

Seminar in Constitutional Law: Appellate Advocacy

Week 5

Matthew Bergman, Ph.D. Candidate

Office Hours: Fridays 12 pm-1 pm

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Nazita Lajevardi, Ph.D. Candidate

Office Hours: Wednesdays 1 pm-2:50 pm

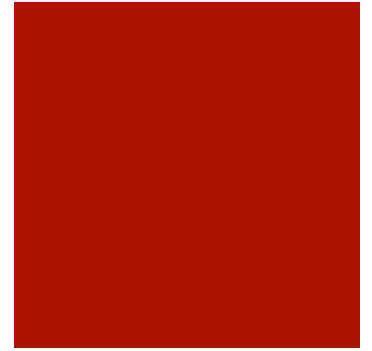
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Wednesday, April 26th, 2016

Agenda

- Hour 1: Matt
 - Research for a brief
 - Pre-writing a brief
 - Outlining a brief and practice on short case
- Hour 2: Nazita
 - Important parts of the USD – Devitt brief
- Hour 3: Groups
 - Begin planning/writing your brief (draft due week 7, final due week 10)



Purpose of the Brief – Persuasion via information



- The **facts** that gave rise to the litigation and subsequent appeal
- The **specific issues** raised in the appeal based on the alleged errors in the court below
- The **questions of law** raised by the issues as defined
- The **principles of law** that the advocate believes govern the outcome of the issues raised
- The advocate's view of the **appropriate application** of those principles to the client's case
- The **specific relief** requested by the advocate

Researching for a Brief



- Review the Record
- Review the Law
- Other Sources
- Pitfalls

Research (I) – Review of the Record



- Thorough review of record – totality of case
- How were facts, legal theory, theories of the case presented in lower court
- Record includes: opinion, findings of the court and judgment, auxiliary briefs or memoranda filed, charges to the jury, and testimony
- Make an accurate history of the case
 - Both factual and procedural
 - Both favorable and unfavorable (preview opponent's argument)
- Summarize with page references. Where are things found in the record?
 - Pleasings, testimony, evidentiary points, exhibits, other procedural matters (e.g. motions)
- Rearrange points/notes by subject

Research (II) – Review of the Law



- Find **primary mandatory authority** to support your position
 - Constitution: supreme law, how has supreme court ruled on these constitutional issues
 - Statutes: legislative law (next highest source unless specific court or agency has been given constitutional authority to decide the issue), is the issue on appeal controlled by statute?
 - Administrative rules, regulations, and decisions (if outcome of controversy is controlled by administrative agency, this has status of statutory law)
 - Case law (next slide)
 - Rules of Court and their Interpretation

Research (II) – Case Law



- Find a case that is legally and factually similar to current case
- *Stare decisis* – Legal doctrine that gives weight to case-made precedent. Once a court has formulated a rule that governs a set of facts, that rule will be applied to controversies involving similar facts
- *Ratio Decidendi* – Rule of law/legal principle that controls the controversy. What applied principle resulted in the case being decided as it had
- *Orbiter Dictum* – NOT an authority; discussion of auxiliary legal rules to explain some portion of opinion used by judges; rule of law is what constitutes the mandatory precedent

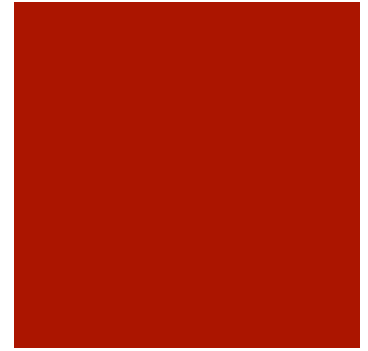
Research (III) – Other Sources



- Secondary sources (not authoritative) summarize, explain, analyze, and comment on the law
 - Legal encyclopedias, hornbooks, or practice books are comprehensive and objectively written focusing on specific topics; American Law Institute “Restatements” attempt to restate common law of various jurisdictions; help researcher find primary authorities
 - Law reviews and other legal periodicals provide in-depth information and extensive footnotes; often exhaustive, but subjective
 - Expert treatises

- Non-legal sources: social science studies, statistics, commission findings
 - For non-fact-specific issue that can be aided by non-legal authoritative persuasive material
 - Muller v. Oregon; Brown v. Board; Roe v. Wade

