STATE-CREATED DANGER IN THE 5TH CIRCUIT

JEFF KOBS, ***Fort Worth***
Kobs, Haney & Hundley

State Bar of Texas
18TH ANNUAL SUING AND DEFENDING GOVERNMENTAL ENTITIES COURSE
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JEFF KOBS
KOBS, HANEY & HUNDLEY, L.L.P.
Sundance Square - Suite 204
115 West Second Street
Fort Worth, Texas 76102
Tel. (817) 332-5956
Fax. (817) 332-2899
Email jeffkobs@sbcglobal.net

BIOGRAPHICAL INFORMATION

EDUCATION

B.A. in Government, The University of Texas

J.D., The University of Texas School of Law

PROFESSIONAL ACTIVITIES

Partner, Kobs, Haney & Hundley, L.L.P., Fort Worth, Texas

Board Certified, Texas Board of Legal Specialization:

- Civil Trial Law
- Personal Injury Trail Law
- Civil Appellate Law

Outstanding Young Lawyer of Tarrant County – 1993

Life Fellow, Texas Bar Foundation

Charter Life Member, Fort Worth/Tarrant County Bar Foundation

BAR AFFILIATIONS

State Bar of Texas
American Bar Association
Bar Association of the Fifth Federal Circuit
American Trial Lawyers Association

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I. Introduction

Federal courts across the nation continue to wrestle with cases seeking to impose liability on governmental entities for failing to protect citizens in certain circumstances - the so-called "state-created danger" doctrine. The Fifth Circuit court in particular continues to struggle with whether or not to recognize and apply the doctrine**.**

This paper addresses the developing history of the state-created danger doctrine and its on-again, off-again status in the Fifth Circuit.

II. Overview of Constitutional Right To Bodily Integrity

Title 42 U.S.C. § 1983 provides a cause of action against any person who, under color of state law, deprives another of his or her constitutional rights. 42 U.S.C. § 1983; *Collins v. City of Harker Heights,* 503 U.S. 115, 120-21 (1992). Generally, the state does not have an affirmative duty to protect someone from the acts of another private citizen. The state's failure to protect a person against private violence does not ordinarily constitute a due process violation because due process is a limitation on state action and not a mandate to take affirmative action. The Constitution's "purpose was to protect the people from the State, not to ensure that the State protected them from each other." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989).

Despite the absence of a *duty* to protect on the part of the state, the constitutional right to "bodily integrity" and "personal security" is a recognized due process right. In *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979), the court held:

> although it would be impossible to catalogue and to describe precisely each "liberty" interest protected by the Due Process Clause, it can hardly be doubted that chief among them is the right to some degree of bodily integrity.

Id. at 383.

The existence of the rights to bodily integrity and personal security are important starting points in the state-created danger analysis. The Supreme Court cautions in *Anderson v. Creighton*, 483 U.S. 635 (1987), against defining the constitutional rights in Section 1983 litigation in too general of terms and requires the right to be defined in a "particularized, and hence more relevant sense." *Id.* at 640.

The district court in *Sciotto v. Marple Newton School District*, 81 F. Supp. 2d 559 (E.D. Pa. 1999), in defining the constitutional right at issue in a state created danger case, stated:

> . . . the relevant constitutional right for purposes of Qualified Immunity in this case is a student's right to freedom from school officials' deliberate indifference to, or affirmative acts that increase the danger of, serious injury from unjustified invasions of bodily integrity perpetrated by third parties in a school setting.

Id. at 568.

III. Early Development - The Snake Bite Cases

Although the Supreme Court's holding in *DeShaney v. Winnebago* is commonly cited as the genesis of the state-created danger doctrine, it is important to remember that prior to *DeShaney*, several circuits had recognized the state-created danger theory in some form. *See Wells v. Walker*, 852 F.2d 368, 370-71 (8th Cir.1988)*; Escamilla v. City of Santa Ana*, 796 F.2d 266, 269 (9th Cir.1986); *Estate of Gilmore v. Buckley*, 787 F.2d 714, 722 (1st Cir.1986); *Jones v. Phyfer*, 761 F.2d 642, 646 (11th Cir.1985); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982).

