UPDATE TO BRIDGE THE GAP
FEDERAL CASE UPDATE
SELECTED 2006-07 EIGHTH CIRCUIT AND SUPREME COURT CASES

Ross A. Walters
United States Magistrate Judge
United States District Court
Southern District of Iowa
123 E. Walnut, Rm. 440
Des Moines, Iowa
(515) 284-6217
Fax: (515) 284-6442

I. CIVIL LITIGATION AND PROCEDURE

A. Jurisdiction

Rockwell International Corp. v. United States, _ U.S. _, 127 S. Ct. 1397 (2007). As a jurisdictional requirement in *qui tam* actions under the False Claims Act, a plaintiff/relator must be an original source, i.e., have "direct and independent knowledge of the information on which the allegations are based;" predictive allegations which subsequently turn out to be true do not qualify. Here plaintiff predicted Rockwell's "pondcrete" blocks would not work; after he left employment Rockwell discovered the blocks failed for other reasons.

Lance v. Coffman, _ U.S. _, 127 S. Ct. 1194 (2007). Citizens of the state of Colorado who brought Elections Clause claims against implementation of a legislated redistricting plan instead of a state court redistricting plan (which came about after the legislators were unable to redraw districts following the 2000 census) alleged only abstract injuries --"undifferentiated, generalized grievance[s]" -- which did not give them standing to bring the action in federal court.

Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., _ U.S. _, 127 S. Ct. 1184 (2007). District court has the discretion to review a *forum non conveniens* motion before looking at issues of subject-matter or personal jurisdiction, *i.e.*, "there is no mandatory sequencing of nonmerits issues."

Moratzka v. Morris, __ F.3d __, 2007 WL 958145 (8th Cir. 4/2/2007). The circuit joins with other circuits in holding that "the collusion of corporate insiders with third parties to injure [a] corporation does not deprive the corporation of standing to sue the third parties," though an *in pari delicto* defense is not barred.

Wilkinson v. Shackelford, 478 F.3d 957 (8th Cir. 2007). In a multiple defendant case, plaintiff could dismiss her claims against one defendant without prejudice to appeal the dismissal of claim against another defendant. With respect to subject matter jurisdiction, the trial court incorrectly determined plaintiff had joined a defendant fraudulently to avoid removal jurisdiction as the allegations in plaintiff's complaint were sufficient to state a colorable claim under Missouri law.

Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965 (8th Cir. 2007). A ruling in a different case involving different parties is held not to be equivalent to "an amended pleading, motion, order or other paper" in the present litigation, therefore, the thirty-day period for removing a case to federal court was not recommenced by the circuit's ruling in Watson concerning federal officer jurisdiction.

Schwan's Sales Enterprises v. SIG Pack, Inc., 476 F.3d 594 (8th Cir. 2007). In determining whether prejudgment interest was a matter of substantive or procedural law, district court sitting in Minnesota did not err in applying Minnesota choice of law rules to determine the effect of a choice-of-law provision in a contract as the provision did not expressly specify the choice-of-law rules of the selected state would also apply.

In re Monosodium Glutamate Antitrust Litigation, 477 F.3d 535 (8th Cir. 2007). Although inflation of MSG/nucleotides prices in the United States may sustain higher prices overseas, they are not the direct cause of appellant's antitrust injuries; therefore the court did not have subject matter jurisdiction over plaintiff's Sherman Act claims under the Foreign Trade Antitrust Improvements Act.

B. Procedure

Limtiaco v. Camacho, _ U.S. _, 127 S. Ct. 1413 (2007). In a holding of limited applicability under the special circumstances of the case, the period of time to file a petition for certiorari to the United States Supreme Court did not begin to run until the Ninth Circuit, which was statutorily divested of jurisdiction over appeals from Guam after an appeal had been filed, dismissed the appeal for lack of jurisdiction.

Greyhound Lines, Inc. v. Wade, __ F.3d __, 2007 WL 1189451 (8th Cir. 4/24/2007). After a truck rear-ended a Greyhound bus which was suffering from mechanical problems, the mere prospect of litigation did not require imposition of the sanction of a spoliation instruction when the bus company's manufacturer erased an electronic control module that had stored information concerning the bus' operation prior to the accident; the data which was taken from the module was retained, identified the specific mechanical defect and passengers testified about the bus' operation before the accident.

Libel v. Adventure Lands of America, Inc., __ F.3d __, 2007 WL 1120329 (8th Cir. 4/17/2007). A reminder concerning the requirements of LR 56.1 and response to statements of undisputed facts--when denying a statement, the denial should accompanied with reference to appendix entries which support that denial and a failure to respond with appropriate citations will constitute an admission of the relevant fact.

Taylor v. Otter Tail Corp., _ F.3d _, 2007 WL 1052459 (8th Cir. 4/10/2007). Where a jury award is reduced by means of remittitur and not by judgment as a matter of law, the appropriate standard of review is abuse of discretion and not "rigorous review."

Pierson v. Dormire, _ F.3d _, 2007 WL 984104 (8th Cir. 4/4/2007). District court can *sua sponte* grant R. 60(b) relief from a judgment, preferably upon provision of notice to the parties and opportunity to be heard; in this habeas case lack of notice was harmless error as intervening case law addressed the same issue concerning tolling of the one-year period and briefing the issue would be "a mere formality."

United States v. Real Property Located at 3234 Washington Avenue North, Minneapolis, Minnesota, 480 F.3d 841 (8th Cir. 2007). In this civil forfeiture action, where evidence from defendant Hell's Angels Church offered in opposition to the government's summary judgment motion directly and strongly contradicted material points related to the element of "substantial connection" between the real property and drug crimes alleged to have occurred on the premises, the government's motion for summary judgment should have been denied.

McAninch v. Wintermute, 478 F.3d 882 (8th Cir. 2007). Trial court did not abuse its discretion in denying plaintiff leave to file an amended complaint which would have expanded the original from nine pages to 143 and added 16 more claims against the insurer under a directors, officers and employees indemnity and bank lenders liability policy; the rejected complaint included "'lengthy, irrelevant, and largely incomprehensible factual allegations, discussions of case law supposedly supporting claims, and argumentative responses directed at defendant's answer to the original petition.'"

Droste v. Julien, 477 F.3d 1030 (8th Cir. 2007). Trial court's pretrial disqualification of plaintiff's counsel because counsel could be a fact witness concerning plaintiff's claim for attorney fees paid by counsel in prior litigation, while an abuse of discretion, was only harmless error as plaintiffs failed to show how they were prejudiced by the conduct of substitute counsel.

Levy v. Ohl, 477 F.3d 988 (8th Cir. 2007). In malicious prosecution case under Missouri law, trial court did not err in reviewing public records concerning underlying litigation in connection with defendant's Rule 12(b)(6) motion to dismiss; motion was not automatically converted to summary judgment motion as public records, here court records, may be considered on a motion to dismiss.

BJC Health System v. Columbia Cas. Co., 478 F.3d 908 (8th Cir. 2007). Although "[s]triking a party's pleading . . . is an extreme and disfavored measure," district court properly exercised its discretion in striking plaintiff's prayer for punitive damages because the fraud claim in plaintiff's complaint was not alleged with particularity under "the heightened pleading standards of Rule 9(b)" and the requirements of Missouri law.

Smith v. Casali, 477 F.3d 540 (8th Cir. 2007). In judgment indemnity action, district court did not abuse its discretion when it denied third-party defendant leave to file second amended answer containing three additional defenses five days after allowing an amended answer to be filed; the record showed counsel had delayed discovery, which delay "seem[ed] calculated to accommodate the personal schedule" of the attorney because he traveled extensively and did not like to work on Fridays; also discovery had closed and the proposed amendment came close to time of trial.

D. Evidence

Ruminer v. General Motors Corp., __ F.3d __, 2007 WL 1147335 (8th Cir. 4/19/2007). After the air bags in plaintiff's vehicle failed to deploy and his seat belt locked up following a single vehicle accident, plaintiff's failure to prove a specific defect in either the air bags or the seat belt required dismissal of his strict liability claim under Arkansas law; plaintiff's expert identified "twelve possible failure modes as the cause" of a lock-up failure in the seat belt but could not specify which one caused the failure in this case.

Ahlberg v. Chrysler Corp., 481 F.3d 630 (8th Cir. 2007). This was a products liability action arising out of the death of a grandfather who tried to stop a Dodge Ram truck from rolling down the driveway after his young grandson shifted the running truck into neutral or reverse. Evidence of a Jeep brake-shift interlock (BSI) retrofit program was properly excluded as irrelevant under Fed. R. Evid. 401 as there was no independent duty under Iowa law to retrofit and defendant conceded installation of the BSI was feasible. The evidence was also properly excluded under Rule 403 because the retrofit evidence related to a different vehicle, which raised issues of confusion and prejudice. Finally, exclusion of plaintiff's expert, a former Chrysler employee who was not an engineer, to testify about whether the Ram was unreasonably dangerous because there was no BSI, was proper as the proffered witness used no methodology in reaching his conclusions.

