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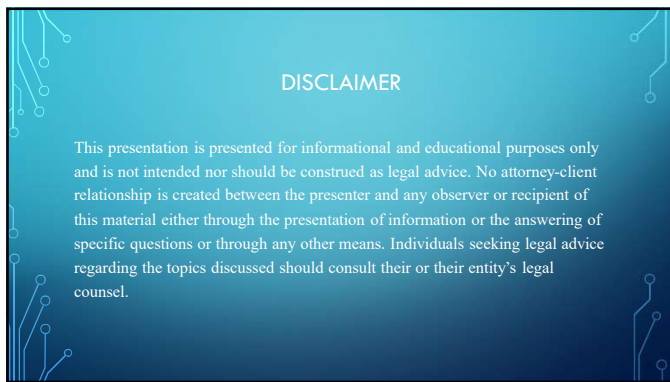
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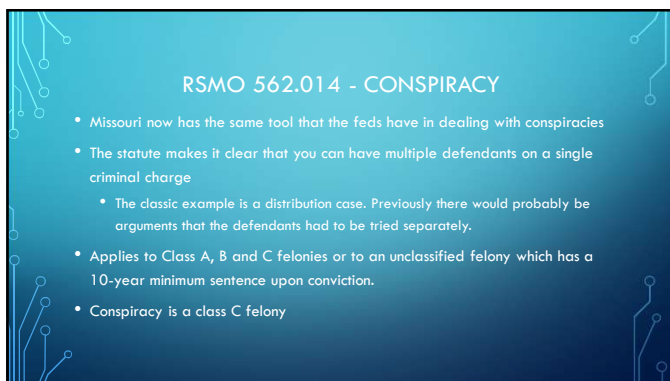
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- Missouri now has the same tool that the feds have in dealing with conspiracies
- The statute makes it clear that you can have multiple defendants on a single criminal charge
  - The classic example is a distribution case. Previously there would probably be arguments that the defendants had to be tried separately.
- Applies to Class A, B and C felonies or to an unclassified felony which has a 10-year minimum sentence upon conviction.
- Conspiracy is a class C felony

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### RSMO 562.014 - CONSPIRACY

- Conspiracy to commit a dangerous felony is itself a dangerous felony
- If charged together, prosecutors are allowed to try the defendants together
- Consider speaking with your prosecutor to see if there are any changes in how they would like these charges submitted
  - For example, the Platte County Prosecutor's Office now encourages agencies to submit one probable cause statement for all defendants if we are intending to pursue a conspiracy charge

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### 8<sup>TH</sup> CIRCUIT COURT OF APPEALS

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### MCMANEMY V. TIERNEY

- This opinion comes from an appeal from the District Court for the Northern District of Iowa.
- The case was a excessive force claim following a high-speed pursuit.
- The District Court granted summary judgment in favor of the deputies on the federal claims but not the state claims and the Plaintiff (McManemy) appealed to the 8<sup>th</sup> Circuit. The defendants also sought to address the District Court's refusal to rule on the state law claims.

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### MCMANEMY V. TIERNEY

- Deputies believed that McManemy was on his way to make a drug delivery.
- When McManemy ran a stop sign, the deputies attempted to stop McManemy and a 10-minute high-speed pursuit through rural highways, gravel roads and a private farm ensued.
- The deputies rammed McManemy's vehicle and after trying to make a call and lighting a cigarette, McManemy emerged from the disabled vehicle and laid face down on the ground with his arms and legs spread.

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### MCMANEMY V. TIERNEY

- The deputies still had trouble arresting McManemy and the parties disputed how much McManemy resisted and his reason for resisting.
- McManemy admitted that he failed to comply with order to "quit resisting" and to "knock it off".
- The dash camera video showed that McManemy's legs were flailing. McManemy was eventually subdued by six deputies.

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit noted that this case was about what happened during the scuffle.
- McManemy claimed that he was tased up to five times and that he was repeatedly kneed in the back of the head.
- McManemy claimed that he suffered damage to his eye, first bruising and later he claimed he had problems with light sensitivity and "floaters".
- McManemy filed an excessive force claim under 42 USC § 1983 and also included claims that the other deputies on scene failed to intervene and protect him.