For an excellent discussion of the pre-*DeShaney* development of the state-created danger, see David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357, 359-61 (2001). Pruessner discusses the evolution of the so-called "snake bite cases" – a name derived from a quote by Justice Posner in *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982):

> If the state puts a man in a position of danger from private people and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. at 618.

IV. *DeShaney v. Winnebago*

DeShaney stands for the proposition that in certain limited circumstances, the United States Constitution imposes on the state affirmative duties of care and protection. *DeShaney*, 489 U.S. at 198. One such limited circumstance arises when the state exposes a person to a danger of its own creation, that is, when the state creates the danger. *Id*. at 201.

In *DeShaney*, a county agency was sued for violating a child's due process rights by failing to protect the child from his father's abuse. *Id*. at 193. The Supreme Court held that the agency was not liable because it did not create the danger that the child faced nor do anything to render the child more vulnerable to it. The Supreme Court went on to comment:

> [the state] played no part in [the danger's] creation, nor did it do anything to render [the plaintiff] any more vulnerable to them.

Id. at 201.

It is this dicta that is commonly cited as the basis for the development of the state-created danger theory. *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002)*; Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567, 572 n.7 (10th Cir. 1995).

IV. Developments after *DeShaney* - Adoption by Each Circuit over Ensuing 12 Years

After the Supreme Court's opinion in *DeShaney*, numerous courts around the country recognized the state-created danger theory and applied the theory to various fact situations, finding the theory imposed liability on state actors. A chronology of each circuit's application of the standard and the factual circumstances in which it was applied are set forth below:

9th Circuit	*Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir. 1989) (adopting the state-created danger theory in the context of a § 1983 claim brought against police officers by the passenger of an impounded vehicle who was raped after officers allegedly abandoned her on the side of the road);
11th Circuit[1]	*Cornelius v. Town of Highland Lake*, 880 F.2d 348, 356 (11th Cir. 1989) (overruled on other grounds by *White v. Lemacks*, 183 F.3d 1253, 1256 (11th Cir.1999)) (adopting the state-created danger theory in the context of a § 1983 claim brought against town and prison officials by a town clerk who was abducted and terrorized by prison inmates assigned to a community work program);
8th Circuit	*Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990) (adopting the state-created danger theory in the context of a § 1983 claim brought on behalf of a woman killed by her estranged husband against a police chief who allegedly directed his officers to ignore her pleas for police assistance);
2d Circuit	*Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by demonstrators against police officers who allegedly conspired to permit a group of "skinheads" to assault the demonstrators with impunity);
7th Circuit	*Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993) (adopting the state-created danger theory in the context of a § 1983 claim brought by motorists who were injured in an automobile collision with an allegedly drunk driver against police officers who had previously failed to arrest the driver);
10th Circuit	*Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995) (accepting the state-created danger theory, but rejecting a § 1983 claim brought against state mental health officials on behalf of an activity therapist who was killed by a mental hospital patient);
4th Circuit	*Pinder v. Johnson*, 54 F.3d 1169, 1175(4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 994, (1995)

[1] *But see* Section VII, *supra*, in which the Eleventh Circuit retreats from the doctrine.

(considering, but not recognizing a state-created danger claim and noting that there may be some "point on the spectrum between action and inaction" in which the state would be implicated in the harm caused by third parties);

3d Circuit — *Kneipp v. Tedder*, 95 F.3d 1199, 1201, 1208 (3d Cir.1996) (adopting the state-created danger theory in the context of a § 1983 claim brought against a city and police officers on behalf of a woman who suffered brain damage when the officers allegedly left her alone to walk home on a cold night while she was intoxicated);

1st Circuit — *Frances-Colon v. Ramirez,* 107 F.3d 62, 63-64 (1st Cir. 1997) (declining to adopt but holding that a substantive due process interest in "bodily integrity" can support a personal injury claim under § 1983 in the rare and exceptional cases when a government employee affirmatively acts to increase the threat of harm to the claimant), *see also Rodriguez-Cirilo v. Garcia*, 115 F.3d 50 (1st Cir. 1997);

6th Circuit — *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998) (adopting the state-created danger theory in the context of a § 1983 claim brought by undercover police officers alleging that city officials released personal information from their personnel files to the drug conspirators that the officers were investigating);

D.C. Circuit — *Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001) (adopting the state-created danger theory, but rejecting a § 1983 claim brought against a police department and individual officers on behalf of an individual who was shot while working as an undercover operative for the department).