Synergetics, Inc. v. Hurst, 477 F.3d 949 (8th Cir. 2007). Even though there may be other methods for calculating damages in a trade secrets misappropriation case, when the methods an expert uses are scientifically valid, exclusion of the testimony is not warranted.

F. Judgments

Koehler v. Brody, __ F.3d __, 2007 WL 895864 (8th Cir. 3/27/2007). Plaintiff's collateral attack on a class recovery through an action against class counsel, in which he asserted breach of fiduciary duty, failed; the earlier judgment approving the settlement prohibited the claim as plaintiff had previously litigated the amount of the settlement

Robinette v. Jones, 476 F.3d 585 (8th Cir. 2007). Where immunity defenses to § 1983 claims were decided in a federal lawsuit and plaintiffs dismissed other claims without prejudice, the court's orders on immunity issues collaterally estopped review of the issues when the plaintiffs refiled again in state court and defendants removed the case to federal court.

II. CRIMINAL LAW

A. Criminal Acts

United States v. Timlick, __ F.3d __, 2007 WL 1052458 (8th Cir. 4/10/2007). Evidence that plaintiff had the keys to an SUV in which cocaine and methamphetamine were found and that she had been lying in the folded down back end of the vehicle, an unusual circumstance, was sufficient to support a finding of constructive possession of the contraband.

United States v. Bamberg, 478 F.3d 934 (8th Cir. 2007). Federal Analogue Act, which makes possession of controlled substance analogues illegal, provided sufficient notice 1,4-Butanediol was a prohibited chemical analogue and therefore was not void for vagueness.

United States v. Miller, 477 F.3d 644 (8th Cir. 2007). Conviction of state correctional officer of offense of inflicting cruel and unusual punishment upon prisoners was supported by evidence that defendant had no legitimate reason to punch a prisoner after the prisoner had been admonished and his restraints removed, then kick and stomp him while he was on the ground.

United States v. Katkhordeh, 477 F.3d 624 (8th Cir. 2007). Jury could conclude defendant made false statements that he was unmarried and had no children at the time he applied for a visa even though defendant argued he was only in a *sigheh* or temporary, non-marital relationship; he submitted an application to the Army Reserves stating he had been married for seven years before he entered the country and submitted his wife's formal Iranian identity card.

United States v. Mitchell, 476 F.3d 539 (8th Cir. 2007). Because pre-petition income cannot be property of the bankruptcy estate, defendant's conviction for failing to disclose this income was reversed.

United States v. Johnson, 474 F.3d 1044 (8th Cir. 2007). Defendant had constructive possession of a handgun found "within arms-reach in a shoebox" in the bedroom where he was sleeping; officers found defendant's i.d. and a cable bill for the residence in the bedroom closet; he kept other personal items there, was the only adult in the room the day of the search and was present in the house at least daily; the jury's verdict was reinstated because they could have disbelieved younger brother's story that the gun was his and he had put the gun in the shoebox before his brother arrived that day.

B. Procedure

Whorton v. Bockting, __ U.S. __, 127 S. Ct. 1173 (2007). The Supreme Court's new procedural rule in *Crawford v. Washington*, 541 U.S. 36 (2005), that testimonial statements of absent witnesses may be admitted only when the witness is unavailable and where defendant has been able to cross-examine the witness previously, is not a "watershed" rule which would apply to cases on collateral review, as respondent's case here was.

United States v. Norris, __ F.3d __, 2007 WL 1174862 (8th Cir. 4/23/2007). Defendant was not entitled to specific performance of the plea agreement from which the government withdrew as it had not been accepted by the court prior to the government's withdrawal and the government agreed it would not use his plea colloquy statements in any proceeding for any purpose.

United States v. Moore, _ F.3d _, 2007 WL 1109381 (8th Cir. 4/16/2007). Trial court did not abuse discretion in denying defendant's motion to withdraw his guilty plea: the plea record demonstrated his understanding of his rights, the contents of the plea agreement and the applicable penalties and guidelines ranges.

United States v. Youngman, __ F.3d ___, 2007 WL 957540 (8th Cir. 4/2/2007). Court's comment during the prosecutor's examination that a witness was difficult did not prejudice defendant; the court subsequently granted the government's motion (out of presence of the jury) to dismiss the charges relating to the witness due to her unwillingness to testify and instructed the jury on multiple occasions concerning the witness, the charges and the court's role.

United States v. Jones, 479 F.3d 975 (8th Cir. 2007). Defendant failed to show a "fair and just reason" for withdrawal of his *nolo contendere* plea; although he claimed his first (of three) counsel's failure to move to suppress the gun found during a search of defendant's car was the "fair and just reason," he failed to show that his position was meritorious: Police stopped defendant after receiving a report he pointed a pistol at a neighbor and drove off; defendant was stopped in the same car and arrested for driving while suspended.

United States v. Baker, 479 F.3d 574 (8th Cir. 2007). New trial standard was not met by recantation by material witness where there was substantial and significant evidence defendant was the individual who fled a vehicle following a traffic violation, including numerous personal items of defendant's found in the vehicle.

United States v. Pierce, 479 F.3d 546 (8th Cir. 2007). Giving a *Pinkerton* jury instruction concerning co-conspirator vicarious liability using mandatory "should" language was not clearly erroneous and correctly stated applicable law.

United States v. Brede, 477 F.3d 642 (8th Cir. 2007). In case charging making false statement in acquiring a firearm, district court did not abuse its discretion in rejecting defendant's requested instruction defining "indictment," "information," and "complaint" -- there is no basis for distinguishing between processes which are "functionally equivalent." Also, rejection of proposed "willfully" instruction was within court's discretion where "knowingly" instruction by the court defined "the requisite criminal intent."

United States v. Mink, 476 F.3d 558 (8th Cir. 2007). Imposition of jury costs on defendant who entered guilty plea on the day jury selection was to begin was not authorized; "sentence" held not to include the imposition of jury costs; also courts may only impose costs on a criminal defendant that are expressly enumerated in 28 U.S.C. § 1920.

C. Fourth Amendment

United States v. Proell, __ F.3d __, 2007 WL 1174859 (8th Cir. 4/23/2007). Officers executing a search warrant issued after the issuing judge took live testimony from two officers were not "entirely unreasonable" in believing there was probable cause to support the warrant, which authorized not only a search of a residence where an alleged poacher lived but also the property of his neighbor, who had dated his mother for sixteen years and to whose property the poacher had access. A search of the neighbor's property turned up drugs and guns, leading to the issuance of a second search warrant for both properties to look for drugs and drug paraphernalia.

United States v. Bradley, __ F.3d __, 2007 WL 1160055 (8th Cir. 4/20/2007). Probable cause to search defendant's computer for child pornography was based on alleged sexual abuse of a toddler, defendant's possession of pornography which probably involved minors and his admission there was pornography on his computer; although the search warrant application for search of his vehicle did not specify the factual basis for a search of the vehicle beyond those above, the officer seeking to search the car told the state magistrate judge under oath defendant kept a large amount of personal property in the car and kept the car locked and could believe in good faith that the judge relied on this additional verbal information.

United States v. Ferrer-Montoya, __ F.3d __, 2007 WL 1147339 (8th Cir. 4/19/2007). After being stopped for speeding, defendant had no title to the vehicle he was driving nor proof of insurance and gave the arresting officer a Mexican driver's license with another name: these circumstances coupled with defendant's vague travel plans led the officer to ask to search the vehicle, during which he found a hidden compartment containing two packages of methamphetamine. Defendant's unlimited consent to search and failure to stop the officer during the search, coupled with the "minimally intrusive manner" in which the officer removed screws holding down a panel over the hidden compartment, led the circuit to conclude that the search of the compartment did not exceed the scope of defendant's consent.

United States v. Summage, __ F.3d __, 2007 WL 1052456 (8th Cir. 4/10/2007). Defendant's motion to suppress should have been denied: failure to include the date of an arranged sexual encounter between a mentally challenged individual and an unknown female (which was videotaped by defendant) in an affidavit for a search warrant for defendant's residence was not fatal to a probable cause determination; the failure to name a specific crime in the affidavit (solicitation or pandering under Iowa law) also did not invalidate probable cause where the affidavit described that defendant had offered money in exchange for the victim's cooperation in the sexual conduct.

