APPENDIX

POST-*McMILLIAN*[*] CASES BY CIRCUIT AND STATE

I. FIRST CIRCUIT

A. Massachusetts

Broner v. Flynn, 311 F. Supp. 2d 227, 233 (D. Mass. 2004) ("Effective July 1, 1998, the government of Worcester County was abolished. Effective September 1, 1998, the Sheriff of Worcester County, who was then and continues to be, John M. Flynn, became an officer and employee of the Commonwealth of Massachusetts and all of the 'functions, duties and responsibilities for the operation and management of' the WCJHC were transferred to the Commonwealth. Mass. Gen. Laws ch. 34(B), §§ 1, 12 (2004). Therefore, a Section 1983 suit against Sheriff Flynn in his official capacity is deemed to be a suit against the Commonwealth. Since a state is not a 'person' for purposes of Section 1983, all claims against Sheriff Flynn in his official capacity are barred.").

B. New Hampshire

Ramsay v. McCormack, 1999 WL 814366 at *6 (D.N.H. June 29, 1999) ("The court concludes that New Hampshire Supreme Court precedent concerning the authority of the attorney general, establishing the county attorney as the deputy of the attorney general in local criminal proceedings, its expansive interpretation of section 7:11, and the second clause of section 7:6 which broadly states 'the attorney general shall enforce the criminal laws of the state,' compels the conclusion that the county attorney functions under the authority of the attorney general in criminal prosecution in the district courts. Therefore, the court rules that in fulfilling his criminal prosecutorial duties, the county attorney acts pursuant to authority vested by state law in the attorney general

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[*] This Appendix also includes some pre-*McMillian* cases from selected jurisdictions.

and under the control of the attorney general, and does not function as a final policy maker for the county. Moreover, it has previously been determined by this court that county attorneys, when fulfilling their criminal prosecutorial duties under the direction and control of the attorney general, do not act as final policymakers for section 1983 liability purposes.").

II. SECOND CIRCUIT

A. New York

Jeffes v. Barnes, 208 F.3d 49, 57–58, 60–61 (2d Cir. 2000) ("In sum, the question of whether a given official is the municipality's final policymaking official in a given area is a matter of law to be decided by the court. Where a plaintiff relies not on a formally declared or ratified policy, but rather on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. We thus reject plaintiffs' contention that the district court erred in imposing that burden on them; and we turn to the question of whether, as to the particular area at issue here, the burden was met. . . . The principal area in question in this suit involves the duties and obligations of the sheriff's staff members toward each other with respect to their exercise of First Amendment rights in breach of the Jail's code of silence. The following review of New York State ('State') law leads us to the conclusion that the Schenectady County sheriff was the County's final policymaker with respect to most of the conduct that plaintiffs challenge. . . . In sum, State law requires that the Schenectady County sheriff be elected; County law provides that elected officials are not subject to supervision or control by the County's chief executive officer; there is only routine civil service supervision over the sheriff's appointments; State law places the sheriff in charge of the Jail; and the County's chief executive officer, advised by the County's attorneys, treats the sheriff, insofar as Jail operations are concerned, as 'autonomous.' . . . The County has pointed us to no provision of State or local law that requires a sheriff to answer to any other entity in the management of his jail staff with respect to the existence or enforcement of a code of silence. We conclude that Sheriff Barnes was, as a matter of law,

the County's final policymaking official with respect to the conduct of his staff members toward fellow officers who exercise their First Amendment rights to speak publicly or to inform government investigators of their co-workers' wrongdoing.").

Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (explaining that when prosecuting a criminal matter, a district attorney represents the state not the county, but that in managing the district attorney's office, the district attorney acts as a county policymaker).

B. Vermont

Huminski v. Corsones, 2005 WL 94542 at *12, *14 (2d Cir. Jan. 18, 2005) ("Whether a defendant is a state or local official depends on whether the defendant represented a state or a local government entity when engaged in the events at issue. To answer that question here, we must determine, *inter alia*, whether it was the State of Vermont or Rutland County that controlled Elrick in his involvement in the events leading up to and culminating in his serving Huminski with the trespass notices. . . . We agree with the district court that an analysis of the relevant factors indicates that Sheriff Elrick was a state official with regard to his involvement in the events related to the issuance of the trespass notices. The Rutland County Sheriff's Department, for whom Elrick was employed, had a contract with the State of Vermont through the Vermont Court Administrator's Office to manage security at the Rutland District Court. We think that Elrick was acting as a state official while doing so and when he played a role in the issuance and service of the trespass notices. First, when Elrick was performing the contract, he was acting as a supervisory policymaker for the State of Vermont, irrespective of what his status was when he performed his other duties as a sheriff. Second, it is undisputed that Elrick acted as a state official when he signed the May 27 Notice as the agent of the Commissioner, himself a state official. Third, although it is not necessary to decide the broader issue, we think that in light of the statutory structure under which Elrick acted, he was likely a state official when he was performing his general duties for the sheriff's department, particularly when he was acting pursuant to state law, as he was with