All circuit courts, save and except the Fifth Circuit, have recognized and adopted some form of state-created danger theory of liability. *See Butera v. District of Columbia,* 235 F.3d 637, 648-49 (D.C. Cir. 2001), n.10 (collecting cases from each of the circuits discussing the state-created danger theory); *Fifth Circuit Rejects §1983 "State-created Danger" Claim of Plaintiff Shot by an Undercover Informant Using a Gun on "Loan" from a City Police Officer*, 116 HARVARD L. REV. 1912 (2003)(eleven circuits have now determined that such a right exists when the affirmative acts of a state actor actually create or increase the danger that results in the plaintiff's injury).

V. State-Created Danger in the Fifth Circuit

A. History of Doctrine in Fifth Circuit

Beginning with *Salas v. Carpenter,* 980 F.2d 299 (5th Cir. 1992), the Fifth Circuit wrestled with the state-created danger doctrine. The Court acknowledged that the doctrine had been adopted in sister circuits and defined the elements of the doctrine in the Fifth Circuit for purposes of appellate review. The Court, however, initially stopped short of adopting the theory.

Notable cases included: *Leffall v. Dallas Indep. Sch. Dist.*,28 F.3d 521, 530 (5th Cir. 1994)("we have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory")*; Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)("no Fifth Circuit case has yet predicated relief on a state created danger theory"); *Randolph v. Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997)("the state-created danger theory has not been adopted in this Circuit"); *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001)("although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory").

B. The *McClendon* Opinions

1. *McClendon I*.

The Fifth Circuit finally recognized and adopted the state-created danger doctrine in *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001), *vacated & reh'g granted en banc,* 285 F.3d 1078 (5th Cir. 2002)(*"McClendon I"*). In *McClendon*, a police officer loaned a gun to a police informant to protect himself from likely harm from McClendon, the man against whom he had informed. The informant then used the gun to shoot McClendon in the face, permanently blinding him. *McClendon I*, 258 at 434 - 38.

The district court for the Southern District of Texas dismissed the case on the grounds that the Fifth Circuit had not adopted the state-created danger doctrine and that even if the doctrine applied, its parameters were not clearly established at the time of the shooting – July 1993. On appeal, the initial panel unanimously disagreed.

Justice Politz discussed the development of the state-created doctrine both outside the circuit and through references in cases within the Circuit. The court held that under the facts, McClendon had established a right to relief under the state-created danger doctrine and that the individual police officer was not entitled to qualified immunity because the application of the state-created danger theory was clearly established by July 1993. *Id*. at 438-41.

2. *McClendon II*

The defendants moved for rehearing *en banc* which was granted by the Court. The panel opinion was ultimately withdrawn and a per curium opinion, *McClendon II*, 285 F.3d 1078 (5th Cir. 2002), was handed down by a divided court. In *McClendon II*, the court did not explicitly adopt or reject the state-created danger doctrine. Instead, the court held that the factual circumstances were insufficient to reach the level necessary to invoke the doctrine.

3. Post *McClendon*

Following the Fifth Circuit's *en banc* reverse course in *McClendon II*, the court continued to review state-created danger cases. In *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002), the Fifth Circuit wrote of their holding in *McClendon II*, "we neither adopted nor rejected the state created danger theory." *Id*. at 321.The Court expressly stated that "this Court had *recognized* but never *adopted* the state-created danger theory." *Id*. (emphasis added).

In *McKinney v. Irving Independent School District*, 309 F.3d 308 (5th Cir.2002), handed down at the same time as *Morin*, the Court again stated: "this Court had *recognized* but never *adopted* the state-created danger theory." *Id*. at 313 (emphasis added).