United States v. Varner, __ F.3d __, 2007 WL 984109 (8th Cir. 4/4/2007). In a felon in possession case, defendant was arrested outside the house where he resided for failure to pay child support: officers lawfully accompanied him into the house when defendant asked if he could tell his girlfriend he was leaving and lawfully accompanied the girlfriend to the basement to get cigarettes for defendant: ammunition which was in plain view when one officer returned to the basement to retrieve drugs and paraphernalia which had been discovered in plain view during the first visit to basement with the girlfriend was not required to be suppressed as the officer was lawfully in a position to view the ammunition.

United States v. Thomas, 480 F.3d 878 (8th Cir. 2007). As he departed from a bus from Chicago, defendant was detained by officers who believed he resembled the picture of a murder suspect from Chicago. Defendant gave officers false information about his identification. A search of defendant's pocket revealed a bus ticket with a different name than defendant had given. Though the search was improper, discovery of the evidence was inevitable because officers were trying to determine whether they had a murder suspect and were following a "substantial, alternative line of investigation" to discover defendant's true identification.

United States v. Bell, 480 F.3d 860 (8th Cir. 2007). Informant's tip identifying defendant's car as one out of which stolen firearms were being sold was reliable and corroborated as the informant knew yet-unpublicized details of the robbery in which the guns were stolen and the description of the vehicle and its location were verified, giving police reasonable suspicion to believe the vehicle carried some of the stolen firearms, justifying an investigative stop.

United States v. Castro-Gaxiola, 479 F.3d 579 (8th Cir. 2007). Officers had probable cause to stop and to make a warrantless arrest of defendant after he left a suspected drug house in vehicles with other individuals: the house had been under surveillance; at the time of the stop defendant told police he had come from a hotel, when police had observed him leaving the house; a confidential informant told police a methamphetamine delivery had been made to the house and officers searching the house after defendant left radioed to the detaining officer their discovery of methamphetamine in the basement.

United States v. Jimenez, 478 F.3d 929 (8th Cir. 2007). After stopping defendant's vehicle for a traffic violation, officer had "reasonable, articulable suspicion" to detain defendant further and expand the scope of the stop: she and her son gave conflicting stories about their travel plans; she lacked tickets, money or plans to return home after they told the officer they were leaving the car at their destination; she was nervous; the vehicle's kick panel and molding had been removed and could be seen in the back seat.

United States v. Williams, 477 F.3d 974 (8th Cir. 2007). Scope and manner of physical search of defendant who had hidden a large amount of crack and powder cocaine near his genitals, which search entailed an officer with latex glove opening defendant's pants and reaching into his underwear, was permissible, as was the location of the search, in a precinct parking lot behind the station surrounded by chain link fence and vegetation.

United States v. Williams, 477 F.3d 554 (8th Cir. 2007). A search warrant affidavit omitted information concerning a financial arrangement between a CI and the police department and the CI's prior misdemeanor conviction for providing false information to an officer, however, neither omission impacted on the CI's reliability or made the application misleading, therefore preliminary showing to justify a *Franks* hearing was not shown.

United States v. Donnelly, 475 F.3d 946 (8th Cir. 2007). Eighty-minute wait for a drug-dog sniff of defendant's vehicle was justified: defendant admitted he had fallen asleep at the wheel in the daylight hours; had glassy, blood-shot eyes; wanted to avoid police involvement after he sideswiped another vehicle; had a strange multi-state itinerary; and exhibited nervousness, all of this could give a reasonable suspicion he may be transporting/using drugs (which he was). Further, while drug-dog's field test discovery rate was not "a model of canine accuracy," his track record was only one of many factors in "the totality of the circumstances calculation."

D. *Miranda*

United States v. Hyles, 479 F.3d 958 (8th Cir. 2007). Defendant's Sixth Amendment right to counsel was not violated by videotaped statements he made to officers where he waived his *Miranda* rights three times and initiated the statements with the officers; defendant's statements were not coerced where he was allowed to smoke before taping began, was given lunch and allowed to use the bathroom and the five-six hours spent at the highway patrol office was not excessive or burdensome.

E. Double Jeopardy

United States v. Honarvar, 477 F.3d 999 (8th Cir. 2007). Even though bank fraud and false statements charges were based on statements defendant made on the same credit card applications, the elements of each crime were not subsumed in one another; therefore, defendant was not subjected to double jeopardy.

F. Due Process/Evidence

United States v. McAtee, __ F.3d __, 2007 WL 1075278 (8th Cir. 4/12/2007). Defendant's post-arrest/*Miranda* statements to the police that he was "f----d" and he used methamphetamine within twenty minutes after he was previously released from prison were probative of his guilt and in determining whether he made methamphetamine; pre-arrest photographs of defendant and his wife in a house where equipment used to manufacture methamphetamine was found were also probative of his guilt.

United States v. Kenyon, _ F.3d _, 2007 WL 1039551 (8th Cir. 4/9/2007). The trial court was not required to hold a preliminary hearing concerning the admissibility of the testimony of the government's expert, a professor of pediatrics who testified concerning characteristics of abused children.

United States v. Meads, 479 F.3d 598 (8th Cir. 2007). Even though defendant made a timely request for a "mere presence" instruction, which was an accurate statement of the law, the evidence did not support giving the instruction because it indicated defendant had *actually* possessed *and used* the firearm in question.

United States v. Bass, 478 F.3d 948 (8th Cir. 2007). There was no showing the prosecution knew or should have known a key witness would commit perjury at trial even though the witness told "different stories" at a pretrial hearing; particularly when defense counsel heard the same inconsistent statements, did not object to the government calling the witness at trial and the jury was informed of the prior inconsistent statements.

United States v. Brown, 478 F.3d 926 (8th Cir. 2007). Trial court's refusal of defendants' proposed good-faith jury instruction was not an abuse of discretion in this wire fraud and conspiracy case involving submission of loan packages containing false information to lenders; instructions contained language concerning the requirement that the jury find defendants acted "knowingly, voluntarily, and intentionally," which covered the "honest intentions" essence of a good-faith defense.

United States v. Levine, 477 F.3d 596 (8th Cir. 2007). In case involving multiple (144) counts of conspiracy to access a protected computer without authority, money laundering and obstruction of justice, evidence that defendant had prior "problems with the SEC" was relevant when at the time of opening statement, defendant offered an "innocent reason" for the structure of his corporation and the SEC problem was offered to rebut that "innocent reason;" evidence of defendant's finances and lifestyle was relevant to rebut the defense that his employees conspired to frame defendant, which he sought to prove by submitting evidence of their finances, salaries and lifestyles.

United States v. Falcon, 477 F.3d 573 (8th Cir. 2007). In a case involving charges of embezzlement of travel funds from Indian tribal organization, deliberate indifference jury instruction which advised the jury they could not find the defendant acted knowingly if she was simply careless was not the same as a constructive knowledge instruction.

United States v. Barajas, 474 F.3d 1023 (8th Cir. 2007). While evidence that DEA manual did not prohibit the use of tape recorders during interviews, contrary to agent's trial testimony about the DEA's tape-recording policy, could have impeached the agent's credibility, it "only tangentially len[t] support" to defendant's argument he did not make admissions to which agent testified, nor was it likely such evidence would have produced an acquittal.

United States v. Gladney, 474 F.3d 1027 (8th Cir. 2007). Motion concerning pre-indictment delay was untimely made, coming just before the jury came into the courtroom for closing arguments; further, there was no showing of prejudice arising from the nineteen-month delay between the time of charged events and indictment: the witnesses still recalled events .

United States v. Jara, 474 F.3d 1018 (8th Cir. 2007). Evidence of defendant's prior cooperation with law enforcement in making a controlled delivery of marijuana on the same travel route seven years before the prior charge was relevant to defendant's knowledge he was transporting marijuana, which he put in issue.

G. Sixth Amendment

United States v. Lewis, __ F.3d __, 2007 WL 1216526 (8th Cir. 4/26/2007). Collection of a buccal swab from defendant before he consulted with counsel did not violate defendant's Sixth Amendment right to counsel, because scientific analyses of physical evidence are not "critical stages" which require the presence or advice of counsel.

United States v. Lightfoot, __ F.3d __, 2007 WL 1217211 (8th Cir. 4/26/2007). After mandate was returned from prior appeal, the addition of defendants to defendant's case, all of whom had speedy trial clocks already running, caused the Speedy Trial clock to be reset to that of the defendant with the most time remaining on the clock

United States v. Suarez-Perez, __ F.3d __, 2007 WL 1138353 (8th Cir. 4/18/2007). Defendant's Speedy Trial Act motion to dismiss should have been granted --court's *nunc pro tunc* order changing the start of the speedy trial tolling clock from August 6, 2004 to June 29, 2004 did not show grounds for the change in the tolling period -- nothing occurred during that period to toll the clock and the order did not show an intent to correct a clerical error -- case remanded for determination whether dismissal should be with or without prejudice.