respect to the Huminski incident. Elrick had the authority to investigate and enforce the State of Vermont's criminal law in Rutland County. He was therefore acting for the state when he engaged in the behavior that is at issue here. It follows that Elrick is immune in his official capacity from suit for retrospective relief. Because Elrick is entitled to sovereign immunity, we also affirm the district court's holding that the Rutland County Sheriff's Department is similarly immune.") (footnotes and parallel citations omitted).

III. THIRD CIRCUIT

A. New Jersey

Coleman v. Kaye, 87 F.3d 1491, 1499–1506 (3d Cir. 1996) (for § 1983 purposes, New Jersey county prosecutor made policy for the county when refusing to promote the investigator).

B. Pennsylvania

Carter v. City of Philadelphia, 181 F.3d 339, 352 (3d Cir. 1999) (observing that other courts have noted the hybrid nature of the district attorney's office and concluding that "[t]he recurring theme that emerges from these cases is that county or municipal law enforcement officials may be State officials when they prosecute crimes or otherwise carry out policies established by the State, but serve as local policy makers when they manage or administer their own offices").

Morgan v. Rossi, 1998 WL 175604 **9–12 (E.D. Pa. Apr. 15, 1998) ("The parties agree that Rossi has 'final policymaking authority' with respect to his decisions regarding the employment of his deputies. The parties, however, disagree about whether he is a policymaker for the Commonwealth of Pennsylvania or for Lehigh County. . . . The question here is whether sheriffs in Pennsylvania act as county or state officials when they decide to dismiss deputies. In contrast to the Alabama Constitution, the Pennsylvania Constitution explicitly states that sheriffs are county officers. . . . Sheriffs and deputies are County employees paid by the County, and the sheriff's office (i.e., equipment, staffing, etc.) is

also funded by the County. Sheriffs are elected locally and their jurisdiction is limited to the County in which they serve. . . . As to the actual hiring and firing of individual deputies, neither the Commonwealth nor the County have much input or control over the sheriff's decisions. Both the State and the County, however, have provisions concerning the employment of deputies. . . . [W]hile there are State and County provisions related to the hiring of deputies, there are no such provisions constraining sheriffs' discretion in dismissing deputy sheriffs. . . . After balancing the respective roles of Lehigh County and the Commonwealth of Pennsylvania in Rossi's decision to dismiss plaintiffs, as required by *McMillian*, I conclude that Rossi was acting as a policymaker for the County rather than the Commonwealth. The Pennsylvania Constitution explicitly lists sheriffs as County officials, and they act within their respective counties and on behalf of the County in all respects. They are elected by the County's citizens, and it is those citizens who pay their salaries, buy their patrol cars and fund their offices. In addition, it is the governing body of Lehigh County—the Board of Commissioners—which decides how many deputies are required and what their salaries will be. By contrast, the Commonwealth's connection to Sheriff Rossi is remote, and it has no proactive supervisory role whatsoever. The County contends that because it has no control over the sheriff's decision to dismiss deputies and because it had no policy about dismissing political opponents it cannot be held liable. This argument, however, misinterprets the teaching of *McMillian*. In *McMillian*, Alabama did not have a policy of intimidating witnesses or suppressing exculpatory evidence and it had no control over the sheriff's murder investigation, yet the Cou[r]t concluded that the Monroe County Sheriff was a State policymaker. *McMillian* does not ask whether either the County or the State has a policy that plaintiff claims violated his constitutional rights or whether the County or State had control over the action alleged to have violated plaintiff's constitutional rights. Rather, it asks whether the policymaker's actions that are alleged to form the basis for plaintiff's claim are more fairly attributable to the State or to the County based on state law. I conclude, based on my review of Pennsylvania law, that Rossi's dismissal of plaintiffs is more fairly described as an action on behalf of the County rather than the State.").

