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FEATURED CASE:

Ninth Circuit Upholds Expanded Monitor Authority in Maricopa County Sheriff's Office Racial Profiling Case

***Melendres v. Skinner*, No. 23-15036 (9th Cir. Aug. 19, 2024).**

This case affirmed a district court's expanded authority granted to a court-appointed monitor overseeing the Maricopa County Sheriff's Office following repeated non-compliance with prior orders. The Ninth Circuit ruled that the district court acted within its inherent equitable powers, rejecting arguments that the order violated constitutional principles or procedural rules. The court emphasized the broad discretion given to district courts in fashioning remedies for constitutional violations, particularly in cases of persistent non-compliance. This ruling underscores the importance for municipal agencies to prioritize compliance with court orders to avoid increasingly invasive judicial interventions.

Background:

This case stems from a class action lawsuit filed against the Maricopa County Sheriff's Office ("MCSO") in Arizona, alleging that MCSO engaged in racial profiling of Latino drivers and passengers under the guise of immigration enforcement. In 2013, the district court issued a permanent injunction against MCSO after finding constitutional violations. The court later issued a supplemental permanent injunction ("First Order") appointing an independent monitor to assess MCSO's compliance.

In 2016, the court issued a second supplemental permanent injunction ("Second Order") requiring MCSO to reform its internal misconduct investigation procedures. In 2022, the court found the Sheriff in contempt for non-compliance with the Second Order and issued a third supplemental permanent injunction ("Third Order") with additional

remedial measures. These included creating a Constitutional Policing Authority (“CPA”) and assigning the monitor the CPA's duties related to overseeing complaint intake and routing, revising processes, and determining and implementing training needs.

The current Maricopa County Sheriff, Russ Skinner, appealed certain provisions of the Third Order to the Ninth Circuit Court of Appeals.

Question of Law:

Did the district court exceed its authority or violate constitutional principles in assigning expanded duties to the court-appointed monitor in the Third Order?

Holding:

The Ninth Circuit affirmed the district court's Third Order, finding that the court acted within its inherent equitable powers in assigning additional duties to the monitor and that the order did not violate constitutional principles or procedural rules.

Analysis:

The court's analysis centered on the source and extent of the district court's authority to issue the Third Order and assign duties to the Monitor. This was crucial in addressing the Sheriff's constitutional and procedural challenges.
First, the court emphasized that the district court relied on its inherent equitable powers rather than Federal Rule of Civil Procedure 53. The court explained that these inherent powers, codified in the All Writs Act (28 U.S.C. § 1651(a)), allow federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The court cited *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir. 1997), to explain that inherent powers are those "necessary to the exercise of all others."

The court further elaborated on the scope of these equitable powers by referencing Supreme Court precedent in *Swann v. Charlotte-Mecklenburg Bd. of Ed*., 402 U.S. 1, 15 (1971), which stated that "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." This broad authority was reiterated in *Stone v. City & County of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992), where the Ninth Circuit held that "Federal courts possess whatever powers are necessary to remedy constitutional violations because they are charged with protecting these rights."

In addressing the constitutional challenge, the court distinguished this case from Armstrong v. Brown, 768 F.3d 975 (9th Cir. 2014), where the Ninth Circuit had vacated provisions granting an expert witness adjudicatory powers. The court explained that here, the Monitor was assigned implementation duties rather than adjudicatory functions, which fell within the court's equitable powers to remedy constitutional violations.

The court also considered the possibility of more invasive equitable remedies, such as receiverships, which courts have used to take over governmental agencies that fail to comply with the law. Citing *Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010), the court noted that the ability to employ such extensive remedies strongly suggested that the court could provide for the less extensive authority conferred on the Monitor in this case.

Regarding judicial review, the court interpreted the First Order's provisions for review as applying to the Third Order. The court explained this interpretation based on the sequential numbering of the orders, their interconnected nature, and the absence of any explicit nullification of the review provisions in the Third Order.

Finally, in addressing the Rule 65 challenge, the court relied on its inherent equitable powers to explain why the specificity requirements were met. The court cited *Fortyune v. Am. Multi–Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004), to emphasize that injunctions need not elucidate how to enforce their terms, only what must be done to comply. The court explained that the district court's broad equitable powers allowed it to fashion remedies tailored to the specific circumstances of the case, including the history of non-compliance by MCSO.

Throughout its analysis, the court consistently referred back to the district court's inherent equitable powers as the primary source of authority for the challenged actions. This emphasis on inherent powers allowed the court to affirm the district court's broad discretion in fashioning remedies to address ongoing constitutional violations, even when those remedies involved significant oversight of a governmental entity.

Melendres v. Skinner

SHORT SUMMARIES:

2nd Circuit – Curfew – Right to Travel – Strict Scrutiny

Following the protests over the George Floyd murder, the City of New York imposed a week long curfew to quell the unrest. Suit followed challenging the curfew under various amendments to the Constitution. The lower court concluded that strict scrutiny applied to the right to travel claim but nevertheless dismissed that claim. On appeal the panel assumed without deciding that strict scrutiny applied and determined that based on all judicially determinable facts and the pleadings that the City's decision withstands the challenge. As no surprise, the country's largest law department does a great job and their win in this case reflects their excellence.