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### MCMANEMY V. TIERNEY

- As a side note the state law claims were mirror images of the federal law claims raised by McManemy.
- The 8<sup>th</sup> Circuit noted that both the excessive force claim and the failure to intervene claim depended on whether the manner in which the taser was used violated clearly established law.
- The 8<sup>th</sup> Circuit noted that on a review of summary judgment the court is required to take the facts in the light most favorable to the non-moving party. In some cases, however, the record "so blatantly contradicts the plaintiff's account that no reasonable jury could believe it."

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit noted that the deputy's taser log showed that the taser had only been discharged twice. Each discharge lasted for three seconds and they were 15 seconds apart.
  - Since McManemy didn't challenge the accuracy of the taser log, the 8<sup>th</sup> Circuit found that the log "blatantly contradicted" McManemy's assertion that he was tased between three and five times.
- The 8<sup>th</sup> Circuit then stated that since McManemy was only tased twice, his admissions took on a central importance.

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit noted that McManemy admitted that he was not handcuffed when the deputy tased him the first time. The 8<sup>th</sup> Circuit held that it is reasonable for an officer to tase an uncuffed suspect who appears to be resisting arrest.
- The 8<sup>th</sup> Circuit also ruled that the second tasing was reasonable because of McManemy's other admission that in the intervening 15 seconds between taser discharges, the deputies had to get the handcuffs on his other wrist.

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit determined that it was possible that the deputy tased McManemy just after he was fully handcuffed. The 8<sup>th</sup> Circuit noted that it had previously held that discharging a taser in drive-stun mode under similar circumstances was objectively reasonable.
  - "After all, here it came at the tail end of a tumultuous struggle between McManemy and the deputies."
- The 8<sup>th</sup> Circuit also dismissed McManemy's argument that one of the deputies knew that he had a preexisting shoulder condition that made it difficult for him to comply with commands.

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### MCMANEMY V. TIERNEY

- "It makes no difference if, as McManemy argues, one of the deputies knew that he had a preexisting shoulder condition.... Regardless of whether one or more of them knew about his injury, the deputies still had to subdue him, even if he had an innocent reason for flailing his legs and refusing to give up one of his arms."
- Since the 8<sup>th</sup> Circuit found that the tasing was reasonable and did not violate the Constitution then the failure to intervene claim also failed.

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit then turned to the claim that a deputy used his knee as a weapon and repeatedly hit McManemy in the head with his knee.
- The 8<sup>th</sup> Circuit noted that the dash camera was not overly helpful because it shows the deputy kneeling next to McManemy's head for approximately 40 seconds, but it was impossible to see what he was doing because other deputies and a dog blocked the camera view.
- The 8<sup>th</sup> Circuit noted that the evidence did not blatantly contradict McManemy's version of the facts, so they had to construe the facts in the light most favorable to McManemy.
  - The deputies denied that anyone's knee touched McManemy and argued that his injuries must have occurred in some other way.

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### MCMANEMY V. TIERNEY

- The 8<sup>th</sup> Circuit held that McManemy failed to identify existing precedent which established that the deputy's conduct violated a clearly established right.
  - The Court noted that the cases raised by the Plaintiff dealt with far more severe uses of force than was used in this case.
- The 8<sup>th</sup> Circuit also noted that McManemy admitted that his injuries occurred during the struggle to handcuff him and not when he was fully subdued.
- The 8<sup>th</sup> Circuit held that the deputy did not violate a clearly established right. Like in the previous claim, since the underlying claim failed, the failure to intervene claim also failed.
- The 8<sup>th</sup> Circuit affirmed the District Court's judgment regarding summary judgment and its declination to exercise supplemental jurisdiction on the state law claims.

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### MCMANEMY V. TIERNEY

- So why are we discussing this case?
  - Failure to Intervene claims
  - Are the deputies actually in the clear?
    - What about future cases?
  - What about the ramming of the vehicle?