Williams v. Fedor, 69 F. Supp. 2d 649, 660, 663 (M.D. Pa. 1999) ("As in *McMillian*, there is some evidence in this case to support the proposition that a Pennsylvania district attorney is a county policy maker when engaged in his law enforcement capacity. Indeed, the constitutional designation of the Pennsylvania district attorney as a county officer is a factor not present in *McMillian* that supports Williams' position. But that factor does not tip the scales in Williams' favor. The historical foundation for the office of district attorney—serving as a replacement for state deputy attorneys' general, with the obligation to perform the duties that had been performed by those deputy attorney's general—coupled with the district attorneys' subordinate relationship to the state's chief law enforcement officer, the Attorney General, compel the conclusion that when engaged in his or her 'basic function—enforcement of the Commonwealth's penal statutes,' . . . a district attorney in Pennsylvania represents the interests of the Commonwealth and not the County. . . . [But] when the focus of the plaintiff's civil rights claims are on the administration of the district attorney's office, the district attorney is regarded as an official of the county so that the county may be held liable where the facts establish a failure to train or supervise that evidences a deliberate indifference to the rights of the plaintiff.") (citations omitted), *aff'd*, 211 F.3d 1263 (3d Cir. 2000).

Jakomas v. McFalls, 229 F. Supp. 2d 412, 430 (W.D. Pa. 2002) ("We have no difficulty deciding, under Pennsylvania law, that Judge McFalls was not acting as a policymaker for the County when he discharged his staff. Judge McFalls' authority to hire, supervise, and discharge his personal employees came from the Pennsylvania Supreme Court. It did not—and could not—come from the County because the County has no policymaking authority over the Pennsylvania courts.").

IV. FOURTH CIRCUIT

A. Maryland

Dotson v. Chester, 937 F.2d 920 (4th Cir. 1991) (accepting the plaintiff's argument that even if the Sheriff was state officer in

certain capacities, he was the final policymaker for the county when operating the county jail).

Rossignol v. Voorhaar, 321 F. Supp. 2d 642, 650–651 (D. Md. 2004) ("Both Plaintiff and the County Defendants agree that for purposes of a *Monell* analysis, Sheriff Voorhaar is the final policymaker concerning law enforcement in St. Mary's County. The County Defendants assert, however, that Sheriff Voorhaar and Deputy Alioto are state, not county, officers. *See* Md. Code Ann., State Gov't § 12-101(a)(6) (defining county sheriffs and deputy sheriffs as state personnel for purposes of the Maryland Tort Claims Act). If the Court were to agree, then the § 1983 claims against Voorhaar and Alioto in their official capacities would be barred by Eleventh Amendment immunity. . . . In concluding that the Monroe County sheriff was a state official when acting in his law enforcement capacity, the Supreme Court minimized the importance of state law provisions establishing that: (1) the sheriff's salary was paid out of the county treasury; (2) the county provided the sheriff with materials and reimbursed him for reasonable expenses; (3) the sheriff's jurisdiction was limited to the county's borders; and (4) the sheriff was elected by county voters. . . . In contrast, heavy emphasis was placed on the fact that state officials maintained a degree of control over the Alabama sheriffs while the counties, lacking any law enforcement powers of their own, could not 'instruct the sheriff how to ferret out crime, how to arrest a criminal, or how to secure evidence of a crime.' . . . Finally, the *McMillian* Court had the benefit of a persuasive Alabama Supreme Court opinion considering similar issues which held that sheriffs were state officers. . . . Here, Maryland county sheriffs are also designated state constitutional officials for purposes of state law, Md. Const. art. IV § 44, with their salaries set by the state rather than the individual counties. . . . Maryland's highest court has previously engaged in a detailed analysis of Maryland's Constitution and Code to conclude that a sheriff and his deputies are state employees. *Rucker v. Harford County*, 316 Md. 275 (1989). The same factors pointing toward the sheriff's status as a county official (compensation from country treasury, limitations on some aspects of their jurisdiction, election by county voters, etc.) may be present, but have already been all but discounted by the Supreme Court. The major differ-

ence propounded by Plaintiff between *McMillian* and the instant case is that St. Mary's County retains a degree of law enforcement power through its ability 'to provide for the appointment of county police and to prescribe their duties and fix their compensation. . . .' This unexercised authority, however, does nothing to change the County's basic impotence to 'directly abridge the functions and duties of a sheriff under the common law and enactments of the General Assembly.' *Rucker*, 316 Md. at 288. Instead, direct control over the sheriff in St. Mary's and other Maryland counties remains solidly with the State General Assembly and the judiciary. . . . Accordingly, this Court concludes that the St. Mary's County Sheriff and his Deputies are state officials when acting in their law enforcement capacities.") (parallel citations omitted).

McCauley v. Doe, 2002 WL 32325676 at *4 (D. Md. July 12, 2002) ("Defendant Frederick County Sheriff's Office moves to dismiss on the grounds that it is not an entity capable of being sued. Suit must be filed against an entity capable of being sued. Fed. R. Civ. P. 17(b). The capacity of a governmental entity to sue or be sued is determined in accordance with the laws under which it is organized. *Id.* Maryland law did not establish an entity known as the 'Frederick County Sheriff's Office' that is capable of being sued. *See Boyer v. State*, 323 Md. 558, 594 A.2d 121, 128 n. 9 (1991). Accordingly, McCauley's suit against the Frederick County Sheriff's Office cannot be maintained and is hereby DISMISSED."), *aff'd*, 2003 WL 932480 (4th Cir. March 10, 2003).