Jeffery v. City of New York

2nd Circuit – Handguns – Unlawful Arrest/Seizure

The facts in this case are fairly straightforward. A person driving a car had trouble with his GPS and pulled over to the side of the road. Unfortunately for him, the area was a known area for lots of drug transactions. Almost immediately an office arrived and asked for ID. The driver gave ID and a duly issued firearms permit. At that, he was ordered out of the car and as allegedly violently forced to the ground and handcuffed. Several other officers arrived and ultimately the firearms permit was found legit, yet the police continued to hold him for another 30 minutes. The man sued and the court denied immunity. The panel noted that: "That conduct, as alleged by Plaintiff-Appellee Basel Soukaneh, is that in the course of a routine traffic stop, Andrzejewski unlawfully and violently handcuffed and detained Soukaneh in the back of a police vehicle for over half an hour and conducted a warrantless search of Soukaneh's vehicle after Soukaneh presented a facially valid firearms permit and disclosed that he possessed a firearm pursuant to the permit." And the panel concluded: "The evidence supports the conclusion that Andrzejewski violated Soukaneh's Fourth Amendment rights to be free from unreasonable search and seizure when he detained Soukaneh in the manner, and for the length of time, that he did, and when he conducted the warrantless searches of Soukaneh's car and trunk. Andrzejewski is not entitled to qualified immunity for this alleged conduct and, accordingly, the district court properly denied his motion for summary judgment."

Soukaneh v. Andrzejewski

3rd Circuit – TikTok – Section 230

This case has nothing to do with local government law, but you may be interested. TikTok curates a host of information from influencers. Apparently, idiots abound on TikTok and in the influencing world. TikTok apparently saw the need to allow them to post what were termed "Blackout Challenges" "which encourages viewers to record themselves engaging in acts of self-asphyxiation. After watching the video, Nylah [a ten year old] attempted the conduct depicted in the challenge and unintentionally hanged herself." The parents sued and the case was dismissed by the lower court. The panel reversed noting that while Section 230 protects against a host platform being sued for the content provided by a third party, in curating the material TikTok acted as a content provider and was not immune from suit.

Anderson v. TikTok

3rd Circuit – False Arrest – Bivens – Federalized deputies

This case sends a message to parents – be careful what you name your children. In this case a woman skipped parole in 1993 in Pennsylvania. In 2019, the folks in Pennsylvania issued a warrant for her arrest but targeted a woman of the same name living in New Jersey. She was arrested in held in jail for about two weeks all the while protesting her innocence and asking that her fingerprints be compared to that of the woman being sought. When that ultimately happened and proved she was a different person, she was still held for two days before being released (presumably with apologies all around). She sued, but the folks she sued were either US Marshals or sheriff's deputies who were cross deputized as federal marshals. The court concluded that because the facts in this case were different from those in *Bivens* it would not extend *Bivens* and granted the officers immunity. *Egbert v. Boule,* 596 U.S. 482, 491 (2022).

Henry v. Essex County

4th Circuit – Malicious Prosecution – Jury Instructions – Dismissals of Jurors

The case stems from a police investigation of an assault. The officer had substantial probable cause to arrest a person involved in the assault but between the time of applying for the charges and executing the arrest warrant the officer received exculpatory information about the suspect in the case. Once the charges were dismissed the once suspected filed suit against the officer and the county. The case ultimately went to trial where the jury rendered a verdict for the officer. On appeal the Plaintiff voiced objections to the jury instructions that varied from the model by incorporating case specific information in line with circuit precedent. The instructions as given were upheld. In a somewhat "you won't believe it until you read it" fact, a member of the empaneled jury during its first lunch break spotted the Plaintiff and sought to give the Plaintiff "a hug". The court, at first concluded that the instructions to the jury were not fully sufficient to have warned them not to offer hugs to the parties, so the case continued with the juror on board. At the conclusion of the trial, on a renewed objection from the defense, the court reconsidered and dismissed the juror. This decision was also appealed and rejected by the panel. Great work by the Anne Arundel County legal department.

Hicks vs. Anne Arundel County

4th Circuit – Excessive Force – Qualified Immunity

It's hard to feel sorry for someone who is the subject of a call from residents about a man walking around the neighborhood pointing a gun at people. That was the call to 9-1-1. However, when the police arrived all the saw was a man walking down the street with something in his hand. The officers told the man to put his hands up and when he did, the officers thought he held a gun. Various commands were issued including "drop the gun." This unfortunate person believing the command was to be obeyed reached into his jacket to collect the gun and drop it. The police, believing him to be engaging in a gun fight shot him. One officer fired three shots and another nine. The wounded man apologized saying he was only trying to obey. Suit followed. The lower court granted summary judgment based on qualified immunity and the panel in a split decision affirmed. The majority noted that hindsight likely would have led the officers to act differently and the dissent noted that the man had something of a Hobson's choice: do as he did to drop the gun and get shot, or do not do so, and get shot or worse.