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### CAMPBELL V. REISCH

- This opinion came from a lawsuit involving a member of the Missouri General Assembly excluded someone who had been critical of a comment the legislator made from posting on her social media page.
- Important note: this case is a capacity case dealing with whether a government official was acting as a private person or under color of law.
- The District Court ruled against the legislator and held that she had violated the First Amendment. The legislator appealed to the 8<sup>th</sup> Circuit.

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### CAMPBELL V. REISCH

- Representative Reisch created her Twitter account in September of 2015, when she announced her candidacy for state representative.
- A few months later she posted a copy of a letter on her campaign letterhead seeking contributions to her campaign along with a picture of her with the Speaker of the House.
- Throughout the first 10 months of 2016, Reisch posted dozens of tweets about her campaign for the Missouri House and frequently used the hashtags #MO44 and #TeamCheri.

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### CAMPBELL V. REISCH

- Reisch won her election in November of 2016, and over the next 18 months, she tweeted about her work as a state representative and posted pictures of herself on the House floor or standing with other elected officials.
- Examples of the messages posted included, "thrilled to have so many of my neighbors from the 44<sup>th</sup> District come by the office at tonight's energetic Governor's Ball! #MOLeg #MO44" and "humbled to commit myself to represent everyone in the 44<sup>th</sup> District & uphold the Constitution of Missouri. #MOLeg".

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### CAMPBELL V. REISCH

- She also tweeted about specific legislation such as Real ID, Right to Work, tort reform, etc.
- The District Court noted that Reisch "used her Twitter page to engage in discourse about political topics and/or to indicate her position relative to other government officials".
- Campbell identified the following message as the impetus for Reisch blocking of Campbell
  - "Sad my opponent put her hands behind her back during the Pledge".
  - Campbell retweeted a response from another legislator that referenced the opponent's military family members and called the post "a low blow and unacceptable from a member of the Boone County delegation".
- In addition to blocking Campbell the District Court found that Reisch had also blocked at least 123 other Twitter users.

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## CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit began its analysis by noting that the First Amendment, by its terms, only prohibits governmental abridgment of speech.
  - "By not interfering with private restrictions on speech, the amendment protects a robust sphere of individual liberty. Similarly, § 1983 excludes from its reach merely private conduct in that, for a § 1983 claim to succeed, a defendant must have acted under color of state law. It is not enough that the defendant is a public official, because acts that public officials take in the ambit of their personal pursuits do not trigger § 1983 liability."

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## CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit noted that the question of law before the court was whether Reisch acted under color of state law when she blocked Campbell on Twitter.
  - Campbell said she did because she blocked him for criticizing her fitness for political office even though she had created a virtual forum for the public to discuss the conduct of her office.
  - Reisch said she did not act under color of law because she ran the Twitter account in a private capacity, namely, as a campaigner for political office.
- The 8<sup>th</sup> Circuit held that running for public office is not state action and that is instead private activity.

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## CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit noted that there is a split of authority regarding situations such as the one presented in the case.
  - The 8<sup>th</sup> Circuit discussed the *Trump* case where the 2<sup>nd</sup> Circuit held that President Trump's Twitter account was of an official nature.
  - The 8<sup>th</sup> Circuit pointed out that the 2<sup>nd</sup> Circuit was careful to note that "not every social media account operated by a public official is a government account."

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### CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit held that Reisch's Twitter account was the kind of unofficial account that the *Trump* court had envisioned.
  - The Court noted that she started the account when she was not a public official;
  - She used the account overwhelmingly for campaign purposes;
    - She solicited donations for her campaign
    - She sought to convince her audience to support her election bid
- The 8<sup>th</sup> Circuit also noted that even if Reisch had been a public official at the time she created the account it would not have automatically made the account an official account because she overwhelmingly used it for campaign purposes.

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### CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit also noted that the character of a social media page is not fixed forever however, the mere fact that the owner got elected did not "magically alter the account's character."
- The Court did state that a private account can turn into a governmental one "if it becomes an organ of official business."
- The Court noted that it felt that Reisch used the account mainly to promote herself and to position herself for future electoral success.