By 2003, the Fifth Circuit had further retreated. In *Rivera v. Houston Independent School District*, 349 F.3d 244 (5th Cir. 2003), the Court reviewed on appeal a trial court's dismissal of a state-created danger claim. In *Rivera*, the parents of a middle school student sued the school board for failing to protect their son from gang violence at the school. The Court's earlier "recognized but never adopted" language was replaced with the statement:

> we have *never recognized* state-created danger as a trigger of State affirmative duties under the Due Process clause.

Id. at 249 (emphasis added).

The following year, the Court again addressed the state-created danger theory in *Beltran v. City of El Paso*, 367 F.3d 299 (5th Cir. 2004), a claim arising from a "911" operator's alleged failure to properly dispatch police units resulting in the deaths of two individuals. The court couched the history of the state-created danger doctrine as follows:

> this court has consistently *refused to recognize* a 'state-created danger' theory of § 1983 liability.

Id at 307 (emphasis added).

In March 2006, the Fifth Circuit released its opinion in *Rios v. City of Del Rio*, 444 F.3d 417 (5th Cir. 2006). In *Rios*, the plaintiff, a US Customs officer, sought recovery for damages he sustained when struck by a police vehicle driven by an escaping prisoner. He asserted claims under the state created danger doctrine against the police chief and officer, who unsuccessfully moved for dismissal under FED. R. CIV. PRO. 12(b).

The Fifth Circuit reversed and dismissed the claims, stating:

> . . . this court has frequently spoken of the "state-created danger" theory, and has discussed its various permutations and requirements as applied in other circuits, but neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof. We have, however, many times refused to allow recovery sought to be predicated thereunder."

Id. at 422.

4. *Scanlan v Texas A & M University*

Pending before the Fifth Circuit are a series of appeals consolidated under the title *Scanlan v. Texas A & M University*, which arise from the deaths and injuries caused by the collapse of the Texas A & M bonfire on November 17, 1999. Various Plaintiffs brought suit in District Court alleging violations of due process under the state-created danger theory.

The Plaintiffs alleged that the construction of the Bonfire stack on university property without professional supervision created a danger to the students assigned to work on the stack. On November 17, 1999, the Bonfire stack collapsed killing 12 and injuring 27 of the student workers.

The district court originally dismissed the Plaintiffs claims under Fed. R. Civ. P. 12b(6). The Fifth Circuit reversed the district court's dismissal, holding the Plaintiffs adequately "stated a section 1983 claim under the state-created danger theory." *Scanlan v. Tex. A&M Univ.*, 343 F.3d at 538. The Court stated:

> Whether deliberately delegating the construction of the bonfire stack to students the University Officials allegedly knew were not qualified to handle such a dangerous project, and whether deliberately providing no supervision to students in building the bonfire even though they knew the students were not qualified to build the stack, constituted deliberate indifference presents fundamental questions of fact.

Id.

On remand, the district court again dismissed the plaintiffs claims, holding that although there were multiple questions of fact as to whether the defendants acted with deliberate indifference, "the state-created danger theory of substantive due process was not clearly established at the time of Defendants' Bonfire related activities." (Order, May 24, 2004). The case was argued on September 30, 2005.

VI. Elements of State-Created Danger Doctrine

A. Elements in other Circuits

As the various circuits have adopted and applied the state-created danger doctrine, variations in the precise elements necessary to find liability have occurred. This was one of the reasons advanced in the *en banc* opinion in *McClendon II* in finding that the state-created danger doctrine was not clearly established, the Court holding that although six other circuits had recognized the state-created danger doctrine by July 1993, courts had not defined the "contours of [the] right . . . with sufficient clarity to provide . . . [the officer] with fair warning that his conduct violated that right." *McClendon II, 285* at 332-333.