Mason v. Mayor & City Council of Baltimore, 1995 WL 168037 at *3 (D. Md. Mar. 24, 1995) ("[T]he City argues that the designation of the Baltimore City Police Department as a state agency shields it from suit. As the Maryland Court of Appeals itself recognized, 'however, the General Assembly's designation of the Baltimore City Police Department as a state agency would not be controlling for all purposes. For example, with regard to federal law liability under 42 U.S.C. § 1983, the state law classification of the Baltimore City Police Department would not be decisive, and the Baltimore City Police Department might well be regarded as a local government agency. . . .' Based on the detailed factual analysis contained in [prior cases] over the involvement of the City in the

conduct of the Baltimore City Police Department and its Commissioner, this Court concludes that the City maintains sufficient practical knowledge of and control over the Police Department to withstand dismissal of this § 1983 action.") (citation omitted).

Kennedy v. Widdowson, 804 F. Supp. 737, 741–742 (D. Md. 1992) ("Several federal courts have stated that a sheriff may be considered as a state or local official depending on whether his challenged actions arise out of his traditional law enforcement functions, which are considered statewide in nature.") (citations omitted).

Kent County v. Shepherd, 713 A.2d 290, 294–295 (Del. 1998) ("In accordance with *McMillian*, we have analyzed the law of Maryland with regard of the facts of this case. . . . In *Rucker v. Harford County*, [558 A.2d 399, 405 (Md. 1989)] the highest court in the State of Maryland held unequivocally, as a matter of Maryland law, that county sheriffs and deputy sheriffs who are engaged in law enforcement activities are 'officials and/or employees of the State of Maryland,' rather than the county. . . . We have concluded that, under Maryland law, the State of Maryland alone is vicariously responsible for Kent County Deputy Sheriff Knapp's negligent conduct because it occurred during the course of his law enforcement duties, while he was operating a motor vehicle within the State of Delaware.").

B. North Carolina

Henderson Amusement, Inc. v. Good, 2003 WL 932463 at *5 (4th Cir. Mar. 10, 2003) ("Because we conclude that Henderson Amusement's § 1983 claim against Sheriff Good in his personal capacity fails because Henderson Amusement has not adequately alleged the deprivation of a constitutional right, it follows that the complaint does not state a claim against the sheriff in his official capacity. We therefore do not reach the issue of whether the Eleventh Amendment bars the claim against Sheriff Good in his official capacity.").

Cash v. Granville County Board of Education, 242 F.3d 219, 226–227 (4th Cir. 2001) ("[W]e conclude that upon our consideration of

each of the factors identified for determining whether a governmental entity is an arm of the State and therefore one of the United States within the meaning of the Eleventh Amendment, the Granville County Board of Education appears much more akin to a county in North Carolina than to an arm of the State. . . . In reaching our conclusion in this case, we continue to follow our jurisprudence, as stated in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*, and in doing so, we believe that we are faithfully applying the relevant Eleventh Amendment jurisprudence announced by the Supreme Court in *Regents*, *Hess*, *Lake Country Estates*, and *Mt. Healthy*. We therefore reject the district court's view that the Supreme Court's recent decisions in *Regents* and *McMillian* overruled our decisions in *Harter*, *Gray*, *Bockes*, and *Ram Ditta*.").

Carter v. Barker, 2000 WL 1008794 at *6 (4th Cir. July 21, 2000) (indicating that *Harter v. Vernon,* 101 F.3d 334 (4th Cir. 1996), holding that the North Carolina sheriff sued in his official capacity is not entitled to Eleventh Amendment immunity, is still good law after *McMillian*).

Knight v. Vernon, 214 F.3d 544, 552–553 (4th Cir. 2000) ("North Carolina law vests the sheriff, not the county, with authority over the personnel decisions of his office. Although the county board of commissioners may fix the number of salaried employees within the sheriff's office, the sheriff 'has the exclusive right' under N.C. Gen. Stat. § 153A–103 (1998) 'to hire, discharge, and supervise the employees in his office.' North Carolina courts interpret this statute to preclude county liability for personnel decisions made by sheriffs. . . . Because Sheriff Vernon, and not Rockingham County, had exclusive responsibility for discharging Ms. Knight, the district court properly granted summary judgment for the county on the § 1983 claims.").