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### CAMPBELL V. REISCH

- The 8<sup>th</sup> Circuit distinguished Reisch's use of the account from other well-known examples.
  - Trump conducting official government activity by announcing appointments or conducting foreign affairs on Twitter.
  - The Court did note that "occasional stray messages that might conceivably be characterized as conducting the public's business are not enough to convert Reisch's account into something different from its original incarnation."
- The 8<sup>th</sup> Circuit held that Reisch's Twitter account was more akin to a campaign newsletter than to anything else. Which provided Reisch the prerogative to select her audience and present her page as she saw fit.
  - "She did not intend her Twitter page to be like a public park, where anyone is welcome to enter and say whatever they want."

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### EAST V. MINNEHAHA COUNTY

- East was a former inmate of Minnehaha County who sued the state Department of Corrections (DOC), the County and the County's contract medical provider under § 1983 for deliberate indifference to his serious medical needs in violation of his 8<sup>th</sup> Amendment and 14<sup>th</sup> Amendment rights. He also claimed that two officers threatened him in violation of the 8<sup>th</sup> Amendment.

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### EAST V. MINNEHAHA COUNTY

- East was incarcerated in the county jail from 2012 to 2014.
- He suffered a right-foot injury requiring medical attention.
- From April to August of 2013, he received wound care almost daily from the jail's medical contractor. In August, a doctor told East that his injury was more serious than initially thought.
- In September, East had a toe amputated and he was placed in medical observation housing but suffered complications after surgery.
- East complained about his care, especially some delays in receiving pain medications and some poorly administered intravenous treatment. He was returned to general population in November after he recovered from his injuries.

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### EAST V. MINNEHAHA COUNTY

- A year after East was sent to the DOC, he reported pain in his foot, and he was diagnosed with cellulitis and an x-ray revealed a stress fracture that was healing.
- A month later his right foot was put in a cast and then he sprained his left ankle and wore a prescribed boot on his left foot. He had surgery to remove a bunion from his right foot in April of 2016, and surgeons inserted five screws into his big toe joint. East complained about difficulties with his foot and an x-ray showed a fractured screw from the bunion surgery which required another surgery to fix.

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### EAST V. MINNEHAHA COUNTY

- East ended up having a heel bone fracture that required a cast, a boot and approximately five months to heal.
- East alleged that the DOC denied him timely access to medical care and use of a wheelchair; housed him in a non-air-conditioned unit after surgery, against the doctor's recommendation; and provided a walking boot that was too big for his foot.

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### EAST V. MINNEHAHA COUNTY

- East alleged that the County and its contract medical provider were deliberately indifferent to his medical needs in violation of the 8<sup>th</sup> and 14<sup>th</sup> Amendments.
- East also alleged that DOC employees secured his belly chain too tightly on a trip and that a DOC employee brandished a firearm and told him, "don't try anything East, cause I'll go John Wayne on your ass" and that he would shoot him.
  - East never filed a formal complaint on the actions of the DOC employees.

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### EAST V. MINNEHAHA COUNTY

- The District Court granted motions to dismiss and motions for summary judgment in favor of the defendants and ruled that East had failed to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA) on the complaints on the DOC employees.
- The 8<sup>th</sup> Circuit began its analysis by outlining the standard of proof for a plaintiff in deprivation of medical care cases.

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### EAST V. MINNEHAHA COUNTY

- "In a deprivation of medical care case, the inmate must show:
  - (1) an objectively serious medical need; and
  - (2) the defendants actually knew of the medical need but were deliberately indifferent to it."
- "Negligence is not enough."
- The deliberate indifference standard applies to claims by pretrial detainees under the 14<sup>th</sup> Amendment and convicted inmates under the 8<sup>th</sup> Amendment.

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### EAST V. MINNEHAHA COUNTY

- The 8<sup>th</sup> Circuit noted that despite East's assertion that the doctor at the DOC knew of his serious medical need and was deliberately indifferent to it, the record showed that the doctor ordered x-rays and told him that his ankle was sprained.
- The Court held that East can only state that the doctor had actual knowledge of his serious medical need and that he did not plead any additional facts to support his conclusory statement that the doctor was deliberately indifferent.