Caraway v. City of Pineville

4th Circuit – Gun Control

The Court *en* banc upheld Maryland gun control regulations in a split decision. "Maryland law prohibits any person in the state from selling, purchasing, receiving, transporting, transferring, or possessing an "assault weapon," subject to limited exceptions. Md. Code, Crim. Law § 4-303. A violator of this statute faces up to three years' imprisonment. Id. § 4-306. Maryland law enforcement officers are authorized to seize and 5 dispose of weapons sold, purchased, received, transported, transferred, or possessed in violation of the law. Id. § 4-304."

Bianchi v. Brown

5th Circuit – Regulating County's Own Property – Political Activity

From the beginning of the opinion: "In April 2024, the Palo Pinto County Commissioners Court enacted a set of electioneering regulations ("Regulations") that restrict where, when, and how people are permitted to electioneer on Palo Pinto County property. Two local grassroots organizations and one citizen subsequently sued, claiming the Regulations violate the First Amendment. The district court denied the plaintiffs' motion for a preliminary injunction." The panel reversed. Long story short, regulating political activity even on the government's own property needs to be carefully crafted. These regulations were not.

Palo Pinto County Conservatives v. Long

5th Circuit – Geofence Warrants

The case describes the novelty of the geofence warrant and gives a description of what the data involves and the process for obtaining it. In essence and very basically, the warrant seeks data from Google as to where an android device has been within a specific area during a specific time and whose account is associated with that device. With that said and because the case is too complicated for me to fairly detail, I note from the opinion: " We hold that the use of geofence warrants—at least as described herein—is unconstitutional under the Fourth Amendment. In doing so, we part ways with our esteemed colleagues on the Fourth Circuit. *See United States v. Chatrie*, 107 F.4th 319 (4th Cir. 2024). A real Circuit split so onto the Supreme Court we may go.

US v. Smith

5th Circuit – Unlawful Seizure – Dogs – Qualified Immunity

From the beginning of the opinion: "Responding to a domestic disturbance call, Deputy James Killian, without a warrant, entered the home that Rubicela Ramirez shared with her boyfriend, Francisco Gonzales. In the first minute after he entered, Killian pepper sprayed both Ramirez and Gonzales and killed two of their dogs. Ramirez and Gonzales filed this lawsuit against Killian asserting claims under 42 U.S.C. § 1983. Killian raised qualified immunity as a defense. The district court dismissed Ramirez's and Gonzales's claims for warrantless entry and excessive force at summary judgment but permitted their claim for seizure of one of their dogs to proceed to a jury trial. The jury found Killian liable, but the district court overturned the jury verdict." The panel reversed some of those decisions. On the warrantless entry claim, the court found that the officer had exigent circumstances sufficient to justify the warrantless entry. As to the excessive force claims, this case again highlights the importance of an officer being clear in the directions given to people before pepper spraying them for not complying. The court noted that the body cam video clearly reflected inconsistent orders given to the people whose response to one of the contradictory orders caused the officer to pepper spray that person. Also, the court wasn't too happy with the officer banging the person's head on the ground and concluded that there wasn't any clearly established law that made that conduct acceptable. Finally, as to shooting the dog, the court said: "Looking, therefore, to the other circuits, we find a robust consensus that an officer may not, consistent with the Fourth Amendment, kill a pet dog unless he reasonably believes that the dog poses a threat and that he is in imminent danger of being attacked. We are far from the first to recognize and apply this rule—in fact, we are almost the last."

Ramirez v. Killian

6th Circuit – Court Proceedings – Contempt – Misconduct

So, the court's rules prohibit filmography in the courtroom. During a virtual proceeding in a criminal case an attorney used his cell phone to take a picture of the proceedings and then posted it. The attorney did not seek approval before doing so. Contempt offers the only enforcement mechanism for violating the court's rule. The local prosecutor took a dim view of the attorney having purportedly violated the rule and filed a petition for contempt. The attorney moved to dismiss and the court granted the motion. Rather than let sleeping dogs lie, the attorney brought a federal claim against the prosecutor seeking to have the federal court enjoin what the attorney perceived as a violation of his Constitutional rights. The lower court granted summary judgment to the prosecutor. The panel on appeal concluded that the attorney actually lacked standing. In doing so, the panel majority wrote "But contempt isn't a crime that hinges on the prosecution. Instead, it depends on the court." In so noting, the court distinguished the attorney's claim from cases involving rules with criminal penalties. The dissent would have found standing and affirmed the lower court's grant of summary judgment to the prosecutor.

Somberg v. McDonald

6th Circuit – Church and State – Police – Secondary Employment

The case begins:""A house divided against itself cannot stand." So too, it seemed, for a house of worship in this case. Off-duty police made the mistake of involving themselves in that division, which is the genesis of this suit." The pastor of a church engaged in an indiscretion that became widely known and the congregation dropped from 2000 to 200 in short order. That decline led to other difficult issues for the church including mortgage payments. The church voted to oust the pastor. The pastor was not too keen on being ousted (albeit outed for adultery which was the indiscretion). The church hired off-duty police to provide security and the city authorized that employment under its secondary employment policies that allowed third parties to hire off-duty officers who could wear uniforms, etc. The church hierarchy provided the town with documentation of the decision to oust the pastor. When the pastor arrived and took the podium, he was asked to step aside and refused. Eventually, he left, but then filed suit. Interfering with religion and various other constitutional claims formed the basis of the suit against officers and the town. Lower court dismisses suit and panel affirms.