Research (IV) – Pitfalls



- Overpowered by thought of “big case”
 - You cant find or preferred one is obsolete
 - If material is all echo-ing, then likely on right track and move on
- Focus on irrelevant matters that cloud main issues
 - Focus on main issues of appeal; watch for distractions or tangents
- Don't forget, you have to actually write a breif, not just research it
 - Research plan should include time to actually write as well

Pre-writing a brief

- Selection of Issues to Be Argued
 - Persuasion favors quality, not quantity
 - Weak points dilute strong ones – courage to forego

- Selection of a Theme to “Hold Together Document”
 - Overall unifying notion upon which the argument is based
 - Single idea that if accepted by court will likely result in a favorable decision
 - Moral or philosophical notion based on equity, policy, or not disturbing long-standing precedent considerations
 - Marriage is union between one man and one woman; constitutional discrimination of same-sex partners



Outlining A Brief

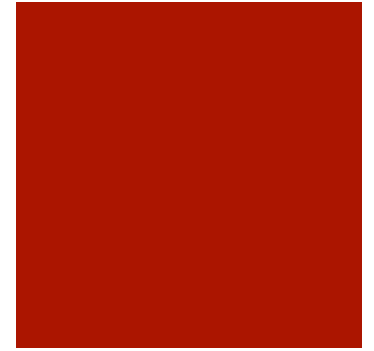


- Efficient way to draft a document
 - Clarify weaknesses in argument that need to be reinforced with additional research or issue development
 - Helps organize actual drafting of arguments and how they fit together into the whole
 - Road map for writer and readers (what comes next)
 - Easier to follow when things in the right place

Practice: For Jane White v. Industrial Commission of Texarkana



- Objective parts of outline
 - What are facts that gave rise to the case
 - What potential legal questions will be raised
 - Outline the record (what is included, where, and summary of content)
 - What sources could one research to help answer legal questions? What would you search for in external sources?
- For each side
 - Pick a theme and issue(s)
 - Preliminary outline of what will be argued where and overall structure that “holds together”



Now, onto Hour 2...

Agenda – Hour 2



- Discussion of the USD Case:

Calibraska Department of Child Protective Services and Zoe Walters

v.

Georgia Pierre, on behalf of K.P., a minor child

- Will go through:
 - 1. Order of the United States District Court for the Southern District of Calibraska
 - 2. Opinion of the United States Court of Appeals for the Twelfth Circuit
 - 3. Order of the SC granting Petition for Certiorari
 - 4. Undisputed Issues
 - 5. Exhibit A: Excerpt of CDCPS Protocol and Policy Manual
 - 6. Exhibit B: Photograph of Bruise
 - 7. Exhibit C: Transcript of Recording of CDCPS Intake
 - 8. Exhibit D: Excerpt of Transcript of Deposition of Zoe Walters

Agenda – Hour 2



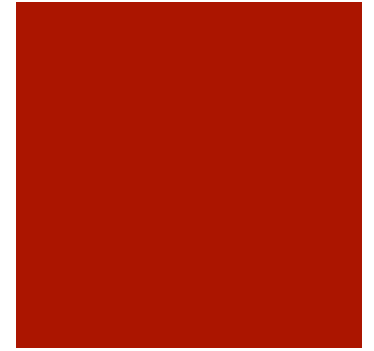
- This is where all the skills you have built and all the knowledge you have attained so far (*which is A LOT*) come into play. I.e.
 - Learning about the court system
 - Reading cases: IRAC
 - Understanding cases
 - CRuPAC
 - Learning what goes into an appellate brief
 - Persuasive v. Predictive Writing
 - Working with others
 - Practicing speaking out loud
 - Professionalism

Agenda – Hour 3

(we will come back to this)



- In Hour 3 you will:
 - 1. Be assigned to your groups for the rest of the quarter
 - 2. Pick a group name.
 - 3. Come sign up for either the Petitioner or the Respondent
 - 4. Access and download the Template Brief on TED
 - 5. Save the Template Brief to a DROPBOX folder
 - 6. Work on/ Fill out:
 - a) Table of Contents (Template Brief p.1)
 - b) Standard of Review (Template Brief p.3) ← Note there is some legal research on Westlaw required here.
 - c) Questions Presented (Template Brief p.2)



Ok, back to Hour 2 and the USD Case

Briefly, re: the USD Case:

- The USD Case:



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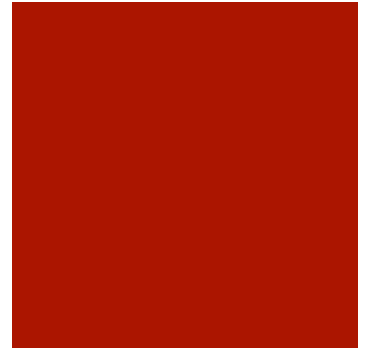
- The USD Case:

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- Which Court are we in?