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### EAST V. MINNEHAHA COUNTY

- Regarding the deliberate indifference claims against the County and its healthcare provider, East alleged that he was initially misdiagnosed by the healthcare provider and tied this to the conditions he was subjected to at the DOC.
- The 8<sup>th</sup> Circuit noted that East received almost daily wound care, including visits with treating doctors and various specialists, surgeons and hospitals.
  - While the Court acknowledged some delays in treatment, it agreed with the District Court that at worst this was negligent.
  - "East's claims are a mere disagreement with treatment decisions. They do not approach criminal recklessness."

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### EAST V. MINNEHAHA COUNTY

- The 8<sup>th</sup> Circuit then addressed the exhaustion issue relating to the "John Wayne" allegations.
- An inmate may not sue under federal law until they have exhausted available administrative remedies.
  - "Administrative remedies are not available if prison [jail] administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation."
  - If this occurs the inmate is not required to exhaust administrative remedies before suing in federal court.

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### EAST V. MINNEHAHA COUNTY

- The 8<sup>th</sup> Circuit noted that there is a split of authority among circuits as to whether a fear of retaliation excuses an inmate from the exhaustion requirements.
- Some other circuits require an inmate to show both subjective and objective elements: that the threat actually deterred filing a grievance (subjective) and that a reasonable inmate of ordinary firmness would have failed to file the grievance (objective). The other circuits only required a showing of the objective element.

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### EAST V. MINNEHAHA COUNTY

- The 8<sup>th</sup> Circuit ruled that East's claims would fail under either test because he could not show that a reasonable inmate of ordinary firmness would have failed to file a grievance in his situation.
  - "There must be some basis in the record from which the District Court could determine that a reasonable prisoner of ordinary firmness would have understood the prison official's actions to threaten retaliation if the prisoner chose to utilize the prison grievance system."
  - "The threat need not explicitly reference the grievance system in order to deter a reasonable inmate from filing a grievance."

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### EAST V. MINNEHAHA COUNTY

- The Court noted that a hostile interaction with a guard, without more, does not excuse exhausting the grievance process.
  - The Court noted the East alleged that another inmate told him that others had been subject to threats for reporting incidents with guards.
  - The Court held that even if that were true, the statement was not specific enough to give East any meaningful information.
    - Even the 9<sup>th</sup> Circuit says that "general and unsubstantiated fears about possible retaliation are not enough to excuse exhaustion."
- The 8<sup>th</sup> Circuit affirmed the rulings of the District Court.

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### CURTIS V. CHRISTIAN COUNTY, MISSOURI

- A couple of procedural notes before we discuss this case:
  - This opinion comes after a consolidation of cases.
  - Parts of this opinion involves a federal court interpreting Missouri law.
    - This opinion is binding on lower federal courts
    - It is persuasive authority to state courts
  - This is a somewhat nuanced legal area, so the specific facts/details of a situation are important.

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### CURTIS V. CHRISTIAN COUNTY

- The Christian County Commission had scheduled a special election on August 4, 2015, to elect a new sheriff after the sitting sheriff resigned.
- Four candidates ran for Sheriff, only one of the candidates (Mills) was employed by the Sheriff's Office.
  - The internal candidate was supported by multiple Sheriff's Office employees, including Curtis, who publically endorsed Mills.
  - In support of Mills, Curtis talked to people, knocked on doors, handed out literature, posted on Facebook and put up a yard sign at his residence.

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### CURTIS V. CHRISTIAN COUNTY

- Another deputy, Bruce, also publically supported Mills and posted on Facebook, told friends and family to vote for Mills and loaned Mills a flatbed trailer to use in a public parade.
  - Bruce also told three or four people in the Sheriff's Office that "if you elect Brad Cole, you're trading one crook for another."
  - The court noted that Bruce and Cole did not get along and Bruce "never made any bones about his feelings for Brad Cole."