Worrell v. Bedsole, 1997 WL 153830 at *5 (4th Cir. Apr. 3, 1997) ("In North Carolina, the Office of Sheriff is a legal entity separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. N.C. Gen. Stat. § 162-1. The sheriff, not the county, has final policy-making authority over the personnel decisions in his office. N.C.

Gen. Stat. § 153A-103 provides that each elected sheriff 'has the exclusive right to hire, discharge, and supervise the employees in his office.' This authority may not be delegated to another person or entity. N.C. Gen. Stat. § 162-24. We agree with the district court's conclusion that 'Bedsole's final policy-making authority over his personnel decisions in the Sheriff's Department is his alone and is not attributable to Cumberland County.'") (citations omitted).

Flood v. Hardy, 868 F. Supp. 809, 812–813 (E.D.N.C. 1994) ("[T]he parties in this action do not dispute that the Sheriff has . . . final policymaking authority. Thus the only question in dispute is whether the Sheriff's policymaking decisions can be imputed to the County. According to the *Dotson* court, where state law makes a county sheriff the final policymaker, with regard to some particular aspect of county operation, his actions can serve to bind the county. In North Carolina, where the Sheriff is given exclusive control over the supervision of his employees, including deputies and jailers, the Sheriff may bind the county by his actions. The defendant asserts that since the Sheriff is an elected official, the County cannot be bound by his decisions. This assertion is without merit. The fact that the Sheriff is an elected official does not exonerate the County.") (citations omitted).

Davis v. Durham Mental Health Developmental Disabilities Substance Abuse Area Authority, 320 F. Supp. 2d 378, 398 n. 16 (M.D.N.C. 2004) (In holding that a regional mental health center was not an arm of the state for Eleventh Amendment purposes, the court observed "that after the United States Supreme Court's decisions in *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, (1997), and *McMillian v. Monroe County*, 520 U.S. 781, (1997), several district courts in this circuit suggested that the impact of a judgment on a State's treasury is no longer the dominant factor in determining Eleventh Amendment immunity. *See e.g. Conlin v. Southwestern Cmty. College*, 2001 WL 1019918 at *1 (W.D.N.C. Jan. 24, 2001); *Sampson v. Maynor*, No. 7:99- CV-51-F (E.D.N.C. Oct. 6, 1999). In *Cash v. Granville County Board of Education*, however, this circuit's court of appeals expressly rejected the district courts' interpretation of *Regents* and *McMillian* and held that the impact of a judgment on a State treasury is still the

dominant factor in determining Eleventh Amendment immunity. 242 F.3d 219, 223–24 (4th Cir.2001).") (parallel citations omitted).

North Carolina ex rel Wellington v. Antonelli, 2002 WL 31875504 at *3 (M.D.N.C. Dec. 20, 2002) ("Where a local government does not have final authority over a particular policy carried out by a sheriff, it cannot be held liable under § 1983 for alleged constitutional violations committed by the sheriff or his deputies. . . . Because Guilford County did not have final policymaking authority in the area of law enforcement, it cannot be held liable for the conduct of Sheriff Barnes or Deputies Antonelli and Caliendo.").

Gantt v. Whitaker, 203 F. Supp. 2d 503, 508–509 (M.D.N.C. 2002) ("Defendants also raise the defense of sovereign immunity to the claim against Whitaker, asserting that North Carolina sheriffs are state officials and consequently immune from suit under the Eleventh Amendment. In support of this argument, Defendants offer the recently-decided case of *Henderson Amusement, Inc. v. Good,* 172 F. Supp. 2d 751 (W.D.N.C. 2001). While the *Henderson Amusement* court did grant immunity to a North Carolina sheriff, *see id.* at 763, it did so in spite of clear Fourth Circuit precedent affirming that North Carolina sheriffs are local, not state, officials and lack Eleventh Amendment immunity. *See Harter v. Vernon*, 101 F.3d 334, 343 (4th Cir. 1996). The *Henderson Amusement* court justified its departure from this controlling precedent by citing two post-*Harter* Supreme Court decisions which it argued have overruled the immunity analysis employed by the Court of Appeals in *Harter.* However, after examining these Supreme Court decisions in a subsequent case, *Cash v. Granville County Bd. of Educ.,* 242 F.3d 219 (4th Cir. 2001), the Fourth Circuit reaffirmed the validity of *Harter* in no uncertain terms. . . . Therefore, in accordance with these controlling authorities, the court hereby finds that Sheriff Whitaker, as a local official, is not entitled to Eleventh Amendment immunity from Plaintiff's official capacity § 1983 claim."), *aff'd on other grounds*, 2003 WL 152856 (4th Cir. Jan. 23, 2003).