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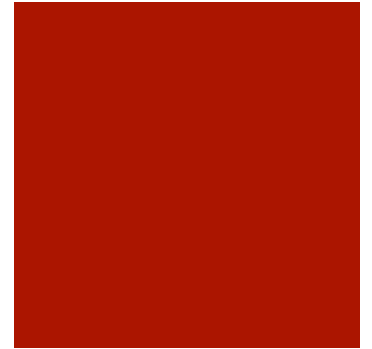
- The USD Case:

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- Which Court are we in?
 - The US Supreme Court



Briefly, re: the USD Case:

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- Which Court are we in?
 - The US Supreme Court
- Are *Calibraska Department of Child Protective Services and Zoe Walters* the petitioners or the respondents in the Supreme Court case?

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- Is *Georgia Pierre, on behalf of K.P., a minor child* the petitioner or the respondent in the Supreme Court case?

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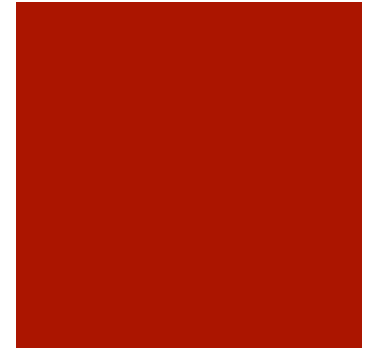
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 - Petitioners
- Is *Georgia Pierre, on behalf of K.P., a minor child* the petitioner or the respondent in the Supreme Court case?
 - Respondent

1. Order of the United States District Court for the Southern District of Calibraska



- What is this motion for? What is the Defendant seeking?

1. Order of the United States District Court for the Southern District of Calibraska



- What is this motion for? What is the Defendant seeking?
 - Motion for Summary Judgment

1. Order of the United States District Court for the Southern District of Calibraska



- What is this motion for? What is the Defendant seeking?
 - *Motion for Summary Judgment*
- What is Summary Judgment?

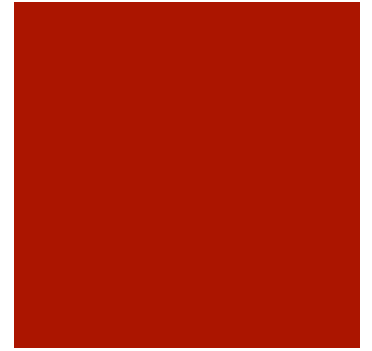
1. Order of the United States District Court for the Southern District of Calibraska



- What is this motion for? What is the Defendant seeking?
 - Motion for Summary Judgment
- What is Summary Judgment?
 - Occurs when one party asks the court to come out in their favor before a full trial (or in the middle of a full trial).
 - A party typically asks for summary judgment when it believes that a full trial will be expensive and when they believe the outcome is obvious, such that no reasonable factfinder (i.e. the judge) could disagree with their evidence presented so far.
- So on p. 4 when CT defines summary judgment as the absence of a genuine issue of material fact – this is what we are talking about.

1. Order of the United States District Court for the Southern District of Calibraska

- Who is the Plaintiff?



1. Order of the United States District Court for the Southern District of Calibraska

- Who is the Plaintiff?
 - Georgia Pierre
- Who is Georgia Pierre? What happened here?



1. Order of the United States District Court for the Southern District of Calibraska



- Who is the Plaintiff?
 - Georgia Pierre
- Who is Georgia Pierre? What happened here?
 - Mother to K.P.
 - She argues that Defendants improperly searched and seized her daughter – 6 at the time – in violation of the Fourth Amendment.
- Who are the Defendants?

1. Order of the United States District Court for the Southern District of Calibraska



- Who is the Plaintiff?
 - Georgia Pierre
- Who is Georgia Pierre? What happened here?
 - Mother to K.P.
 - She argues that Defendants improperly searched and seized her daughter – 6 at the time – in violation of the Fourth Amendment.
- Who are the Defendants?
 - CDCPS – a state agency that receives and investigates alleged cases of child abuse.
 - They employ social workers to assist in preventing and detected child abuse.
- Who is Zoe Walters?