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### CURTIS V. CHRISTIAN COUNTY

- One week before the election, the interim sheriff (McNiel) told Bruce that "he needed to be on the right side to keep his job and the right side is Brad Cole."
  - One of McNiel's interim command staff members (Haefling) made similar comments 2 or 3 times about supporting the right candidate for 2 to 3 weeks before the election.
- Brad Cole (Cole) won the election on August 4, 2015. The next day Bruce called Cole to discuss his employment. Bruce was concerned about his job based on what McNiel and Haefling had told him.
  - Bruce told Cole that he had supported Mills. He also asked Cole about a rumor that Cole was going to fire employees who had supported Mills. Cole replied that he would not fire Bruce.

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### CURTIS V. CHRISTIAN COUNTY

- On August 7, 2015, Cole assumed the duties of sheriff and terminated both Curtis and Bruce. At the time, Curtis was a sergeant and Bruce was a detective. Both Curtis and Bruce had been promoted by Cole's predecessor just months prior to their termination.
- RSMo §7.275.1 provides that "any full-time deputy sheriff upon dismissal shall be furnished with a written notice of the grounds for the dismissal."
  - A written notice was not provided to Curtis nor Bruce and they were not provided an opportunity to request a hearing.

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### CURTIS V. CHRISTIAN COUNTY

- Curtis and Bruce brought separate lawsuits under § 1983, alleging that Cole and Christian County wrongfully discharged them in violation of their First Amendment rights.
- The District Court consolidated the two cases and denied the motions for summary judgment filed on behalf of Cole and Christian County, denying qualified immunity to Cole.
  - The District Court applied the *Elrod-Branti* test and ruled that a genuine issue of material fact existed as to whether Cole terminated Curtis and Bruce because of their political activity.

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### CURTIS V. CHRISTIAN COUNTY

- An interlocutory appeal was filed with the 8<sup>th</sup> Circuit.
  - On an interlocutory appeal regarding a denial of qualified immunity the Court must determine:
    - (1) whether the facts taken in the light most favorable to the non-moving party (here the plaintiffs) make out a violation of a constitutional or statutory right; and
    - (2) whether that right was clearly established at the time of the alleged violation
  - "Our review is thus limited to determining whether all of the conduct that the District Court deemed sufficiently supported for purposes of summary judgment violated the plaintiffs' clearly established federal rights."

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit noted that the "government may not make public employment subject to the express condition of political beliefs or prescribed expression in the absence of some reasonably appropriate requirement. With a few exceptions, the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate."

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit noted that two distinct lines of cases exist on how to balance the First Amendment rights of government employees with the need of government employers to operate efficiently.
  - The *Pickering-Connick* test
  - The *Elrod-Branti* test

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### CURTIS V. CHRISTIAN COUNTY

- The *Pickering-Connick* test is used when "overt expressive conduct" is at issue. The typical case involves a government employee causing workplace disruption by speaking as a citizen on a matter of public concern, followed by government action adversely affecting the employee's job.
  - The test provides flexible weighing of the case-specific facts to balance the interests of the government with those of the employee.
  - The test considers: the need for harmony in the workplace; whether the government's responsibilities require a close working relationship; the time, place and manner of the speech; the context in which the dispute arose; the degree of public interest in the speech; and whether the speech impeded the employee's ability to perform his or her duties.

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### CURTIS V. CHRISTIAN COUNTY

- The *Elrod-Branti* test is a narrow justification test applied to "pure patronage dismissals." The typical case involves the dismissal of an employee because of his or her political affiliations or support for certain candidates.
- A government employer who dismisses an employee solely on account of the employee's political affiliation violates the First Amendment unless the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.
  - Under this test, a court cabins its inquiry to the political affiliation requirement itself, without the need to do the *Pickering-Connick* balancing analysis.

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit, like many circuits, has extended the *Elrod-Branti* test to include cases in which political affiliation was a motivating factor in the dismissal, rather than the sole factor.
  - The Court did note that some cases may present an intermixed scenario in which a policy making employee receives an adverse employment action based on specific instances of the employee's speech or expression.
    - When a political affiliation employee gets discharged for his or her expressive conduct, the courts apply the *Pickering-Cornick* test.