Layman v. Alexander, 294 F. Supp. 2d 784, 791–792 (W.D.N.C. 2003) ("While the undersigned has held previously, and remains

convinced, that the creation of the office of sheriff and the historical role of the sheriff in North Carolina in the exercise of his duties of governance and the enforcement of state law is more properly considered an office of the State of North Carolina, entitled to all of the privileges and immunities bestowed upon any office of the State, *see e.g. Henderson Amusement, Inc. v. Good,* 172 F.Supp.2d 751 (W.D.N.C. 2001), *aff'd,* 59 Fed. Appx. 536, 2003 WL 932463 (4th Cir. 2003), as explained in two recent decisions, *see Harmon v. Buchanan,* No. 1:00cv28 (W.D.N.C. Aug. 27, 2003); *Jones v. Buchanan,* No. 1:00cv27 (W.D.N.C. Oct. 9, 2003), the Fourth Circuit held in 1996 and has since reaffirmed that 'the Eleventh Amendment does not bar a suit against a North Carolina sheriff in his official capacity,' *Harter v. Vernon,* 101 F.3d 334, 343 (4th Cir.1996); *see also Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 227 (4th Cir. 2001). In light of the Fourth Circuit's decision in *Harter* and its clear and unequivocal reaffirmation of its *Harter* decision—both its analysis and its judgment—in *Cash*, this Court is bound to adhere to that decision and, therefore, concludes that North Carolina sheriffs are not entitled to immunity under the Eleventh Amendment, but rather, are subject to suit in federal court.").

Henderson Amusement, Inc. v. Good, 172 F. Supp. 2d 751, 763 (W.D.N.C. 2001) ("As this court can discern, a decisional rift is growing between state and federal courts in North Carolina in Section 1983 actions, which are actionable in either forum. The potential for inconsistency is most real in such circumstances, inasmuch as federal and state courts share Section 1983 jurisdiction. . . . The difficulty arises when on one side of the street (in federal court) a Section 1983 claim against a sheriff is viable, while on the other side (in state court) it is not. Compounding this problem, there is no method in North Carolina for a federal court to certify an issue of state law (whether a sheriff is considered by the state to be a state official) so that a federal forum can determine the ultimate federal issue (whether eleventh-amendment immunity can be extended to such official). With due deference and the utmost respect for decisions which have reached opposite conclusions in this district, *see Olvera v. Edmundson, supra*, and *Ramsey v. Schauble*, 141 F. Supp. 2d 584 (W.D.N.C. 2001) (Horn, M.J.), and based upon all the information and precedent available

to this court, including the decision of the Supreme Court in *McMillian,* this court finds that the Section 1983 official-capacity claim lodged against the sheriff is not viable, inasmuch as it is a suit against the State of North Carolina, which enjoys eleventh-amendment immunity."), *aff'd on other grounds*, 2003 WL 932463 at *5 (4th Cir. Mar. 10, 2003).

Harmon v. Buchanan, 164 F. Supp. 2d 649, 656 (W.D.N.C. 2001) ("The court notes a growing dichotomy between federal and state jurisprudence in North Carolina concerning the role of a sheriff—the state courts find, with little explanation, that a sheriff and his deputies are state officials who enjoy the state's eleventh-amendment immunity in Section 1983 actions; however, federal courts, with much explanation, find that they are local officials, who enjoy no immunity. The parties have indicated to the court that they do not wish to enter the fray on such issue. The undersigned is on the record in a number of cases as finding that a North Carolina sheriff is, by mandate of the North Carolina Constitution, which has its origin in English common law, a representative of the state who is now elected locally. The dichotomy that is growing between the federal and state courts in North Carolina could lead to a lessening in the confidence of the judiciary for one reason—federal and state courts have concurrent jurisdiction over Section 1983 actions, and, as it now stands, a plaintiff cannot bring an action in state court against a sheriff under Section 1983, but can walk across the street and do so in the federal forum. Such issue needs resolution by either the highest state court or by legislative action. This court, therefore, does not reach such issue.") (footnotes omitted).

Wilkerson v. Hester, 114 F. Supp. 2d 446, 464–465 (W.D.N.C. 2000) ("Based upon all the information and law available, including the decision of the Supreme Court in *McMillian*, the undersigned must recommend that the official-capacity claims lodged against the sheriff and his deputy be dismissed, inasmuch as a suit against a North Carolina sheriff and/or his deputy is a suit against the State of North Carolina, which enjoys eleventh-amendment immunity.").