Couzens v. City of Forest Park, Ohio

6th Circuit – Jails – medical conditions – deliberate indifference – trial practice

Following a $6.4 million verdict against them, several nurses at the jail appeal. Essentially, the issues involve whether their failure to provide essential medical treatment was the proximate cause of the death of an inmate. The inmate was evaluated as having severe alcohol withdrawal symptoms. The nurses did not provide intravenous fluids nor drugs that might have alleviated his condition. The autopsy results concluded that "the cause of Jones's death was from "complications of chronic ethanol abuse" and noted damage to various vital organs, including "extensive necrosis" in Jones's brain." There were several experts who testified and apparently, efforts to revive Jones when he was first observed unresponsive were inadequate at first possibly leading to a longer period of lack of oxygen. Regardless, the case reflects the importance of having policies in place to test and retest medical decisions involving inmates to mitigate risk. Because inmates often lie about their health to get relief from oppressive conditions in the jail, officers and health professionals are often

cynical about how elevated the need for intervention might be, so having in place ways to counteract cynicism while at the same time protecting against inmates "testing" the system can be a necessary component of risk reduction. Having tried cases early in my career, I recognize that sometimes the handling of a matter at trial seem wrong in retrospect. Not objecting may be the best course to avoid having the jury see you as nasty but may affect the ultimate result very negatively. This case presents some reminders in that regard. During the trial Plaintiff's counsel cried in front of the jury while questioning the deceased's brother. On appeal, the court discounted any basis for appeal of the attorney's misconduct for trying to influence the jury improperly, by noting that the defense did not object at the time. Similarly, the jury found the nurse did not violate professional standards in a count for a state law remedy which the appeal argued was inconsistent with the verdict of deliberate indifference. This argument the court found the defendants waived.

Jones v. Kent County, Mich., et al.

6th Circuit – Towers – FCC – Shot Clock

A brief summary only advises that a tower company thought it could build a tower to resolve a dead zone. The company found land on property owned by a public school and leased it. Neighbors were not too pleased. The tower company sought to comply with local zoning and notified the neighbors but then concluded that because the land was owned by a public school that Illinois law provided for immunity from local regulation. It sought to get around the local zoning. It filed suit. The lower court granted a preliminary injunction against the town. Filing the suit, however, meant that there was no final action starting the shot clock according to the appellate court. Preliminary injunction reversed.

TowerCo 2013, LLC v. Berlin Twp. Bd. of Trs., et al.

6th Circuit – First Amendment – on-duty vs off-duty

In this case a security guard at a public library expressed feelings about the Black Lives Matter protests following the George Floyd murder. Those feelings were expressed in a meme he posted to his Facebook page which was restricted to friends and family. As the court characterized it, the post was "insensitive". The post lasted about 24 hours before the guard's mother convinced him to remove it. Despite its brief lifespan, the post generated his termination from employment. Significant to the majority's decision, the library administration adopted a position in support of the BLM protests, no evidence existed that members of the public knew anything about the post or the employee's involvement with it, and only a very limited number of employees saw the original post albeit those upset with it circulated it within the ranks of the library staff. The panel split 2-1 with the dissent adopting the position that the employer should receive a wide degree of latitude in determining what disrupts its workplace and how to address disruption the best. The panel reversed SJ for the defendants and directed SJ be granted to the Plaintiff on his First Amendment Retaliation claim.

Noble v. Cincinnati and Hamiliton County Public Library

6th Circuit – Social Media – Blocking Comments – First Amendment

This is the remand from the Supreme Court in Lindke vs Freed. If you thought it would be resolved quickly, you were wrong. The issues were remanded to the District Court for more fact finding and to analyze the facts under the test announced by the Supreme Court which differs from that analysis used in the previous reviews of this complaint. If you think, it will be quick and easy, let me quote from the court's conclusion: "Lastly, even if discovery uncovers that some of Freed's posts were state action, a host of other First Amendment issues remain: what kind of forum Freed's social-media accounts are, what level of scrutiny his deletion or block decisions receive, and whether he's entitled to qualified immunity. We leave these interesting questions for another day."

Lindke vs. Freed

7th Circuit – Democratic National Convention – Injunctions – Weapons

The Court affirmed denial of an injunction against Chicago's restriction on certain objects entering a zone of protection for the DNC. The city in addition to attacking the standing of the plaintiffs argued that their effort to protect health and safety through a list of banned potential weapons did exactly that. The law was not void for vagueness. The court's conclusion says it all: "Their [the Plaintiffs} problem is not lack of standing but lack of merit. The City's list has a (large) core of ascertainable meaning; potentially problematic applications are not "substantial" in relation to the valid ones; plaintiffs therefore cannot prevail." This case and the result reflect the great work of the Chicago legal department.