United States v. Aldaco, 477 F.3d 1008 (8th Cir. 2007). Neither defendant's Speedy Trial Act or the Sixth Amendment right to speedy trial were violated even though his case did not go to trial until three years and four months after filing of the original indictment: many continuances were due to defendant's change of counsel (six times), counsel filed or presented orally forty-five motions, and at one point defendant's competency was at issue.

United States v. Watson, 479 F.3d 607 (8th Cir. 2007). Representation of a criminal defendant while counsel is facing federal court disciplinary proceedings following a state license suspension is not *per se* ineffective assistance, particularly where the district court found counsel had vigorously defended on defendant's behalf and rejected defendant's assertions he lacked knowledge of his counsel's suspension.

United States v. Torres-Villalobos, 477 F.3d 978 (8th Cir. 2007). Warrants of deportation, signed by an official who observed a deportee actually leave the United States, are not considered testimonial and therefore their admission did not implicate the Confrontation Clause of the Sixth Amendment.

H. Sentencing

Abdul-Kabir v. Quarterman/Brewer v. Quarterman, _ U.S. _, _ S. Ct. _, 2007 WL 1201582; *Smith v. Texas*, __ U.S. __, __ S. Ct. __, 2007 WL 1201586 (4/25/2007). Three death penalty sentences thrown out because the state and federal courts incorrectly applied prior rulings on jury instructions which prevented jurors from considering "constitutionally relevant mitigating evidence."

James v. United States, __ U.S. __, 127 S. Ct. 1586 (2007). Attempted burglary under state law qualifies as a "violent felony" within the residual clause of the Armed Career Criminal Act.

United States v. Meyer, __ F.3d __, 2007 WL 1201880 (8th Cir. 4/25/2007). The circuit holds that sweat patch test results are a "generally reliable method" to show whether an offender has violated a condition of probation, most notably avoidance of drugs; in this particular case the results showing cocaine use were reliable even in the face of defendant's negative UA's and hair samples because there were eight consecutive positive results from the sweat patches.

United States v. Petruk, __ F.3d __, 2007 WL 1201882 (8th Cir. 4/25/2007). While defendant may have lived in his truck for long periods of time during a co-defendant's HUD Section 8 lease term, evidence that he named the house he owned and rented to the co-defendant as his legal homestead supported the sentencing court's finding of continuous residence with the co-defendant, justifying restitution of the full amount of Section 8 subsidies received.

United States v. Feemster, __ F.3d __, 2007 WL 1201885 (8th Cir. 4/25/2007). Sentencing variance for career offender which was 67% below the guidelines minimum was not justified merely because defendant's prior adult convictions occurred while he was a juvenile, particularly where his criminal history showed two additional convictions after he turned eighteen.

United States v. Thomas, __ F.3d __, 2007 WL 1160054 (8th Cir. 4/20/2007). A state law conviction for tampering in the first degree, which was based on defendant's unlawful operation of a motor vehicle without the consent of the owner, qualified as a crime of violence under the guidelines.

United States v. Myers, __ F.3d __, 2007 WL 1094445 (8th Cir. 4/13/2007). Trial court properly declined to apply a vulnerable victim enhancement to defendant's sentence for the crime of interstate transportation of minor with intent to engage in sexual activity because there was no evidence defendant knew the fifteen-year old victim suffered from ADHD or had a "troubled" home life. Also, in light of evidence that the victim had already discussed running away with another man before her internet contacts with defendant, the trial court did not err in rejecting an undue influence enhancement based on the presumption arising from their age differences (victim was 15; defendant was 37).

United States v. Paterson, __ F.3d __, 2007 WL 984102 (8th Cir. 4/4/2007). Six-level sentencing enhancement for creating a substantial risk of harm to a minor in the course of manufacturing methamphetamine was supported by defendant's plea admission to the presence of the equipment and components of methamphetamine manufacture in the small duplex he shared with his girlfriend and her four-year-old son, as well as a forensic chemist's testimony the chemicals found would be dangerous, especially in unmarked containers around a small child.

United States v. Griffin, __ F.3d __, 2007 WL 967265 (8th Cir. 4/3/2007). A case of first impression in this circuit concerning "whether an expectation of receipt of child pornography" through a peer-to-peer file-sharing network is a "thing of value, but not for pecuniary gain" for the purposes of sentence enhancement: child pornography material received in exchange for similar material could be a "thing of value."

United States v. Garate, _ F.3d _, 2007 WL 967317 (8th Cir. 4/3/2007). In case involving charge of travel with intent to engage in sexual conduct with a minor with a sentencing range of 57 to 71 months, 30-month sentence based on defendant's youth (21), lack of criminal history and family support was unreasonable as the factors on which the court relied were already accounted for in the guidelines and the court failed to consider other factors, such as the injuries defendant's offenses caused to the minor and her family.

United States v. Watson, 480 F.3d 1175 (8th Cir. 2007). Sentencing disparity between defendant and co-defendant was justified by differences in departures applicable to the two defendants: the co-defendant received reductions for acceptance of responsibility and substantial assistance; defendant received enhancements based on use of a handgun in the charged conspiracy, the conduct was within 1,000 feet of a protected area, and the court determined defendant was the leader of the conspiracy.

United States v. Gallegos, 480 F.3d 856 (8th Cir. 2007). A ninety-eight month sentencing difference between defendants was not unreasonable as defendants were not similarly situated: the lower sentenced defendant was in a lower criminal history category and received motions for downward departure based on his substantial assistance, including naming his co-defendant as a co-conspirator and cooperating with law enforcement to prove the co-defendant's involvement in a drug distribution conspiracy.

United States v. Miller, 479 F.3d 984 (8th Cir. 2007). District court's apparent merging of departure and variance analysis in sentencing defendant to a nine-level increase above the advisory guideline range was harmless error; the increase, while a "substantial deviation from the advisory benchmark" was justified by the exceptional circumstances of defendant's perjured testimony at the time of her plea in a prior stolen property case, specifically, that she had no knowledge concerning what happened to the body of her boyfriend from whom she stole valuable property. At the murderer's trial, she then testified in detail concerning how she witnessed her boyfriend being murdered and assisted in disposing of the body in a particularly gruesome way, the circumstances of which led the sentencing court to find defendant was a "very dangerous person" who had not been sanctioned for her role in the murder.

United States v. Carter, 481 F.3d 601 (8th Cir. 2007). District court erred when it excluded a statutory mandatory sentence for defendant's conviction under a second gun possession count in the same indictment; the "second or subsequent conviction" language of 18 U.S.C. § 924(c)(1)(C) is held to refer to a finding of guilt prior to entry of final judgment of conviction.

United States v. Red Feather, 479 F.3d 584 (8th Cir. 2007). In revoking defendant's supervised release and sentencing him to a term of imprisonment representing an upward variance which was 272 percent of the upper end of the revocation range, the court did not abuse its discretion given its findings that defendant's criminal history and substance abuse problems were an extraordinary threat to the community and defendant had refused to rehabilitate while on supervision.

United States v. Alfonso, 479 F.3d 570 (8th Cir. 2007). In determining sentencing range for defendant who pled guilty to wire fraud violation after operating a Ponzi scheme, defendant was not entitled to offset victims' gains on one investment against their losses on other investments with defendant.

United States v. Craft, 478 F.3d 899 (8th Cir. 2007). Obstruction of justice enhancement to defendant's sentence after being convicted of two counts of witness tampering was supported by defendant's attempt to hide financial information from the presentence writer: he misrepresented the value of his assets, tried to liquidate them into gold and silver to hide, tried to transfer other assets to his child, and told investigators an individual who had no knowledge of defendant's finances was his accountant.

United States v. Dalton, 478 F.3d 879 (8th Cir. 2007). Defendant was not entitled to "an extraordinary" reduction based on her assistance, which was not extraordinary; here a departure which would take a sentence below the statutory mandatory minimum could only be based on § 3553(e) factors and not § 3553(a) factors.

United States v. Mata-Peres, 478 F.3d 875 (8th Cir. 2007). Leadership role enhancement of defendant's sentence was not clearly erroneous in methamphetamine possession and sale case where defendant decided on the price and quantity of drugs to be sold and carried and held the drugs and money.

United States v. Alvarez, 478 F.3d 864 (8th Cir. 2007). Special condition of supervised release limiting defendant's internet access (after 216-month sentence) was sufficiently linked to his possession of child pornography where defendant compared his sexual exploitation of a two-year-old niece to material he found online; defendant admitted having a problem with self-control and needing help; and he did not have a vocational need for internet access.