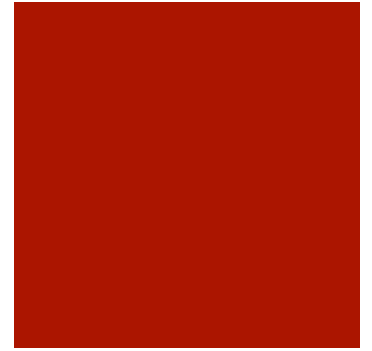
1. Order of the United States District Court for the Southern District of Calibraska



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 - Georgia Pierre
- Who is Georgia Pierre? What happened here?
 - Mother to K.P.
 - She argues that Defendants improperly searched and seized her daughter – 6 at the time – in violation of the Fourth Amendment.
- Who are the Defendants?
 - CDCPS – a state agency that receives and investigates alleged cases of child abuse.
 - They employ social workers to assist in preventing and detected child abuse.
- Who is Zoe Walters?
 - A named Defendant.
 - She worked for CDCPS as a social worker since 1997.

1. Order of the United States District Court for the Southern District of Calibraska

- What happened around 8 am on Wednesday April 24, 2013?



1. Order of the United States District Court for the Southern District of Calibraska

- What happened around 8 am on Wednesday April 24, 2013?
 - Clara Simon –a first grade teacher – telephoned the CDCPS hotline and reported that KPs Father had abused KP.
 - She had noticed a bruise on KP's forearm and noticed KP's anxious behavior.
 - KP's mom had previously told Clara Simon that KPs father had a history of abused her and so Mr. Pierre was not allowed to see KP often and only under supervision.
- What happened throughout the course of the investigation?



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- What happened throughout the course of the investigation?
 - Zoe Walters decided that meeting with KP as soon as possible was the best first step. She went to the elementary school, met with the principal – MR. Garry – and asked him to retrieve KP and put her in a private room.
- What did Mr. Garry say to Zoe Walter's Request?

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 - Mr. Garry said no.
- What did Zoe Walter do after that?

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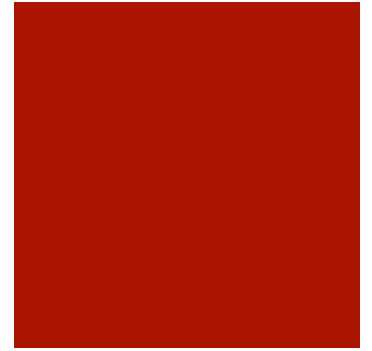
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- What did Mr. Garry say to Zoe Walter's Request?
 - Mr. Garry said no.
- What did Zoe Walter do after that?
 - She contacted a local police officer – Officer Nash. He agreed to come to the school. He arrived in his patrol car and in his police uniform, and stated to Mr. Garry to retrieve KP. Mr. Garry then retrieved KP from her classroom.
- Did Officer Nash or Zoe Walters have a court order to interview or examine KP?

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- Did Officer Nash or Zoe Walters have a court order to interview or examine KP?
 - No, they did not. They also did not present a search warrant.

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- Was Officer Nash present throughout the course of KP's questioning?

1. Order of the United States District Court for the Southern District of Calibraska



- Was Officer Nash present throughout the course of KP's questioning?
 - No, he escorted KP into a small room, set up a small video camera, and then received a call regarding a small house fire, which he had to report to. He was therefore not present for the questioning.
- Was the principal present throughout the course of KP's questioning?

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- Was the principal present throughout the course of KP's questioning?
 - No.
- What happened throughout the course of Ms. Walters' Questioning of KP?

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- Was the principal present throughout the course of KP's questioning?
 - No.
- What happened throughout the course of Ms. Walters' Questioning of KP?
 - Ms. Walters introduced herself and learned that KP had stayed unsupervised at her father's house for the past two weekends because "mommy was working a lot and now on weekends too."
 - When Ms. Walters asked how KP had gotten the bruises on her arm, she said "dunno."
 - When Ms. Walters asked if it was at her father's house, KP did not respond.
 - When Ms. Walters asked if her father had ever hurt KP, KP's eyes welled up.
 - Ms. Walters asked KP to remove her long-sleeve shirt to see the bruise. KP hesitated and when prompted again, KP did so. Ms. Walters took 4 photographs of the bruising. Walters did not touch KP at all.
- How did KP react to her questioning by Ms. Walters?