Thayer v. City of Chicago

7th Circuit – Probable Cause – Unlawful Arrest

A school administrator got into a scuffle with a student. Afterwards, the sheriff's office investigated. Following the investigation, the sheriff filed affidavits with the magistrate seeking an arrest warrant for the administrator which was granted. The affidavits did not include information regarding affirmative defenses or exculpatory information. The magistrate issued warrants charging the administrator with several battery related charges. When the trial occurred, the administrator moved for a directed verdict following presentation of the state's case which was granted and this case under Section 1983 followed. In the interim, the administrator was suspended and ultimately terminated form his position. The lower court granted judgment to the defendants on the pleadings concluding that probable cause existed and that qualified immunity also protected them. On appeal the court concluded that "arguable" probable cause existed and affirmed. According to the panel and the 7th Circuit "But an officer is still entitled to qualified immunity in a false arrest case when "'a reasonable officer could have mis[1]takenly believed that probable cause existed.'" Id. at 880 (quoting Humphrey v. Staszak, 148 F.3d 719, 725 (7th Cir. 1998)). This inquiry is sometimes referred to as "arguable probable cause." Id."

Schimandle v. DeKalb County Sheriff's Office

7th Circuit – *Batson* in Civil Trials – False Tip to Police

Following a tip that a black man was robbing two white women in a Lexus, an officer stopped the Lexus. The officer removed the man from the backseat, cuffed him and placed him in the police cruiser. The officer interviewed the women who informed that the man was one of the women's grandson and that they were going for ice cream. Man released after about 5 minutes. Suit followed for Section 1983 and state law claims. Jury rules for defendant officer after lower court judge bifurcates trial to proceed only against the originating officer and denies Plaintiffs' objections to a peremptory challenge to the lone black juror left on the panel. Defendants describe their basis for exercise of the peremptory because juror was a social worker and because Plaintiffs' were having someone testify with that background that the Defense believed the juror would be favorable to the Plaintiffs. Judge agrees. On appeal, the panel in a split decision concludes that the lower court judge did not properly proceed under the three step Batson procedure, that the case needed to be remanded for the judge to explain why the judge felt the juror was excused on race neutral grounds. The dissent felt the explanation on the record was sufficient. Apparently, the litigation was poorly handled in the opinion of the lower court and of the panel but the litigators' poor performance did not excuse the lower court's failure to handle the case properly. Seems a learning lesson would be for counsel to make sure Batson challenges are handled on the record and that the court provide a clear statement as to why the exclusion of a juror is race neutral.

Carter v. Wauwatosa

7th Circuit – K-9 – Qualified Immunity

From the decision: "At about 11:35 p.m. on May 9, 2019, the Barron County Sheriff's Department received information from an anonymous caller that Trevor Davis was at David Haseltine's property in Cameron, Wisconsin. Davis had several outstanding arrest warrants for violent felonies, including armed robbery, No. 23-1838 3 strangulation and suffocation, and bail jumping." Officers went to the property and when Davis saw their headlights, ran into a trailer. The officers spoke with the owner who was on probation and advised that they could search his trailer due to his being on probation. The officer got to the door of the trailer which was dark. They announced their presence and advised Davis that they had a K-9 and he should announce himself or be bit. The warning was repeated and Davis did not announce himself. As warned the dog was released and Davis was bit. He screamed and asked to have the dog released, but because the officers could not fully see Davis or reach him quickly they did not release the dog and he continued to bite Davis for about two minutes until the officers were able to get to him and cuff him. Davis suffered serious injuries and claimed in his suit that the officers could see him and should have released the dog. The lower court apparently agreed and did not grant immunity. The panel concluded that they had no jurisdiction as it was a factual dispute regarding whether the officers should have been able to see Davis and perceive that he was no longer a threat.

Davis v. Allen

8th Circuit – Jails – Medical Conditions – Deliberate Indifference – Spoliation

The police arrest a man who seems fine during the arrest. He's brought to the jail and seems fine when processed and strip searched. At some point, apparently before the stop search he swallowed two bags of methamphetamine. The drugs began attacking his body and the guards noticed that he was sweating and fidgeting. They asked about his condition, if he was on drugs. He denied drug use

and claimed anxiety. The officers tried to help him with anxiety. The officers asked several times if he was on drugs and if that caused his condition to which he replied each time that he was anxious. He was seen lying on his back in his cell with his arm raised, the officers checked on him and called an ambulance immediately. He died. When suit was filed requests for the video's of him in the holding cell and elsewhere were made, but the jail had destroyed these tapes. The Plaintiff asked for an adverse inference instruction which they got. Despite the adverse inference the court granted summary judgment concluding that a jury would not find deliberate indifference even with an adverse inference. The panel affirmed. The panel described its understanding of the law: "To establish a § 1983 medical indifference claim, the plaintiff must show that officers acted with "deliberate indifference to a pretrial detainee's objectively serious medical needs." *Ivey v. Audrain Cnty*., 968 F.3d 845, 848 (8th Cir. 2020). "Deliberate indifference has both an objective and a subjective component." *Vaughn v. Gray*, 557 F.3d 904, 908 (8th Cir. 2009), quoting *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir.2006). "To succeed on this kind of claim, a plaintiff must demonstrate that a pretrial detainee had an objectively serious medical need that the defendants knew of and yet deliberately disregarded." *Ivey*, 968 F.3d at 848. See also *Thompson v. King*, 730 F.3d 742, 750 (8th Cir. 2013) ("The Supreme Court has declared that it is unconstitutional for prison officials to act deliberately indifferent to an inmate's serious medical needs."), citing *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)."