United States v. Guerra-Cabrera, 477 F.3d 1021 (8th Cir. 2007). Trial court's denial of safety valve relief in drug conspiracy case was reasonably based on the court's perception that defendants were not truthful with respect information concerning their offense, including identification of the supplier and their connection to a stash house, in which some of their personal possessions were found.

United States v. Lynch, 477 F.3d 993 (8th Cir. 2007). Although assaults defendant committed occurred on consecutive dates and in the same way, they involved different locations and victims, therefore, the separate sentences for each assault were not "related" for career offender guideline determination.

United States v. Gonzalez-Alvarado, 477 F.3d 648 (8th Cir. 2007). In illegal reentry case, sentence of 12 months and one day, a 64% reduction from the guideline range of 33 to 41 months, was not reasonable: reduction based on defendant's cultural assimilation, job and family in the United States and the absence of a fast-track program were impermissible reasons for reduction and not extraordinary circumstances.

United States v. Garnica, 477 F.3d 628 (8th Cir. 2007). Sentence at the bottom of the undisputed guidelines range was reasonable, both presumptively under circuit law and based on the factors considered by the sentencing court on the record.

United States v. Bell, 477 F.3d 607 (8th Cir. 2007). Defendant's felon-in-possession and drug trafficking convictions should have been grouped for sentencing purposes as the conduct was "closely intertwined": the firearm for the felon-in-possession charge was the same one defendant was found guilty of possessing in furtherance of the drug trafficking crimes-- the conduct involved in the three offenses was accounted for by the guidelines.

United States v. Akers, 476 F.3d 602 (8th Cir. 2007). Sentencing guideline for defendants convicted of smuggling drugs into federal correctional facilities involved different and more egregious conduct from drug dealing on the street given the detrimental effect of drug smuggling in a prison facility; therefore, the guideline applied to defendant's conduct did not create an unreasonable sentencing disparity.

United States v. Sanchez, 475 F.3d 978 (8th Cir. 2007). Defendants were not entitled to safety valve relief when one refused to answer questions about his role in drug transactions, another denied knowledge of the subject transactions, and the last testified inconsistently with his post-arrest statement and proffer statement concerning his role in the drug transaction and prior history.

United States v. Kendall, 475 F.3d 961 (8th Cir. 2007). Opinion remanding case for resentencing did not place limitations on the sentencing court and in fact suggested there was insufficient information concerning defendant's DWI conviction to determine whether it qualified as a crime of violence, effectively inviting the district court to open the record to hear additional evidence on the issue.

United States v. Gomez Godinez, 474 F.3d 1039 (8th Cir. 2007). Defendant was not entitled to a minor role reduction: he transported drugs, stored them and sold them and did not contest the facts in the presentence report showing he was the leader.

I. Habeas

Lawrence v. Florida, __ U.S. __, 127 S. Ct. 1079 (2007). The one-year limitations period of 28 U.S.C. § 2244(d)(2) for filing a habeas petition is not tolled during the pendency of a petition for writ of certiorari with the U.S. Supreme Court.

Clay v. Norris, __ F.3d __, 2007 WL 1201753 (8th Cir. 4/25/2007). Arkansas' abstracting rule is a consistently applied state rule which applied as an independent and adequate state law ground to bar habeas review; petitioner's failure to cure deficiencies in the abstract on post-conviction review acted to bar federal habeas review.

Collier v. United States, __ F.3d __, 2007 WL 1109311 (8th Cir. 4/16/2007). The prosecution's suppression of impeachment evidence that a witness claimed to have been paid $300 and promised a reward for his testimony did not prejudice petitioner under *Brady* because there was sufficient evidence of petitioner's guilt in the state record that the suppressed evidence did not make it reasonably probable the results would have been different.

Morales v. Ault, 476 F.3d 545 (8th Cir. 2007). Although the circuit found the list of errors by trial counsel (not interviewing the treating physicians, failing to investigate the medical examiner, for example) "disturbing," and prosecutorial conduct, including withholding information of a meeting between the prosecutors, the medical examiner and treating physicians, "troubling," there was overwhelming evidence of defendant's guilt in a case involving the conviction of a father for the death of his two-year old son from head injuries. Seven doctors testified the child's injuries were not consistent with the defense theory he fell down stairs; defendant gave various conflicting accounts about the incident; and there was evidence of other possible abuse of the child while in the father's care.

Skillicorn v. Luebbers, 475 F.3d 965 (8th Cir. 2007). State court did not unreasonably apply federal law in excluding co-defendant's confession; the statement was not "unquestionably" against the co-defendant's penal interest because he tried to minimize his deliberative conduct and lacked corroboration.

Garcia v. Mathes, 474 F.3d 1014 (8th Cir. 2007). Because state law required an intervening act to be the *sole* proximate cause of death in order for it to relieve a defendant of criminal responsibility, state trial court excluded physician's opinion that removal of a tracheotomy tube was the proximate cause of a shooting victim's death when physician agreed removal of the tube was not the sole proximate cause of death. This ruling was not an objectively unreasonable application of clearly established federal law because trial courts may exclude irrelevant evidence without violating the Constitution.

III. EMPLOYMENT LAW

A. General Issues

Miles v. Bellfontaine Habilitation Center, _ F.3d _, 2007 WL 1075655 (8th Cir. 4/12/2007). Pro se plaintiff's FMLA claim against a state agency was barred by the Eleventh Amendment; however, she was not required to prove exhaustion of administrative remedies in her complaint and her statement therein that she filed an EEOC charge was sufficient to withstand dismissal on the grounds she had failed to plead exhaustion since failure to exhaust is an affirmative defense to be proved by defendant.

C. Disability

Thomas v. Corwin, __ F.3d __, 2007 WL 967315 (8th Cir. 4/3/2007). Employer police department request for plaintiff to undergo a fitness for duty evaluation was "job-related and consistent with business necessity;" plaintiff worked in the juvenile unit, had expressed concerns about the work situation and safety in the unit, had an anxiety attack attributed by her doctor to work-related stress (the cause of which plaintiff would not disclose to the employer), then wanted to return to the unchanged work situation without articulating the basis for her stress; furthermore, a focused request for a limited part of plaintiff's medical records in order for evaluating physician to determine whether there were any psychological problems which might interfere with plaintiff's ability to return to work was not overly broad or intrusive.

Gretillat v. Care Initiatives, 481 F.3d 649 (8th Cir. 2007). Plaintiff's known walking and standing limitations did not qualify as a disability under the ADA as they were only moderate: she did not experience numbness, her leg did not collapse nor did she required a cane on occasion. As for her limitations on crawling, kneeling, crouching and squatting, the circuit holds these functions are not major life activities.

EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561 (8th Cir. 2007). On summary judgment plaintiff demonstrated defendant's reasons for not hiring him, his job history and limited availability, were pretextual: the hiring person admitted she did not know if he had worked at other jobs before or after Wal-Mart failed to hire him and two of the jobs he definitely worked at after his application was rejected; and also conceded she would have hired plaintiff based on the availability listed on his second application, without reference to an earlier application on which he had indicated limitations. Also as a matter of first impression, the circuit held the employer bears the burden of proof on the affirmative defense of direct threat.

D. Race/Gender/Retaliation

Elnashar v. Speedway SuperAmerica, LLC, __ F.3d __, 2007 WL 1215939 (8th Cir. 4/26/2007). In a case alleging race discrimination in employment following the events of 9/11, denial of plaintiff's motion to compel the FBI to produce the identity of a confidential informant was not an abuse of discretion; the court properly required the FBI to show the informant's identity was privileged; then required plaintiff to show disclosure of the identity was material to plaintiff's claims against the employer.

Vajdl v. Mesabi Academy of KidsPeace, Inc., __ F.3d __, 2007 WL 1201867 (8th Cir. 4/25/2007). Conduct of youth offenders towards a female youthcare worker could not be attributed to the worker's employer to show their harassment affected a term, condition or privilege of employment.

Tipler v. Douglas Co., NE, __ F.3d __, 2007 WL 1080585 (8th Cir. 4/12/2007). A policy requiring female-only supervision of female jail inmates was reasonable and the governing CBA granted the county employer the right to adjust shift schedules if a shift-bid process failed to provide enough female staff members to supervise female inmates; also plaintiff was not denied any "significant employment opportunities" by virtue of being placed on another shift for three months to satisfy the female-only supervision policy.

Stewart v. Independent School Dist. No. 196, __ F.3d __, 2007 WL 1029327 (8th Cir. 4/6/2007). Faculty opposition to appointment of plaintiff as school principal on a recall rights basis (when they favored an inside candidate) was a permissible grounds for opposition, which plaintiff could not show was a pretext for discrimination based on her filing previous EEO complaints.