Little v. Smith, 114 F. Supp. 2d 437, 446 (W.D.N.C. 2000) ("In North Carolina, the Office of Sheriff is a legal entity, established by the state constitution and state statutes, separate and distinct from the Board of County Commissioners because a sheriff is elected by the people, not employed by the county. . . . The sheriff, not the county, has final policymaking authority over the personnel decisions in his office. . . . [I]t is Sheriff Sellers, not Anson County, who has the final decision making authority over law enforcement policies of his office. Indeed, Anson County does not have the power to exercise supervision or control over the law enforcement officers who work for the sheriff who 'are appointed by and act for the sheriff, who alone is responsible for their conduct.' . . . In short, Anson County has no authority to control law enforcement policies of the Anson County Sheriff's Office or to control its personnel.").

Boyd v. Robeson County, 2005 WL 850420 at *1 (N.C. App. Mar. 15, 2005) (impugning the reasoning of *Buchanan v. Hight*, 515 S.E.2d 225 (N.C. App. 1999), and holding "that a North Carolina sheriff is a 'person' subject to suit under 42 U.S.C. § 1983").

Buchanan v. Hight, 515 S.E.2d 225, 229 (N.C. App. 1999) (A Sheriff acting within his statutory authority in terminating employees was a "state official," not a "person," who could be sued for money damages under § 1983.).

C. South Carolina

Wall v. Sloan, 1998 WL 54938 at *2 (4th Cir. Feb. 11, 1998) ("[A] South Carolina sheriff such as Sloan is a state official and therefore is not subject to suit for monetary damages in his official capacity. . . . Wall primarily contends on appeal that because he seeks monetary relief from the county rather than the state, Sloan should not be entitled to Eleventh Amendment immunity. We find this claim unavailing. While the extent of the state treasury's liability is the main consideration in determining immunity, a party cannot file suit under § 1983 and specifically seek money from the county and not the state in an effort to circumvent an official's entitlement to Eleventh Amendment protection. An individual who brings a § 1983 action under these circum-

stances cannot choose which entity will satisfy any resulting judgment. Accordingly, the district court properly concluded that Sloan is a state official entitled to immunity in his official capacity.").

D. Virginia

Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999) ("[T]here can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the [Adult Detention Center]. . . . Rather, the State Board of Corrections tells Sheriff Peed what he has to do in running the jail, and the State Department of Criminal Justice Services tells the Sheriff what he must do to train his employees. . . . As the county has no control over policy within the jail, it bears no concomitant responsibility.").

Bockes v. Fields, 999 F.2d 788, 791 (4th Cir. 1993) ("In Virginia, neither the County nor the local boards have authority to set 'general goals and programs' for social services personnel; that authority is reserved for the State Board . . . the Grayson County Board enjoyed its discretion to fire [plaintiff] at the prerogative of and within the constraints imposed by the Commonwealth. Such bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under § 1983.").

Strickler v. Waters, 989 F.2d 1375, 1390 (4th Cir. 1993), *cert. denied*, 510 U.S. 949 (1993) ("The City of Portsmouth is not liable under section 1983 for the actions of its Sheriff in the administration of its jail, because under the law of Virginia those actions do not embody an official policy of the City of Portsmouth. That the city apparently is charged with keeping the jail 'in good order' in no way alters this conclusion. The cited statute at most obligates the city to provide for the jail's physical plant, not to oversee the activities within.").

Brown v. Mitchell, 308 F. Supp. 2d 682, 698–699 n. 19 (E.D. Va. 2004) ("[A]s a constitutional officer, a Virginia sheriff is separate and distinct from the municipal or local government in which she may operate. . . . The question then becomes what are Mitchell's

statutory powers, obligations, and duties respecting the Jail. To begin, it appears that the design, the construction, and apparently the structural maintenance of local jails in Virginia are the responsibilities of local governments—in this case, the City. . . . In other words, those responsibilities are not statutorily allocated to the sheriff. By statute, however, the sheriff is 'the *keeper* of the local jail, and the *legal custodian* of those who are lawfully confined in it.' . . . Thus, 'the final policymaking decision maker in the [daily] operation of the jail' is the sheriff. . . . It is worth noting that even though a Virginia sheriff is a state employee, in the sheriff's operation of a local jail, 'the [locality] may be liable for [the sheriff's] policies where they violate constitutional standards.'") (emphasis in original). The court, later in the opinion, notes that "Whether, under the decision in *May v. Newhart*, 822 F. Supp. 1233 (E.D. Va. 1993), the potential liability under Count I is that of the Sheriff or the City must await further factual development." *Id.* at 701 n. 22 (E.D. Va. 2004).