Vogt v. Crow Wing County, et al.

8th Circuit – Deadly Force – Qualified Immunity – Fleeing Felon

This case reflects a significant difference in opinion both in the review of the District Court's decision denying immunity and within the panel. The facts as stated by the court: "A Columbia County resident was shot and killed on November 19, 2018. An eyewitness reported to responding officers, including Deputy McClinton, that a man named Roderick McDaniel was the shooter and had taken the gun with him as he fled the scene. No gun was recovered at the crime scene. An arrest warrant issued for McDaniel on a charge of first-degree murder. A dispatch advised local officers that the warrant issued and that McDaniel was believed to be driving a white SUV. While on patrol late the following evening, Deputy McClinton noticed a white SUV idling in a parking space at an apartment complex. McClinton positioned his patrol car several feet behind the SUV, blocking the SUV from backing out of the space. He approached the driver's side door. The SUV's occupant partially rolled down the tinted window. Deputy McClinton asked his name. The man responded, "Roderick McDaniel." McClinton radioed the name to dispatch. McDaniel rolled up the window, gunned the vehicle in reverse, and collided with McClinton's patrol vehicle, just as dispatch was telling McClinton that Roderick McDaniel was "him," the man charged with first-degree murder. McClinton drew his service weapon and ordered McDaniel to stop multiple times. McDaniel "slammed his vehicle into drive and gunned it forward." Deputy McClinton fired a single shot into the driver's side window, hitting McDaniel. The SUV accelerated forward, jumped a curb, traveled through the lawn, reentered the parking lot, and collided with other parked cars. Deputy McClinton and another responding officer found McDaniel deceased in the crashed SUV, with a loaded handgun located "in or around" his hand. Ballistic testing determined that the handgun was used to murder the other person."

The lower court concluded that facts including from the video dashcam and bodycam established a factual dispute between the Plaintiff and the officer over whether the officer was in danger when he fired the fatal shot. The majority cut to the chase however seizing upon language in *Garner*. "The district court stated that at the time Deputy McClinton shot McDaniel "it was clearly established that it is unreasonable to use deadly force against a suspect merely for fleeing, even when that flight is via automobile." Maybe so, but McDaniel -7- was not a suspect who was "merely fleeing." Deputy McClinton had probable cause to believe that McDaniel had committed first-degree murder the day

before and that McDaniel was still armed with the murder weapon. First-degree murder is as inherently violent as a crime can be. A reasonable officer aware of the Supreme Court's guidance in Garner, as applied by this court in Krueger and by the Tenth Circuit in Ryder, would believe it was constitutionally permissible to use deadly force to prevent the escape of this dangerous felon who was attempting to flee in a vehicle. Arnold does not cite, and we have not found, any post-Garner cases from this Court that clearly establish a police officer could not use deadly force against a likely[1]armed, first-degree murder suspect attempting to flee from arrest via vehicle."

Arnold v. McClinton

8th Circuit – Jails – Mail – First Amendment – Due Process

The jail adopted a policy that it would not allow inmates to receive publications through the mail. The jail adopted a policy to scan inmate mail and allow inmates access to kiosks to read their mail and the kiosks could access various publications. A human rights group sought to challenge the jail's policy and began sending its magazine to the inmates. The jail returned some of the magazines with the note that it did not accept publications. The group sued. The jail in defense claimed that scanning the mail and not scanning publications was a policy designed in the first instance to stop contraband from entering the jail as a thorough search of each mail item and publication would require significant time and divert staff form other duties. The case went to trial and the jury ruled in favor of the jail. On appeal the panel affirmed. "We thus conclude that the County's policy was reasonably related to legitimate penological objectives and consistent with the First Amendment. The district court correctly denied HRDC's motion for judgment as a matter of law on that claim."

Human Rights Defense Center v. Union County, Arkansas

8th Circuit – Peper Spray – Excessive Force – Knuckleheads

The facts described by the court explain clearly what the officers in this case were dealing with: "Officer Hemsted and Officer Jordan Ulin were sent to investigate a woman's complaint of harassment from her next-door neighbor. She and her one-year-old daughter were sitting in the grass outside the apartment building when Officer Hemsted arrived. She told him that her neighbor, Drew, was "always trying to get into [her] apartment" and that he had threatened to kill her and "blow [the] place up." That day, he had grabbed her shoulders and asked her, "Baby, why you . . . leaving me." When he blocked her doorway and refused to let her leave, she called the building manager to intervene. With the manager standing between them, the woman scooped up her daughter and escaped—but not before Drew lunged at her more than once. She told Officer Hemsted that Drew was running around looking for her. She was fed up. Drew's non-stop harassment left her feeling unsafe in her own home, and she wanted him arrested." When the officers met the apartment manager, the manager advised that Drew was a drunken idiot and wouldn't leave the single women alone among other similar facts. The officer got to Drew's apartment and heard arguing inside, a woman rushed out and thanked the officers. In confronting the suspect an officer put his hand on his shoulder and was told not to touch him. The officer told him to turn around to be handcuffed and the man began to verbally refuse and was immediately pepper sprayed. Lower court – judgment for the defense. On appeal the same result.