Carrington v. City of Des Moines, _ F.3d _, 2007 WL 1029329 (8th Cir. 4/6/2007). Where plaintiff did not engage in protected activity (making complaints of discrimination and retaliation) until after his supervisors began to investigate his job performance, there was no causation between his termination and his complaints; therefore, summary judgment on his retaliation claim was appropriate.

Carpenter v. Con-Way Central Express, Inc., 481 F.3d 611 (8th Cir. 2007). Caucasian male who had been married to an African American and who was harassed by a co-worker who made racial comments out of plaintiff's presence did not prove constructive discharge as an adverse employment action as his decision to quit after the co-worker played yet another prank on him was not a reasonably foreseeable consequence of the employer's failure to address the co-worker's conduct: the racial comments were never reported and other drivers had suffered from the same conduct as plaintiff.

Fair v. Norris, 480 F.3d 865 (8th Cir. 2007). Although the employer initially failed to hire plaintiff for a position for which she had applied based on a mistake made in its pre-screening procedures, because the employer then offered plaintiff the job after reviewing her grievance, plaintiff was no longer "rejected" as a job applicant and her complaint that she was only offered the standard compensation (retroactive to the time she would have been hired) instead of a higher grade salary package was not supported by evidence that similarly situated employees of a different race received higher than the standard salary.

Higgins v. Gonzales, 481 F.3d 578 (8th Cir. 2007). Lack of mentoring or supervision of Native American AUSA was not adverse employment action where plaintiff could not show their absence had any effect on her employment situation, in fact, she acquired a new term position in another location in the district after her original term of employment ended.

Standridge v. Union Pacific RR Co., 479 F.3d 936 (8th Cir. 2007). A case of first impression in the circuit concerning extension of the Pregnancy Discrimination Act to coverage of prescription contraception: the circuit holds that "contraception is not 'related to' pregnancy for PDA purposes because, like infertility treatments, contraception is a treatment that is only indicated prior to pregnancy," with the result that coverage for contraception in health insurance policy was not required. The lack of coverage also did not violate Title VII as it applied equally to men and women.

Allen v. Tobacco Superstores, Inc., 475 F.3d 931 (8th Cir. 2007). Court's rejection of employer's explanation that it failed to promote plaintiff to assistant manager at its convenience store because of an argument between plaintiff and the store manager was reasonable; similar argument occurred at another store between white cashier and white store manager, white store manager was fired and the white cashier ended up with promotion, unlike plaintiff who only maintained the assistant manager rate of pay; however, punitive damages award was not supported by the evidence which showed that employer did not terminate plaintiff for insubordinate acts, as it did with white employees, but transferred her.

H. Miscellaneous Employment Cases

EEOC v. Woodmen of the World Life Ins. Society, 479 F.3d 561 (8th Cir. 2007). Although plaintiff could "piggyback" on EEOC's discovery and litigation to reduce her litigation costs, that fact did not render an arbitration agreement unconscionable, particularly where defendant agreed to waive the fee-splitting provision of the agreement and to pay the arbitrator's fees in full.

Peterson v. County of Dakota, MN, 479 F.3d 555 (8th Cir. 2007). Plaintiff's tortious interference with contract claim against the union (because it decided not to arbitrate denial of a grievance concerning termination of plaintiff's employment) failed because the exclusive remedy for such conduct was breach of fair representation duty; plaintiff's due process claim failed as she was given pre-termination notice of the charges against her, the opportunity to respond, had access to post-termination procedures, and refused an offer to resign rather than be terminated.

Bradley v. James, 479 F.3d 536 (8th Cir. 2007). In case alleging plaintiff was fired in retaliation for exercising his First Amendment rights when he characterized the chief of police (his superior) as being intoxicated and interfering with investigation of a complaint in a college dormitory, *Garcetti* principles applied: plaintiff's statements were not made as a citizen but as part of his official responsibility to cooperate in an investigation into the department's response to the dormitory complaint, thus, no First Amendment retaliation occurred.

Harris v. Brownlee, 477 F.3d 1043 (8th Cir. 2007). Plaintiff who entered into a Title VII Negotiated Settlement Agreement with the government concerning classification of his employment grade level was not entitled to rescission of the agreement and reinstatement of the complaint he had filed as the government did not materially breach the contract; an independent classifier considered plaintiff's position description in conformance with OPM standards and plaintiff did not show the classifier erred in determining the classification status of plaintiff's job.

Bearden v. Lemon, 475 F.3d 926 (8th Cir. 2007). Because the district court found there was a genuine issue of material fact whether plaintiff's protected speech motivated his discharge, court of appeals did not have jurisdiction to consider the court's denial of qualified immunity to defendant.

IV. CONSTITUTIONAL LAW

A. First Amendment

Williams v. City of Carl Junction, MO, 480 F.3d 871 (8th Cir. 2007). In a First Amendment retaliation case, plaintiff failed to show not only that the mayor "harbored retaliatory animus" against plaintiff because of plaintiff's protected speech (frequent criticisms at city council meeting) but also that multiple citations over a two-year period were issued without probable cause.

Wickersham v. City of Columbia, 481 F.3d 591 (8th Cir. 2007). Where the city "provided critical assistance in planning and operating" an annual air show sponsored by a private organization and "played an active role" in enforcing the organization's speech restrictions, specifically by direct police enforcement, the private organization could be held liable as a state actor in the First Amendment challenges to the speech restrictions it sought to enforce during the show.

Parks v. City of Horseshoe Bend, Ark., 480 F.3d 837 (8th Cir. 2007). In § 1983 suit alleging defendants violated plaintiff's constitutional right by conspiring to prevent her re-election as city recorder/treasurer in retaliation for her vocal opposition to the mayor, plaintiff's claim failed because there is no constitutional right to be elected to a particular office and plaintiff could not show a link between the actions defendants were alleged to have taken (a friend of the mayor harassed plaintiff by speeding by her house and honking his horn in violation of a no-contact order) and the votes made by the electorate which ended in her defeat.

Osborne v. Grussing, 477 F.3d 1002 (8th Cir. 2007). While it was clear plaintiffs had engaged in First Amendment-protected conduct when they publicly criticized a county planning commission's enforcement practices, with respect to environmental regulations governing a residential lakeshore project, because plaintiffs' actions in building rip-rap and a retaining wall without obtaining the required grading or permits were illegal, they could not meet the strict causation standard to prove the First Amendment retaliation claim (that the commission responded with action forcing plaintiffs to costly conditions in granting permits after the fact).

B. Fourth Amendment

Scott v. Harris, __ U.S. __, __ S. Ct. __, 2007WL 1237851 (4/30/2007). Pursuing officer's action in applying the push bumper of his patrol car to the rear bumper of plaintiff's fleeing vehicle in an attempt to end a high-speed chase was not unreasonable under the circumstances, even if the action put the fleeing motorist at risk of serious injury or death, here, plaintiff was rendered a quadriplegic.

Wallace v. Kato, __ U.S. __, 127 S. Ct. 1091 (2/21/2007). A § 1983 false arrest claim accrues when the plaintiff is detained by legal process, *i.e.*, bound over for trial, not when the conviction is set aside later.

C. Due Process/Equal Protection

Flowers v. City of Minneapolis, 478 F.3d 869 (8th Cir. 2007). Conduct of police officer, who lived in the same block as plaintiff, in requesting special patrols and special investigations of plaintiff's house, did not deprive plaintiff of a fundamental right for substantive due process purposes "whatever effect his actions may have on the contemporary conscience."

Brown v. Simmons, 478 F.3d 922 (8th Cir. 2007). Plaintiff's "stigma plus" claim that he was denied a name-clearing hearing after remarks allegedly defamatory to him were made failed to state a claim as he failed to "allege any alteration or extinguishment of a right or legal status," only injury to his reputation which allegation does not trigger due process protections.

Buser v. Raymond, 476 F.3d 565 (8th Cir. 2007). Chief medical officer of state medical board was entitled to absolute immunity in hearing and deciding disciplinary complaints against physicians.

D. Miscellaneous Constitutional and Common Law Claims

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., _ U.S. _, _ S. Ct. _, 2007 WL 1237912 (4/30/2007). Waste control ordinance which required private haulers to obtain a permit in order to pick up all nonhazardous solid waste within a town and to pay a "tipping fee" when deposited at the municipality's public landfill, as required by the permits, did not violate the Commerce Clause; local and out-of-state haulers were treated the same -- the fact haulers could dispose of the waste cheaper out of state did not discriminate against interstate commerce.