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### CURTIS V. CHRISTIAN COUNTY

- The Court noted that under *Branti*, "a government employer can take adverse employment actions against employees for protected First Amendment activities if they hold confidential or policy making positions for which political loyalty is necessary to an effective job performance."
  - The question is not whether a particular person can be labeled confidential or as a policy maker. The question is whether political loyalty is an appropriate requirement for the effective performance of the public office involved.
    - "The proper focus is on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office."

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit also noted that some circuits have determined that deputy sheriffs hold policy making positions and could be transferred for political reasons.
  - These cases depended on the law of the state where the incidents occurred.
- The 8<sup>th</sup> Circuit then discusses cases out of the 4<sup>th</sup> Circuit and the 11<sup>th</sup> Circuit.
  - *Jenkins v. Medford* (4<sup>th</sup> Circuit)
  - *Terry v. Cook* (11<sup>th</sup> Circuit)

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### CURTIS V. CHRISTIAN COUNTY

- In *Jenkins*, the 4<sup>th</sup> Circuit examined the role of a deputy sheriff under North Carolina law and determined that "in North Carolina the office of deputy sheriff is that of a policy maker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable."
- The 4<sup>th</sup> Circuit held that a deputy sheriff under North Carolina law could properly be terminated for political affiliation under the *Elrod-Branti* test.
  - "We hold that newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity. Either basis serves as a proxy for loyalty to the sheriff."

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### CURTIS V. CHRISTIAN COUNTY

- "We can think of no clearer way for a deputy to demonstrate opposition to a candidate for sheriff, and thus actual or potential disloyalty once the candidate takes office, than to actively campaign for the candidate's opponent....It was never contemplated that sheriffs must perform the powers and duties vested in them through deputies or assistants selected by someone else, and we do not believe it was ever contemplated that a sheriff must attempt to implement his policies and perform his duties through deputies who have expressed clear opposition to him." (4<sup>th</sup> Circuit)

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit noted that when the 4<sup>th</sup> Circuit applied the *Elrod-Branti* test to the position of deputy sheriff it looked "to the electorate's approval of the policies on which the sheriff ran and the duties and responsibilities of the deputy sheriff in implementing those policies and priorities."
  - The 8<sup>th</sup> Circuit also reiterated that a court must examine the law of the state concerning the relationship between sheriffs and their deputies.

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### CURTIS V. CHRISTIAN COUNTY

- The 11<sup>th</sup> Circuit also concluded that political loyalty is an appropriate requirement for the job of deputy sheriff because "of the closeness and cooperation required between sheriffs and their deputies" in fulfilling overlapping duties."
- The 11<sup>th</sup> Circuit discussed the sheriff being liable for the actions of deputies and likewise determined that "the deputy sheriff is the alter ego of the sheriff."

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit pointed out that it had previously examined the role of a deputy sheriff under state law to determine whether political loyalty was a requirement.
- The 8<sup>th</sup> Circuit's prior cases took two different approaches on this question.
  - Under North Dakota law it was permissible for a sheriff to fire a deputy who ran against him.
  - Under Minnesota law deputy sheriffs did not hold policy making position, were in the classified service and the positions were not based on political affiliation. (*Shackency*)

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit noted that under Missouri law sheriffs are empowered to appoint their deputies by RSMo 57.201.1 and noted that Missouri courts have held that deputies "are the sheriff's agents who hold office at the pleasure of the sheriff."
- The 8<sup>th</sup> Circuit also noted that Missouri courts have held that "the deputy sheriff has all the powers and may perform any of the duties" of the sheriff."
- The 8<sup>th</sup> Circuit further noted that the Missouri Supreme Court had previously stated that a deputy sheriff is the alter ego of the sheriff.

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit also noted that under Missouri law "the sheriff has the final decision-making authority to terminate a deputy sheriff."
- The 8<sup>th</sup> Circuit further noted that the statute requiring written notice and the ability to request a hearing "shall not be interpreted as creating any new substantive due process rights." The Court pointed to a Missouri Supreme Court case explaining the notice and hearing statute.

