 837. Nevertheless, the evidence was insufficient to uphold one defendant's conviction. *Id.* at 832 & n.1.

Procedural issues important to the litigation of claims for ERISA health or pension benefits were decided in Judge Jolly's en banc opinion in *Vega v. National Life Insurance Services, Inc.*, 188 F.3d 287 (5th. Cir. 1999) (en banc), *abrogated in part by Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S. Ct. 2343 (2008). That case resolved questions about the scope of federal court review,

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[1] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 109 S. Ct. 998 (1989).

the extent of the factual record on which to conduct judicial review, and the proof required to establish a decisionmaker's conflict of interest that would trigger broader review.

Judge Jolly has written two en banc opinions for the court during this century and one dissent. These cases continue to display his versatility and acute legal reasoning. In *Okpalobi v. Foster*, physicians who perform abortions sued to stop the state of Louisiana from enforcing a law that exposed them to potential tort damages for injuring the mother or "unborn child." 244 F.3d 405, 409 (5th Cir. 2001) (en banc). Legal issues going to the heart of federalism were implicated: the scope of 11lth Amendment state sovereign immunity and the interpretation of the *Ex parte Young*[2] exception to that constitutional protection. Seven judges concurred in Judge Jolly's careful opinion explaining complex constitutional principles and powerfully criticizing the implications of the dissenters' position. (The final judgment resulted from partial concurrences.) The opinion stated its conclusion at the outset:

> Although, in this facial attack on the constitutionality of the statute, consideration of the merits may have strong appeal to some, we are powerless to act except to say that we cannot act: these plaintiffs have no case or controversy with these defendants, the Governor and Attorney General of Louisiana, and consequently we lack Article III jurisdiction to decide this case.

Id. Judge Jolly's opinion concluded that because the Governor and Attorney General had no direct "enforcement connection" with the challenged statute, they were not proper defendants in an *Ex Parte Young* injunction against the law's operation. *Id.* at 423-34.

The *Okpalobi* opinion also held, for a clear majority of judges, that the plaintiffs could not satisfy the test for constitutional standing to sue these defendants, who neither caused nor could remedy the statute's alleged unconstitutional application to them. Constitutional standing requires not only injury to the plaintiff, but a "causal connection" between injury and the claimed

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[2] The *Ex parte Young* fiction holds that state officials may be enjoined by federal courts from enforcing unconstitutional statutes. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).

violation, and "redressability" of the injury by a court. Consequently,

> [i]f the defendant Governor or Attorney General has no authority under state law to issue a specific directive, then the plaintiff might as well sue *any* state officer who, in turn, could direct any other state officer to carry out the injunction orders; or, under the dissent's reasoning, why not simply order the defendant Governor to decree that no court may entertain any suit brought under Act 825?

Id. at 427. To allow standing in this case would open virtually any state law to challenge by a suit against any high-ranking public official.

Equally important on quite another front was his en banc majority opinion that issued a mandamus order to transfer a case from a court in the Eastern District of Texas "which has no connection to the parties, the witnesses, or the facts of this case—to the Dallas Division of the Northern District of Texas—which has extensive connections to the parties, the witnesses, and the facts of this case." *In re Volkswagen*, 545 F.3d 304, 307 (5th Cir. 2008) (en banc), *cert. denied*, 555 U.S. 1172, 129 S. Ct. 1336 (2009). Mandamus relief is an extraordinary remedy, rarely granted by appellate courts. Yet the decision in this case appeared at a pivotal moment, as several later cases decided by this court, the Federal Circuit, and the Supreme Court have continued to apply federal venue rules to prevent rampant forum shopping. *See, e.g.*, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017); *In re Radmax, Ltd.*, 720 F.3d 285 (5th Cir. 2013), *reh'g denied*, 736 F.3d 1012 (5th Cir. 2013); *In re Nintendo Co., Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009).

This discussion almost ends with a dissent by Judge Jolly from an en banc decision of this court in a federal sentencing case. *United States v. Gonzalez-Longoria*, 831 F.3d 670 (5th Cir. 2016) (en banc). Federal sentencing has become the bane of our existence, so rarefied and complex is the legal logic we must apply to rule on even short federal criminal sentences. Judge Jolly differed from the majority on the question whether the "crime of violence" definition present in 18 U.S.C. Sec. 16(b) and mirrored in the U.S. Sentencing Guidelines, U.S.S.G. Sec. 4B1.2(a), was

unconstitutionally vague in the wake of the Supreme Court's decision overturning for that reason another "crime of violence" definition, *Johnson v. United States*, 135 S. Ct. 2551 (2015), construing 18 U.S.C. Sec. 924(e)(2)(B)(ii). Judge Jolly's opinion accused the majority of "drift[ing] from reason—and into the miasma of the minutiae . . . ." *Gonzalez-Longoria*, 831 F.3d at 684 (en banc) (Jolly, J., dissenting). He regarded one of the majority's points as providing "a shadow of difference, but hardly a constitutional sockdolager." *Id.* at 685. His dissent concluded that "[t]he majority, engrossed by thinly sliced and meaningless distinctions, adopts the minority view and errs by losing track of the entirety: these statutes, in constitutional essence, say the same thing." *Id.* at 686. Well, the Supreme Court affirmed our majority result, albeit on the ground that Sentencing Guidelines are not subject to attacks for constitutional vagueness. *Beckles v. United States*, 137 S. Ct. 886 (2017). Uncharacteristically, Judge Jolly departed into the realm of "constitutional essences" rather than apply the principles of traditional statutory interpretation that he otherwise rigorously observes. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012). But even the most perceptive judges can occasionally err.

That brings me to an anecdote concerning the unusual case in which an opinion by Judge Jolly was reversed—unanimously—by the High Court. He noted that unfortunate fact to Justice Scalia during a social event, and the Justice, with a twinkle in his eye, retorted, "Ah, but it was the closest 9-0 reversal we ever had."

To end on a high note from his perspective, Judge Jolly's opinion overturning a Louisiana law that required parity in teaching evolution and creation theory in the public schools was eventually affirmed by the Supreme Court. *Aguillard v. Edwards*, 765 F.2d 1251 (5th Cir. 1985), *reh'g denied*, 778 F.2d 225 (5th Cir. 1985), *aff'd*, 482 U.S. 578, 107 S. Ct. 2573 (1987). The case was controversial within our court, however, and provoked a witty and biting dissent from the denial of en banc review by Judge Tom Gee (in which I concurred). *Aguillard*, 778 F.2d at 225-28 (Gee, J., dissenting). Not to be outdone, Judge Jolly took the extraordinary step of responding briefly to the dissent. *Id.* at 228 (Jolly, J., responding to dissent). The last two points of his response are as follows:

". . . I commend to the dissenters a serious rereading of the majority opinion that they may recognize the hyperbole of the opinion in which they join. And, finally, I respectfully submit, the panel opinion speaks for itself, modestly and moderately, if one will allow its words to be carefully read." *Id.*

And so it is with Judge Jolly's opinions: they speak for themselves, modestly and moderately, and the words, always carefully chosen, must be carefully read. To quote one of his favorite aphorisms, the opinions "put it down where the little goats can eat it;" they are clear but not simplistic. Judge Jolly is a fair and conscientious appellate judge, a judicial conservative steeped in traditional legal reasoning, and a lively character. Congratulations on his career as an active judge and accomplishments yet to come in senior status.