Gonzales v. Carhart/Gonzales v. Planned Parenthood, _ U.S. _, 127 S. Ct. 1610 (2007). The court held the federal Partial-Birth Abortion Ban Act of 2003 is constitutional: it is not vague and does not impose undue burdens nor is it overbroad.

Cox v. Sugg, __ F.3d __, 2007 WL 1225376 (8th Cir. 4/27/2007). Plaintiff's § 1983 claim against University officials for sexual harassment by a professor failed as there was insufficient proof the University officials had actual notice of the professor's alleged harassment or failed to respond appropriately when it was reported, given the professor was forced to resign within a week after the report.

Hawkeye Commodity Promotions, Inc. v. Vilsack, _ F.3d _, 2007 WL 1189449 (8th Cir. 4/24/2007). Statute banning TouchPlay machines did not violate the Contracts Clause; license agreements between the Iowa Lottery and plaintiff vending company were lottery charters which are not protected by the Contracts Clause; the agreements themselves recognized the existence of regulation and notified the company statutory law would rule where there was a conflict; and there was a legitimate public purpose for the statutory ban -- to curb the expansion of gambling.

Thao v. City of St. Paul, 481 F.3d 565 (8th Cir. 2007). Because no one knew plaintiff's decedent had a dangerous weapon (a sickle and a BB gun) when police assisted the family in forcibly entering their home where the decedent had barricaded himself, even if officers had received other training under the ADA plaintiffs could not show such training would have made any difference in how the officers responded under the circumstances.

V. ERISA

Anderson v. U.S. Bancorp., _ F.3d _, 2007 WL 1189426 (8th Cir. 4/24/2007). A "palpable" conflict of interest was not created by the fact that a few members of defendant's self-funded severance administration committee were also employees of the human resources department which approved plaintiff's firing for cause; therefore, plaintiff's breach of fiduciary duty claim failed.

Fischer v. Andersen Corp., _ F.3d _, 2007 WL 1094442 (8th Cir. 4/13/2007). In case alleging he had been forced to take early retirement with the purpose of interfering in plaintiff's participation in an ERISA plan, plaintiff did not demonstrate adverse employment action -- implementation of a performance improvement plan did not amount to constructive discharge as there was no evidence the PIP was set up for him to fail or that its requirements were unreasonable.

Hillstrom v. Kenefick, _ F.3d _, 2007 WL 1039557 (8th Cir. 4/9/2007). Even though there were multiple versions of a long-term disability policy in the record and other discrepancies in the various versions, under either a *de novo* or abuse of discretion standard of review the discrepancies were not material to resolution of the case: the plan administrator's denial of plaintiff's disability claim was correctly based on his status as an independent contractor and not an employee and his failure to show the amount of earnings defined in the plan to calculate monthly benefits.

Jessup v. Alcoa, Inc., _ F.3d _, 2007 WL 957523 (8th Cir. 4/2/2007). Although a plan document and SPD used different language to define eligibility for early retirement benefits, the plan benefit appeals committee did not abuse its discretion in concluding plaintiffs, who continued to be employees of a successor corporation after Alcoa sold the facilities at which they worked, were not eligible under either definition.

Rutledge v. Liberty Life Assur. Co. of Boston, 481 F.3d 655 (8th Cir. 2007). Long-term disability benefits insurer was not bound by the Social Security Administration's decision to grant plaintiff disability benefits, which was made nearly a year before the insurer decided to terminate benefits and before significant changes in plaintiff's medical status occurred.

Administrative Committee of the Wal-Mart Stores, Inc. Associates' Health and Welfare Plan v. Gamboa, 479 F.3d 538 (8th Cir. 3/7/2007). In view of ERISA's requirement for written arrangements for health benefits, an Associate Benefits Book which included subrogation rights language and which was the only written document under which benefits had been paid to the insured fit within the "Plan Wrap Document's" definition of welfare program and the Committee could treat the Book as a plan document in seeking enforcement of its right of reimbursement.

Greeley v. Fairview Health Services, 479 F.3d 612 (8th Cir. 2007). Plaintiff failed to show detrimental reliance on a typographical error in a summary plan description (SPD); he had no choice but to go on disability because of his physical condition and could not show he took an action or failed to take an action he would not have taken otherwise.

Rittenhouse v. UnitedHealth Group Long Term Disability Ins. Plan, 476 F.3d 626 (8th Cir. 2007). Plaintiff failed to show good cause for his failure to submit doctors' letters, a letter from his superior and a hearing test to the plan administrator before a decision was made on his appeal of a benefits denial decision; therefore, the district court could not consider the non-record evidence.

Smith v. United Television, Inc. Special Severance Plan, 474 F.3d 1033 (8th Cir. 2007). Plan committee's interpretation of "reduction in salary or bonus opportunity" language of "Special Severance Plan," set up to "provide economic security" to certain employees when a change in control of the company occurred, to include consideration of an employee's "total earnings opportunity" rather than just the employee's salary was reasonable, given the fact that account executives were primarily compensated by commissions rather than by salaries and plaintiff's new payment terms actually enhanced her economic opportunities.

VI. PRISONERS' RIGHTS

C. Eighth Amendment

Kahle v. Leonard, 477 F.3d 544 (8th Cir. 2007). In qualified immunity analysis, it was not necessary that defendant subjectively be aware of the actual harm to plaintiff which occurred, only that there was a substantial risk of harm. Here defendant was supervising a new trainee correctional officer who went into plaintiff's cell after lockdown three times within an hour; the supervisor failed to log the trainee's entry into the cell as required and failed to notice lights on a panel in front of his face changing color to show entry into the cell.

D. Due Process

Clemmons v. Armontrout, 477 F.3d 962 (8th Cir. 2007). Prison investigator was entitled to qualified immunity because the undisputed facts showed that his conduct in failing to disclose to the prosecutor a witness statement in an interoffice communication or investigating other leads were merely negligent and not intentional or reckless.

VII. MISCELLANEOUS

KSR International Co. v. Teleflex Inc., __ U.S. __, __ S. Ct. __, 2007 WL 1237837 (4/30/2007). In patent law, when deciding whether an invention is "obvious," that is unpatentable because the differences between the invention and prior art would have been obvious to one "having ordinary skill in the art," the "teaching, suggestion, or motivation" (TSM) test should not be applied rigidly as the Federal Circuit did in this case.

Microsoft Corp. v. AT&T Corp., _ U.S. _, _ S. Ct. _, 2007 WL 1237838 (4/30/2007). Patent law does not prohibit Microsoft from sending overseas for installation in computers made and sold overseas software which contains software code which might infringe a patent in the United States.

EC Term of Years Trust v. United States, _ U.S. _, _ S. Ct. _, 2007 WL 1237845 (4/30/2007). The exclusive remedy for third-party wrongful tax levy claims is to bring a wrongful levy action against the United States within 9 months from the date of the levy; third parties may not bring a tax refund claim, which has a longer statute of limitations.

Zuni Public School Dist. v. Dep't of Educ., _ U.S. _, 127 S. Ct. 1534 (2007). An action challenging the method by which the Secretary of Education determines whether a state school program "equalizes expenditures" among local school districts, triggering a statutory exception to the federal law which prohibits a state from offsetting federal aid to local school districts by reducing state aid to a district. The Secretary's calculation is upheld as a reasonable method which carries out Congressional intent and falls "within the scope of the statute's plain language."

Watters v. Wachovia Bank, N.A., _ U.S. _, 127 S. Ct. 1559 (2007). Subsidiaries of national banks engaged in mortgage lending practices are not subject to state mortgage lending regulations in the states in which the subsidiaries operate.

Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., _ U.S. _ , 127 S. Ct. 1513 (2007). A refusal by a long distance carrier to pay compensation to payphone operators for allowing "free" access by payphone users to their carrier of choice qualified as a failure to pay compensation under federal regulatory law, thus the payphone operators' lawsuit was authorized under the same law as a regulated activity.

Environmental Defense v. Duke Energy Corp., __ U.S. __, 127 S. Ct. 1423 (2007). The term "modification" in one part of the Clean Air Act could be defined differently than in another part of the statute in accordance with the language in the statutory context surrounding each use of the term; therefore the court of appeals' attempt to conform the definitions exceeded the limits of judicial review under the EPA.

Massachusetts v. Environmental Protection Agency, _ U.S. _, 127 S. Ct. 1438 (2007). The Supreme Court has jurisdiction to decide whether the EPA has a duty to stake steps to slow or reduce global warming; greenhouse gases fit within the Clear Act's definition of "air pollutant," thus fall within the EPA's statutory authorities to regulate; the EPA's rejection of a rulemaking petition was based on impermissible considerations.