Although the exact elements in any particular circuit may be stated differently, the differences are more cosmetic than substantive. For example, the Third Circuit recently reviewed the "state-created danger" theory of liability in cases brought pursuant to 42 U.S.C. § 1983. *See Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006). There, the Court reiterated the four salient elements of a viable state-created danger claim. *Id*. at 281. First, the harm ultimately caused must have been foreseeable and fairly direct. *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996). Second, a state actor must have acted with a degree of culpability that shocks the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); *Miller v. City of Philadelphia*, 174 F.3d 368, 375-76 (3d Cir. 1999). Such culpability is more than the state actor acting in willful disregard for the plaintiff's safety. *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004). Third, a special relationship must have existed between the state and the plaintiff such that "the plaintiff was a foreseeable victim of the defendant's acts," or a "member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general. *Kneipp*, 95 F.3d at 1209 n.22; *Morse v. Lower Merion Sch. Dist*., 132 F.3d 902, 906, 913 (3d Cir. 1997).

Finally, a state actor must have "used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." *Bright*, 443 F.3d at 281. As to the fourth element, the Court stressed that "[i]t is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." Id. at 282. In other words, "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of

exposure to danger." *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1374 (3d Cir. 1992) (en banc) (emphasis supplied); contra *Bright*, 443 F.3d at 290 (Nygaard, J., dissenting) (stressing that the Court should not focus on whether the act is appropriately characterized as "affirmative").

The Third Circuit's four part test can be contrasted with the Sixth Circuit's three part test. In the Sixth Circuit, to bring a "state created danger" claim, the individual must show: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered the plaintiff. *See* Jones v. Reynolds, 438 F.3d 685 (6th Cir. 2006).

B. Elements in the Fifth Circuit

In *Johnson v. Dallas Independent School District*, the Fifth Circuit framed the state-created danger theory as: "when state actors knowingly place a person in danger. . ." *Johnson v. Dallas Independent School District*, 38 F.3d 198, 201 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995). The Court went on to describe the elements of liability under the state-created danger theory:

(1) The environment created by the state actors must be dangerous;

(2) The state actors must know it is dangerous; and

(3) The state actors must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. *Id.* at 201.

In *Piotrowski v. City of Houston*, 51 F.3d 512 (5th Cir. 1995) the Fifth Circuit identified the elements necessary to recover in this Circuit under the state-created danger doctrine:

(1) that state actors increased the danger to the Plaintiff; and

(2) that the actors acted with deliberate indifference.

Piotrowski, 51 F.3d at 515; *see also McClendon v. City of Columbia*, 258 F.3d 432, 437 (5th Cir.2001); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir.1997); *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir.1994); *Greene v. Plano Indep. Sch. Dist.*, 2004 U.S.App. Lexis 13255, at 4 (5th Cir. 2004)(unpublished).

The Court subsequently in *McKinney v. Irving Independent School District*, 309 F.3d 308 (5th Cir.2002) subsumed these factors in determining deliberate indifference. In *McKinney*, the Court held that deliberate indifference is established by showing "that the state actors created a dangerous environment, that they knew it was dangerous, and that they 'used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur.'" *McKinney*, 309 F.3d at 313-14, *citing Johnson v. Dallas Indep. Sch. Dist.***,** 38 F.3d 198, 201 (5th Cir. 1994).

In *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002) the Court held that to establish deliberate indifference, "a state actor must know of and disregard an excessive risk to the victims health and safety. . . The state actor's actual knowledge is critical to the inquiry. A state actor's failure to alleviate 'a state significant risk that he should have perceived but did not,' while 'no cause for commendation,' does not rise to the level of deliberate indifference." *Morin* at 321-22, *citing McClendon v. City of Columbia (McClendon II)*, 305 F.3d 314, 326 (5th Cir. 2002).

C. Requirement of affirmative act

In discussing the elements necessary to establish liability, many courts have required an affirmative act on the part of a state official. For example, the Court in *Johnson v. Dallas Independent School District* noted: "[t]he key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." *Johnson*, 38 F.3d at 201.