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### CURTIS V. CHRISTIAN COUNTY

- "Although there is to be a hearing, and findings of fact are to be made, and the sheriff must review those findings, the sheriff still has the final decision-making authority, and the statute does not subject that decision to any gauge or criteria. Indeed, absent such statutory direction, the sheriff can terminate the deputies even in the face of findings that wholly support the deputy's continued employment. In other words, even in view of the mandated hearing, the deputies are no less at will employees. That is, they are employees who can be terminated for cause or for no cause at all, absent, of course, any recognized public policy exception." (SCOMO)

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit held that "the role of the deputy sheriff under Missouri law is substantially similar to the role of the deputy sheriffs in *Jenkins* and *Terry*; therefore, as deputy sheriffs, Curtis and Bruce held policy making positions for which political loyalty is necessary to an effective job performance."
- "First, Missouri sheriffs are elected. As the Fourth Circuit explained, the interplay between the voters, the sheriff and his policies, and the role of deputies in implementation of policy demonstrates that political affiliation and loyalty to the sheriff are appropriate job requirements."

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### CURTIS V. CHRISTIAN COUNTY

- "Second, just as in *Jenkins* and *Terry*, Missouri deputy sheriffs assist the sheriff in the performance of his duties."
- "Third, sheriffs in Missouri, like the sheriffs in *Jenkins* and *Terry*, are liable for their deputies' actions; the deputies are the sheriffs' alter egos."
- "Fourth, just like the deputy sheriffs in *Jenkins*, Missouri deputy sheriffs are at-will employees who serve at the pleasure of the sheriff. By contrast, the deputies in *Shockey* were in classified service subject to open application and examination and protected by a collective bargaining agreement that prohibited appellants from discriminating against them for their political beliefs and from disciplining or discharging them except for just cause."

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### CURTIS V. CHRISTIAN COUNTY

- "Fifth, no dispute exists that Bruce and Curtis are law enforcement officers. Bruce was a deputy sheriff employed as a detective, and Curtis was a deputy sheriff employed as a sergeant. Thus, just as in *Jenkins* they were deputies actually sworn to engage in law enforcement activities on behalf of the sheriff."
- The *Jenkins* court limited dismissals based on its holding to deputies who were actually sworn to engage in law enforcement activities on behalf of the sheriff. "The purpose of that limitation was to caution sheriffs that courts examine the job duties of the position, and not merely the title...."

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### CURTIS V. CHRISTIAN COUNTY

- The 8<sup>th</sup> Circuit held that because Curtis and Bruce held policy making positions for which political loyalty is necessary to an effective job performance, Cole was permitted to take adverse employment actions against them and did not violate their constitutional rights.
- Since the claims against Christian County were inextricably intertwined with Cole's qualified immunity question the Court found that it had pendent jurisdiction to decide those claims.
  - For the County to be liable there had to be an unconstitutional act by a County official. Since Cole did not violate the plaintiffs' constitutional rights the County was also entitled to summary judgment.

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### ALWAYS READ THE FOOTNOTES

- In the footnotes, the Court addressed the Missouri law setting forth the political activity rights of first responders. (RSMo 67.145)
  - "No political subdivision of this state shall prohibit any first responder from engaging in any political activity while off duty and not in uniform, being a candidate for elected or appointed public office, or holding such office unless such political activity or candidacy is otherwise prohibited by state or federal law."
  - "first responder means any person trained and authorized by law or rule to render emergency medical assistance or treatment. Such persons may include, but shall not be limited to, ...." (the statute then list a variety of job titles).

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### ALWAYS READ THE FOOTNOTES

- While the Court stated that the statute did not alter their analysis, it highlights that the definition for the term first responder contained in the statute includes deputy sheriffs.
  - "This statute is addressed to the political activity rights of first responders. Neither Bruce nor Curtis submitted evidence that they are a first responder, i.e., a person trained and authorized by law or rule to render emergency medical assistance or treatment."

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### QUESTIONS?

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