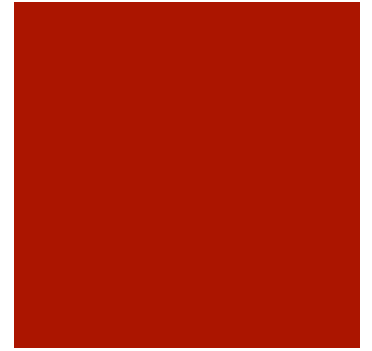
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 - Ms. Walters asked KP to remove her long-sleeve shirt to see the bruise. KP hesitated and when prompted again, KP did so. Ms. Walters took 4 photographs of the bruising. Walters did not touch KP at all.
- How did KP react to her questioning by Ms. Walters?
 - She had trouble sleeping and would cry, scream, and hide behind her mom's leg almost every morning when her mom dropped her off at school.
 - This anxiety lasted at least three months.

1. Order of the United States District Court for the Southern District of Calibraska

- Did the court find that the Fourth Amendment applied in this case and why?



1. Order of the United States District Court for the Southern District of Calibraska



- Did the court find that the Fourth Amendment applied in this case and why?
 - Yes, the Fourth Amendment protects citizens from unreasonable searches and seizures of their “persons, houses, papers, and effects.” Thus, state actors may not commit searches and seizures without probable cause or a warrant supported by Probable Cause.
- What did the court decide re: the existence of a special need in the context of child abuse investigations?

1. Order of the United States District Court for the Southern District of Calibraska



- Did the court find that the Fourth Amendment applied in this case and why?
 - Yes, the Fourth Amendment protects citizens from unreasonable searches and seizures of their “persons, houses, papers, and effects.” Thus, state actors may not commit searches and seizures without probable cause or a warrant supported by Probable Cause.
- What did the court decide re: the existence of a special need in the context of child abuse investigations?
 - The court finds a special interest exists here where child protective services agencies have an interest in protecting minors’ well being.
 - The court finds:
 - The interview was justified at its inception and Ms Walters helped KP calm down when distressed.
 - The physical examination was also justified – was conducted in a private room, did not touch her.

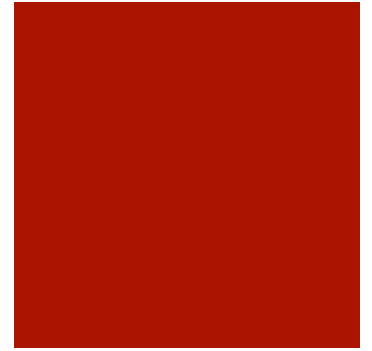
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- What was the court's conclusion?
 - The Court granted the Defendant's motion for Summary Judgment.
 - The suit was dismissed.

- Name the party that won at the district level.
 - Calibraska Department of Child Protective Services and Zoe Walters

1. Order of the United States District Court for the Southern District of Calibraska



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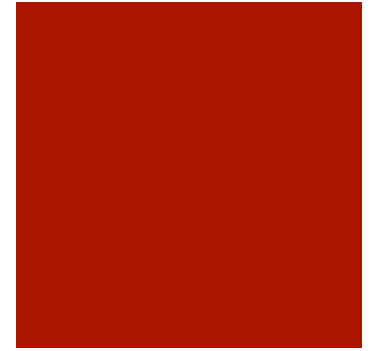


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 - Calibraska Department of Child Protective Services and Zoe Walters

So at this juncture...

- District Court
 - Plaintiff – Georgia Pierre (on behalf of KP)
 - **Defendants – CDCPS and Zoe Walters**
 - (win)



2. Opinion of the US Court of Appeals for the 12th Circuit

- 1. Who appeals the district court's opinion?
- 2. What are the two issues before the court?
- 3. Which standard is this appellate court using?
- 4. What 3 reasons does the court rely on when formulating its argument?
 - A. _____
 - B. _____
 - C. _____
- 5. What is the 12th Circuit's conclusion?
- 6. What does Circuit Judge Major say in the concurrence?



So at this juncture...



- District Court
 - Plaintiff – Georgia Pierre (on behalf of KP)
 - **Defendants – CDCPS and Zoe Walters**
 - (win)

- United States Court of Appeals for the Twelfth Circuit
 - **Appellant – Georgia Pierre (on behalf of KP)**
 - (wins)
 - Appellee – CDCPS and Zoe Walters

3. Order of the SC Granting Petition for Certiorari



- 1. Who appealed the 12th Circuit's Decision?