The Third Circuit recently noted in *Bright v. Westmoreland County*, 443 F.3d 276 (3d Cir. 2006) in focusing on that Circuit's fourth element requiring an affirmative act:

> If there were any inconsistency in the holdings of our prior cases regarding

> the fourth element of a state-created danger claim, the controlling precedent would be our *en banc* decision in *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3d Cir. 1992). While acknowledging that the line between action and inaction is sometimes difficult to draw, we there affirmed what *DeShaney* clearly teaches: the Due Process Clause proscribes only state *action* and, accordingly, liability "under the state-created danger theory [can only] be predicated upon the state's affirmative *acts* which work to plaintiffs' detriment in terms of exposure to danger.

972 F.2d at 1374.(emphasis added).

The Third Circuit's affirmative act element may be incorporated in other Circuit's "creation of opportunity" elements. *See Bright v. Westmoreland County*, 443 F.3d 276, 283 (3d Cir. 2006) ("[w]e perceive no conflict, however, between D.R[2]. and those cases which phrase the fourth element in terms of whether "state actors used their authority to create an opportunity that would not otherwise have existed" for injury to the plaintiff").

D. Requirement of a criminal, or third-party act

While each of the state-created danger cases examined by the Fifth Circuit has involved criminal conduct by a third party which constituted the "danger" that was alleged to be the cause of the harm, other circuits have had occasion to examine and apply the state-created danger theory in situations that do not involve "criminal" conduct by the third party or do not even involve a third party at all.

In *Sciotto v. Marple Newton School District*, 81 F. Supp. 2d 559 (E.D. Pa. 1999), a high school wrestler was injured when the coach invited an older, heavier college wrestler to a school exhibition. The district court found the state-created danger doctrine to apply, imposing liability on the school district for creating the danger to the student. In examining the causation of the injury, the Court noted:

> Causation in the "state-created danger" setting will often be less than direct, as the factual setting necessarily includes an independent 'danger' – in some cases a third party, in others a cold night or a state of inebriation, as in *Kneipp* – that lead to an injury to the plaintiff. *See Kneipp*, 95 F.3d at 1203. By analogy, the proper inquiry on causation under the state created danger theory is not whether the state actor "pulled the trigger," but whether the state actor placed the plaintiff in a bullet's likely path. *Sciotto v. Marple Newton School District*, 81 F. Supp. 2d 559, 565 (E.D. Penn. 1999).

VII. Future of State-Created Danger

In 2003, the Eleventh Circuit in *Waddell v. Hemerson*, 329 F.3d 1300 (11th Cir. 2003) held that state-created danger was no longer a basis for liability. The Court wrote:

> For a while, this Court had concluded that state and local government entities could be held liable for substantive due process violations for their failure to protect victims from harm caused by third parties where the state, through its affirmative acts, put the victim in "special danger" of harm. *See Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989). In *White v. Lemacks*, 183 F.3d 1253, 1257-59 (11th Cir. 1999), we concluded, however, that the "special relationship" and "special danger" doctrines were superceded by the standard employed by the Supreme Court in Collins, 503 U.S. 115, 117 L. Ed. 2d 261, 112 S. Ct. 1061. Thus, conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense. *See Collins*, 112 S. Ct. at 1070.

Id. at 1305.

Subsequent decisions in the Eleventh Circuit have confirmed that circuit's abandonment of the state-created danger doctrine as a basis for recovery.

[2] D.R. by L.R. v. Middle Bucks Area Vo. Tech. School, 972 F.2d 1364 (3d Cir. 1992)

Meanwhile, recent Fifth Circuit opinions may leave the door open to official adoption of the theory. For example, following the court's critical language of the theory in *Rios, supra*, recent unpublished opinions speak favorably regarding the state-created danger doctrine. *See Teague v. Tex. City Indep. Sch. Dist*., 2006 U.S. App. LEXIS 14976 (5th Cir. June 16, 2006)(unpublished) ("As to the state-created danger theory, we assume without deciding that it would be viable in this Circuit"); *Mason v. Richardson*, 2006 U.S. App. LEXIS 15296 (5th Cir. June 21, 2006,)("[appellant] has not shown that the exceptions to this general rule based on a special relationship or a state-created danger are applicable to this case").

The court's ruling in *Scanlan* should ultimately resolve the viability of the theory in the Fifth Circuit.