Drew v. City of DesMoines

8th Circuit – Malicious Prosecution – Unlawful Arrest

The facts in this case suggest that something is a little funky in Siloam Springs, Arkansas. An officer stops a man for driving erratically, including DWI, but because the man was driving 10 mph under the speed limit, the man challenged the stop. The man, a bounty hunter, was returning from a casino having sought to collect on some perceived bounty there. The two did not see eye to eye about the events and the bounty hunter defended the traffic citations. The bounty hunter refused a plea agreement that would have him plead guilty to the minor traffic offenses in return for the DWI being dropped. Oddly, the prosecutor dropped the minor traffic offenses anyway and only pursued the DWI but did not offer evidence of DWI and the court found the bounty hunter not guilty. Suit under Section 1983 followed. The charges that survived a motion for summary judgement included those against the prosecutor in his official capacity (thus against the city) for malicious prosecution and against the officer under Section 1983. The District Court concluded that the evidence was in dispute as to whether the officer had probable cause to stop the bounty hunter concluding the video evidence was too murky to show that the bounty hunter crossed the center line (the charge that would have supported the stop). The court concluded that weaving within a lane was not a violation under Arkansas traffic laws. On appeal, the panel reviewed the video and concluded that the video showed that the bounty hunter's vehicle's wheels had touched the center line. The panel noted that touching the line, similar to the football touching the goal line for a touchdown, was sufficient to violate the Arkansas traffic law and reversed the lower court's decision. The panel remanded for additional fact finding analyzing the distinction between the probable cause for the stop versus whether there was sufficient basis to charge and prosecute for DWI. This the panel concluded was not developed in the record. As to the malicious prosecution, the argument that immunity applied because Arkansas immunity provides immunity for negligent but not intentional acts and malicious prosecution is an intentional tort.

Lockhart v. Siloam Springs

8th Circuit – Riot – Order to Disperse – Unlawful Seizure – Malicious Prosecution

This case involves protests in Des Moines that took place following George Floyd's death. The suit by 14 people against a number of city police and county deputy sheriffs flows from those protests. As with so many of the protests, peaceful became an adjective having only fleeting relevancy. Long story short, the court concluded as did the District Court that most of the claims against the officers survived summary judgment and the defense of qualified immunity because the police could not tie those they arrested with violent behavior (a core element of the riot statute), nor for most of them could they show that the arrestees heard the command to disperse. No probable cause equals illegal seizure and malicious prosecution.

Dunn v. Does

9th Circuit – Riot – Excessive Force – First Amendment Retaliation

Apparently, it takes about four years for cases to wind their way through the court system as this case also involves events associated with protests over George Floyd's death. Because it's the 9th Circuit, you can figure the case does not turn out well for the officer or the city. According to the court the protest started peacefully, but rapidly devolved into riot. The crowd was told to disperse, which, as best I can tell from the court's rendering of the facts, the crowd did not. Rather, they moved

towards City Hall. During their parade towards City Hall, the crowd threw objects at the police and were generally unruly. The officer was directed to leave his police car and stand with other officers in a skirmish line helping to keep the crowd from destroying properties along their way. The officer came equipped with a 40mm launcher capable of firing foam batons. Seeing two individuals who he had previously noticed throwing objects at the police and believing them to be each holding gallon paint cans, the officer sought to control the scene, but a protestor carrying a sign moved in between the officer and the two rioters. The officer shouted to the protester to move or be hit, but when he did not move, the officer launched a foam baton at him hitting him in the groin. While the bodycam shows the protestor limping away, the man and his wife (who really didn't want to stay at the protest but did to support her husband's desire to be there and maintain calm) claim he fell prostrate on the ground and when his wife found him he was alone lying there. (At this point, I must say that I sympathize with people who are learning the English language as they might mistake which form of lying the man was doing.) Suit followed. The panel affirmed the denial of qualified immunity on claims of First Amendment retaliation and excessive force.

Sanderlin V. Dwyer

9th Circuit – Defamation – Discovery – Expert Witnesses – Fees

When two officers shot and killed a black man while attempting to arrest him, the city started to boil over. One member of the City Council, four days after the shooting took a crowd to police headquarters and when speaking to the crowd told the crowd that the shooting was: "blatant murder at the hands of the police." As it turned out, the officers were not indicted and ultimately sued for defamation. In the course of the suit the Councilmember designated experts for her defense. The officers deposed them and the Councilmember sought to recover their fees. Ultimately, the court granted summary judgment to the Councilmember and the experts' testimony was never used. The officers refused to pay and claimed that the experts weren't experts under Daubert and they shouldn't have to pay. The lower court required that they pay and the panel affirmed noting: "We join the Fifth, Sixth, Seventh, and D.C. Circuits in holding that reasonable expert witness deposition preparation fees are recoverable under Rule 26." The panel did note that it was not deciding if fees are recoverable if the experts were precluded from testifying under Daubert.