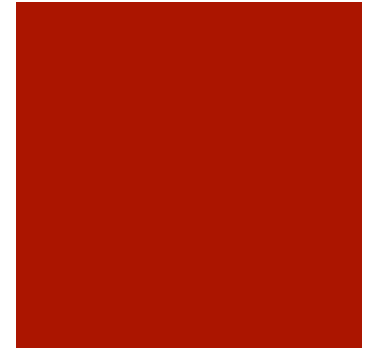
- 2. What are the two issues the Court is granting writ of certiorari for?
 - A. _____
 - B. _____

3. Order of the SC Granting Petition for Certiorari



- 1. Who appealed the 12th Circuit's Decision?
- 2. What are the two issues the Court is granting writ of certiorari for?
- 3. What are the two issues that you will be arguing in your appellate case briefs and during oral arguments?

4. Undisputed Issue



- There is one undisputed issue in the case.
- What is it?

5. Exhibit A – Excerpt of CDCPS Protocol and Policy Manual

- 1. What is CDCPS? What is its objective? What is its purpose?

- 2. Initial Investigation
 - (a) What are the requirements of the case worker during initial investigations?
 - (b) What is CDCPS' policy re: interviewing and examining victims?
 - (c) What is CDCPS' policy re: documentation versus physical examinations for their caseworkers in initial investigations?
 - (d) What is CDCPS' policy re: response time for their caseworkers in initial investigations?



6. Exhibit B – Photograph of Bruise



- What do we see here? How many distinct areas of bruising?

6. Exhibit B – Photograph of Bruise



- What do we see here? How many distinct areas of bruising?



7. Exhibit C – Transcript of Recording of CDCPS Intake



1. Was KP in danger when Ms. Simon called the dispatcher?
2. Why did Ms. Simon believe that KP had been mistreated?
3. Has something like this occurred to KP in the past that Simon was aware of?

8. Exhibit D – Excerpt of Transcript of Deposition of Zoe Walters



- 1. Did Walters think KP was uncomfortable during any point in the questioning?
- 2. According to Walters, did KP ever ask for her mother? If so, how many times?
- 3. Where was KP being interviewed? Could KP see out of a window?
- 4. According to Walters, could anyone have hypothetically seen into the window?
- 5. According to Walters, did anyone peer through the window?
- 6. What did Mr. Garry want?

So at this juncture...

- District Court
 - Plaintiff – Georgia Pierre (on behalf of KP)
 - **Defendants – CDCPS and Zoe Walters**
 - (win)

- United States Court of Appeals for the Twelfth Circuit
 - **Appellant – Georgia Pierre (on behalf of KP)**
 - (wins)
 - Appellee – CDCPS and Zoe Walters

- United States Supreme Court
 - Petitioner – CDCPS and Zoe Walters
 - Respondent – Georgia Pierre (on behalf of KP)

- *** YOU are writing a brief and making oral arguments for this stage of the case



The rest of the quarter...

- You will work in groups of 2 or 3 as either Petitioners (counsel for CDCPS and Zoe Walters) or Respondents (counsel for Georgia Pierre (on behalf of KP))
- You will create a written appellate brief to be submitted to the fictional Devitt Supreme Court.
- You will argue your brief and your main points Week 10 in front of a panel of judges.
- The rest of the quarter: hands on mentoring with your written brief and preparing you for oral arguments.

Agenda – Hour 3

- Now you will:

- 1. Be assigned to your groups for the rest of the quarter
- 2. Pick a group name.
- 3. Come sign up for either the Petitioner or the Respondent
- 4. Access and download the Template Brief on TED
- 5. Save the Template Brief to a DROPBOX folder
- 6. Work on/ Fill out:
 - a) Table of Contents (Template Brief p.1)
 - b) Standard of Review (Template Brief p.3) ← Note there is some legal research on Westlaw required here.
 - c) Questions Presented (Template Brief p.2)



Groups!

- Group 1:
 - Samia
 - Mary
- Group 2:
 - Fadi
 - Salvador
 - Candi
- Group 3:
 - Nicole
 - Diana
 - Amanda
- Group 4:
 - Luis
 - Ruchell
 - Rebecca
- Group 5:
 - Osiris
 - Jessica
 - Gary
- Group 6:
 - Chris
 - Jillian
 - Cassandra
- Group 7:
 - Allison
 - Matt
 - Hillary
- Group 8:
 - Moises
 - Hugo
 - Catherine
- Group 9:
 - Julia
 - Howie
 - Nathan





Finally, come pick up your exams.