Travelers Cas. & Surety Co. v. Pacific Gas & Elec. Co., _ U.S._, 127 S. Ct. 1199 (2007). Contract-based attorney fee claims are not disallowed by federal bankruptcy law simply because they were incurred in the course of litigating bankruptcy issues.

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., _ U.S. _, 127 S. Ct. 1069 (2007). The Supreme Court holds the *Brooke Group* test applied to predatory-pricing claims also applies to predatory-bidding claims.

Philip Morris USA v. Williams, __ U.S. __, 127 S. Ct. 1057 (2007). Punitive damages may not be awarded for harm to nonparties to a lawsuit.

Marrama v. Citizens Bank of Massachusetts, _ U.S._, 127 S. Ct. 1105 (2007). Plaintiff's prepetition bad-faith conduct in misrepresenting the value of real estate and its transfer status acted to forfeit any right to convert his Chapter 7 case to one under Chapter 13 because the prepetition misconduct disqualified him as a debtor under Chapter 13.

Ferguson v. United States, __ F.3d __, 2007 WL 1225379 (8th Cir. 4/27/2007). The evidence supported a finding that a co-defendant was a "responsible person" who failed to remit excise taxes from the sale of airline tickets: he was the chief financial officer during the first three quarters of 1999 and president and chief operating officer during the fourth quarter; was authorized to sign checks in these capacities and had authority to pay the taxes without board approval. The board's directive to pay only company obligations necessary to keep the planes in the air did not extend to failure to pay excise taxes and even if so construed, did not change the co-defendant's status as a "responsible person."

Enderlin v. XM Satellite Radio Holdings, Inc., _ F.3d _, 2007 WL 1138368 (8th Cir. 4/18/2007). While plaintiff's argument concerning the enforceability of an arbitration clause was a "claim" within the meaning of the contract, the issue was excepted from arbitration by another provision in the contract, thus arbitrability was an issue which the district could determine.

Whitebox Convertible Arbitrage Partners, LP v. IVAX Corp., _ F.3d _, 2007 WL 1029367 (8th Cir. 4/6/2007). Make-whole premiums for conversion of indentures were only payable for those indentures converted during the 30-day period beginning on the date a merger occurred and not on a date prior to the merger.

Immigration Law Group, LLP v. Danna McKitrick, P.C., __ F.3d __, 2007 WL 984103 (8th Cir. 4/4/2007). Where retainer fees were disbursed to law firm after second of three-step immigration work process had been completed, new law firm of partner who had obtained the immigration cases originally was equitably estopped to make a claim for those fees from the partner's old law firm because the partner was the one who had directed when the fees should be disbursed and both he and the new firm were aware the fees had already been disbursed when the new firm took on the partner's clients to complete the third step of the immigration work.

Hudson v. Conagra Poultry Co., __ F.3d __, 2007 WL 984106 (8th Cir. 4/4/2007). A broad and unambiguous arbitration clause in a poultry production contract was held to encompass contract-related tort claims; a separate choice of law section in the contract did not narrow the scope of the arbitration provision nor did it render the arbitration provision ambiguous.

Walnut Grove Partners, LP v. American Family Mut. Ins. Co., 479 F.3d 949 (8th Cir. 2007). When at least six months elapsed between the time the owner of a building became aware mold had developed on the premises and the date an affected tenant terminated its lease because of the mold, the occurrence of mold was not sudden or accidental as required by the owner's business liability policy.

Minn. Public Utilities Comm'n v. FCC, __ F.3d __, 2007 WL 838938 (8th Cir. 3/21/2007). FCC did not act arbitrarily or capriciously in applying the statutory "impossibility exception" of 47 U.S.C. § 152(b) to allow preemption of state regulation of digital voice transmission services (telephone service over the internet) supplied by Vonage; the court must give a "high level of deference" to the fact-specific findings of the FCC which required "a high level of technical expertise."

Mountain Pure, LLC v. Bank of America, 481 F.3d 573 (8th Cir. 2007). Arkansas law provided for attorney's fees for breach of contract and in recovering property; therefore, to the extent plaintiffs had to hire an attorney and incur fees before defendant bank released stock, they were recoverable as damages which the bank "tacitly agreed" to pay when it extended the line of credit which the stock had secured.

Wood v. Valley Forge Life Ins. Co., 478 F.3d 941 (8th Cir. 2007). Even if insured *had* made misstatements in his life insurance application, the plain written terms of the policy application indicated material misrepresentations would only make the policy voidable, not void *ab initio*; therefore, a two-year incontestability clause governed, barring the insurance company's rescission claim made more than four years later.

Wood v. Foremost Ins. Co., 477 F.3d 1027 (8th Cir. 2007). Although insurance company finally paid plaintiffs' roof damage claim under their homeowner's policy, after three inspections and four payments over an eight-month period, a jury could find the company breached the 30-day settlement provision of the policy, permitting penalties and attorney fees to be awarded under Missouri's "Vexatious Refusal to Pay Claim" statute; however, the same delay did not make plaintiff's fall from a roof to make repairs reasonably foreseeable under state contract law, therefore, a personal injury claim against the insurance company failed to state a claim on which relief could be granted.

Matrix Group Ltd v. Rawlings Sporting Goods Co., 477 F.3d 583 (8th Cir. 2007). Thirty-day notice-and-cure provision of contract unambiguously required notice of any breach of the contract, including a claimed breach by plaintiff of a best-efforts provision, which defendant claimed excused it from complying with the notice-and-cure provision.

Level 3 Communications v. City of St. Louis, 477 F.3d 528 (8th Cir. 2007). The circuit construes a provision of the Federal Telecommunications Act of 1996 prohibiting state and local statutes and regulations from erecting barriers to the telecommunication services market, holding section 253(a) requires the party seeking the preemptive effect of the statute to prove violation of the statute by the local municipality, after which the municipality then bears the burden of proving the regulation falls within a safe harbor provision of section (c) of the statute.

American Economy Ins. Co. v. Jackson, 476 F.3d 620 (8th Cir. 2007). A professional services exclusion in a general business liability policy did not cover the decision of the director of nursing/administrator of a nursing home concerning whether to switch on the air conditioning in the face of a spring heat wave which caused the deaths of four residents of the nursing home; the nursing director's decision rested on her professional training and experience, which qualified as "professional services" within the unambiguous terms of the policy.

Twin Cities Galleries v. Media Arts Group, Inc., 476 F.3d 598 (8th Cir. 2007). Parties' agreement under a Dealer's Agreement to apply California law to disputes between manufacturer of Thomas Kinkade's original art and galleries (whose sales under the agreement did not meet anticipations) did not violate public policy of Minnesota seeking to protect franchisees; examining the franchise laws and decisions of both states, the court concluded inquiry into the threshold issue concerning payment of a "franchise fee" did not differ materially between the two states; therefore the public policy exception to enforcement of arbitral awards did not apply.

Crossett Paper Mills Employees Federal Credit Union v. Cumis Ins. Society, Inc., 476 F.3d 578 (8th Cir. 2007). Credit union's business liability policy which excluded bodily injury arising out of the ownership of automobiles did not cover settlement paid to resolve claims that credit union was negligent in failing to repossess a vehicle after being notified its owner was carelessly operating it (owner did not have a license and was uninsurable at the time the credit union lent money to purchase the vehicle).

Pins v. State Farm Fire and Cas. Co., 476 F.3d 581 (8th Cir. 2007). Liability insurer did not have a duty to defend insured under a personal liability umbrella policy against a claim of alienation of affections; alienation of affections is an intentional tort under South Dakota state law and it did not matter whether the insured intended to break up a marriage.

IBEW Loc. No. 124 v. Smart Cabling Solutions, Inc., 476 F.3d 527 (8th Cir. 2007). Defendant's termination of a CBA did not terminate the clause requiring binding arbitration of issues regarding renewal of CBA and jurisdictional challenges were of a procedural nature which must be resolved by the arbitrator.

Dunmire v. Morgan Stanley DW, Inc., 475 F.3d 956 (8th Cir. 2007). Investment firm did not violate the Gramm-Leach Bliley Act protecting the privacy of nonpublic personal financial information when it served a Second Demand for payment on plaintiff's estranged wife: plaintiff had failed to keep his address up to date; his financial information lost its "nonpublic" character when plaintiff filed a reparations complaint with the CFTC against the investment firm; and service on the estranged wife was "an appropriate and acceptable method of settling or collecting a debt" owed under an exception to the GLBA.

Prudential Ins. Co. v. Kamrath, 475 F.3d 920 (8th Cir. 2007). Insured failed "to do everything reasonably possible" to make a beneficiary change as required by the terms of his life insurance policy; although he completed an assignment form, he did not mail the required change-of-beneficiary form and did not confirm the change with the insurer, even though his attorney had advised him to do so.