Miller v. Sawant

9th Circuit – High Risk Vehicle Stop – Reasonable Suspicion – Probable Cause

As we approach football season, the concept of a Monday Morning Quarterback filters back into our subconscious and what better Circuit to do that after the fact quarterbacking than the 9th. A black suburban limousine is stolen. Officers locate the area of the stolen car through lojack. They decide to wait until the following Monday to check out the location, but before then an officer the next day, sees what looks like the stolen vehicle. The officer follows the vehicle and checks its license plate which comes back issued to a Dodge Ram, not the limousine. The windows are heavily tinted and the officer cannot see who is driving. Other officers pass the vehicle and see two people inside. By now helicopters and several patrol cars are engaged. The driver see the police presence pulls to the curb at about the same time the officers activate lights and sirens. The driver and passengers are ordered out of the car and to lie prone on the ground which they do. After about three minutes they are handcuffed and ordered to sit while the officers check out the car. They find quickly that the VIN does not match that of the stolen vehicle and find that the license plate is only one digit off from the one issued to the VIN of the vehicle they stopped. The officers assume that the DMV issued the

wrong plate. One officer, still skeptical, decides to confirm that the VIN has not been switched out. When he does the driver and passengers are released, the plates are confiscated and the driver, whose husband is the owner, is told they need to straighten things out with DMV. Suit follows against the police officers, the police department and the city. The officers are granted immunity and suit proceeds against the department and the City. The jury found in favor of the department and of the city. On appeal the panel reversed the grant of immunity concluding that the high risk stop was based on reasonable suspicion only and therefor did not justify immunity for having violated the rights of the driver and passengers. The decision in favor of the city and department was upheld. The dissent would have concluded that the decision in favor of the department and the city was sufficient to justify the judgment in favor of the officers.

Chinaryan v. Los Angeles

9th Circuit – Mugshots – substantive due process

The court's description of the case and result: "The Maricopa County (Arizona) Sheriff's Office posts photographs of arrestees on its website, accompanied by identifying information, for several days after an arrest. These identified photographs are often gathered by other internet sites and thus remain available after they are removed from the County website, even if the arrestee is never prosecuted, let alone convicted. The result is public exposure and humiliation of pretrial detainees, who are presumed innocent and may not be punished before an adjudication of guilt. Our question is whether Maricopa County's policy of posting photographs of arrestees is constitutionally permissible. We conclude that it is not."

Houston V. County of Maricopa

9th Circuit – Class Actions

In another case stemming from the riots following George Floyd's death, several plaintiffs sought to sue the City of Los Angeles by class action. Rather than delve into the details (which I leave to those interested), the court noted: "To certify a class under Federal Rule of Civil Procedure 23, plaintiffs must first show that common questions exist, meaning that questions can be resolved using class-wide evidence. And to certify a damages class under Rule 23(b)(3), plaintiffs have a higher burden of proving that common questions predominate over individual ones. The district court certified all four classes, but it did not address whether the damages classes satisfy Rule 23(b)(3)'s predominance requirement and did not adequately analyze Rule 23(a)'s commonality question. Nor did it address whether the Injunctive Relief Class meets the commonality requirement.

"We vacate the class certification and remand for the district court to fully address Rule 23's requirements. Under Rule 23, district courts must rigorously analyze whether plaintiffs have produced sufficient evidence that they have met class certification requirements. That requires the district court to engage with each of Rule 23's prerequisites. That the classes bring fact-specific constitutional claims challenging a wide variety of LAPD's actions across Los Angeles underscores the importance of the rigorous analysis in a case like this."

Black Lives Matter Los Angeles v. Los Angeles

11th Circuit – First Amendment – Government Speech – Prayer

A Christian school made it to the state high school football championships. Not content with showing dominance on the field, the faith based school wanted to use the public address system to pray during the pregame proceedings. The Florida High School Athletic Association concluded that doing so wasn't to be, denied the request. The school sought relief in the courts. The case went up and down and up again the ladder of the federal 11th Circuit. Long story short – government speech, no prayer. There's a lot more in this one about standing, mootness and a host of other pre merits issues.

Cambridge Christian v. FHSAA

Federal District Court Idaho - Sheriffs

The opinion begins: "On November 9, 2021, Plaintiffs Chelsea Cox and six minors were leaving "personal written notes that were folded into paper turkeys" "at the front doors of community members" in "expressions of gratitude for the Thanksgiving season." The teens wanting to make the gesture anonymous would ring the doorbell and then run. They opted to leave one of these expressions of gratitude for the local sheriff. For whatever reason the sheriff did not take the ring and run well. He got his gun, caught up to the teens grabbed the hair of one and pointed his gun at here head and threatened to kill her. The sheriff was charged and pled guilty to aggravated assault. A suit was filed against the Sheriff and the Sheriff's Office. This action involves the claim against the Sheriff's Office. The state law claims were dismissed against the Office because it was not a political subdivision under the Idaho Tort Claims Act and the 1983 claim because there was no evidence the Sheriff's acts were sanctioned by the office.

Cox v. Bingham County Sheriff's Office