Hussein v. Miller, 232 F. Supp. 2d 653, 655 (E.D. Va. 2002) ("Upon consideration of the parties' pleadings, the relevant provisions of the Virginia Code and the Virginia Constitution, and binding case law, the Court holds that the Commissioner of the Revenue for the City of Falls Church is protected by sovereign immunity from claims against him in an official capacity, because any adverse judgment against the Commissioner would be paid in full by the State treasury, and because Commissioners of Revenue are not local officers; rather they are constitutional officers. As such, claims against constitutional officers are essentially claims against the Commonwealth of Virginia, and the Commonwealth has not waived Eleventh Amendment immunity.").

Keathley v. Vitale, 866 F. Supp. 272, 276 (E.D. Va. 1994) ("[W]hile [plaintiff] does provide a lengthy list of state statutes which demonstrate a relationship between local municipalities in Virginia and their respective sheriff departments, he offers no specific provisions of the Virginia Code which would support his contention that the hiring and firing of VBSD employees should be attributed to Virginia Beach. . . . Plaintiff proffers no authority to support the proposition that the electoral process is a sufficient basis upon which to attribute Drew's acts *with respect to employment*

decisions to Virginia Beach. . . . In essence, [Plaintiff] asks that this Court create a vast 'elected official' exception to *Monell*. We decline any such expansion.") (emphasis in original) (footnote omitted).

Olivo v. Mapp, 838 F. Supp. 259, 261 (E.D. Va. 1993) ("[T]he employment practices of a sheriff do not involve the exercise of any policymaking authority on behalf of a locality.").

V. FIFTH CIRCUIT

A. Louisiana

Cozzo v. Tangipahoa Parish Council-President Government, 279 F.3d 273, 281–283 (5th Cir. 2002) (concluding that the Sheriff in Louisiana is not an arm of the state and not entitled to Eleventh Amendment immunity).

Burge v. Parish of St. Tammany, 187 F.3d 452, 470 (5th Cir. 1999) ("Considering the Louisiana constitutional and statutory law and tort cases, we conclude that, in a suit against a district attorney in his official capacity under § 1983 for constitutional torts caused by the district attorney's policies regarding the acquisition, security, and disclosure of *Brady* material, a victory for the plaintiff imposes liability on the district attorney's office as an independent local entity. Accordingly, a district attorney cannot be held personally liable in an 'official capacity' suit, and any judgment against a district attorney in his official capacity must be recovered from his liability insurer or the public funds controlled by him or his successor in office.").

Porche v. St. Tammany Parish Sheriff's Office, 67 F. Supp. 2d 631, 634, 636 (E.D. La. 1999) ("This case calls upon the court to assess whether the sheriffs of Louisiana are arms of the state and thereby entitled to the protection of the Eleventh Amendment. Courts in several other states have resolved this issue with mixed results. . . . [A] sheriff in Louisiana may not be properly characterized as an arm of the state and, therefore, the Eleventh Amendment affords a sheriff in Louisiana no protection against being sued.").

B. Mississippi

Hamilton v. Stafford, 1997 WL 786768 at *1 (N.D. Miss. Nov. 26, 1997) ("The holding in *McMillian* is quite narrow and limited to Alabama sheriffs, as pointed out in the majority opinion, . . . and indeed, does not even apply to Alabama sheriffs in every instance. . . . In light of the narrow holding in *McMillian*, the validity of prior decisions within the Fifth Circuit regarding Mississippi sheriffs and their status as county officials under section 1983 remain unaffected. . . . Indeed, every court outside of the Eleventh Circuit to address the issue has determined that sheriffs, other than those in Alabama, remain county officials for section 1983 purposes.").

C. Texas

Williams v. Kaufman County, 352 F.3d 994, 1013–1014 (5th Cir. 2003) ("We have . . . held that sheriffs in Texas are final policymakers in the area of law enforcement. Therefore, it is clear that the County can be held liable for Harris's intentional conduct, to the extent it constitutes the 'moving force' behind the alleged injury. Harris testified that he is the final policymaker for law enforcement matters in the County. Harris and others have testified as well that both the strip search and lengthy detention of the plaintiffs were conducted according to the Sheriff Department's unwritten policy for executing 'hazardous' warrants. As a result, Harris's actions as policymaker were undeniably the moving force behind, and the direct cause of, the violation of plaintiffs' constitutional rights, thereby establishing the County's municipal liability. Finally, we note that the County has not expressly contested its municipal liability, but rather argued only that it is not liable for actions that do not amount to constitutional violations, a truism that none contests.") (footnotes omitted).

Skelton v. Camp, 234 F.3d 292, 296 (5th Cir. 2000) (concluding that in removal proceeding, the alderman represented the municipality, not the State of Texas).

Brady v. Fort Bend County, 145 F.3d 691, 700, 702 (5th Cir. 1998) ("Sheriffs under Texas law are unlike the hypothetical sheriff dis-

cussed in *Pembaur* because a Texas sheriff is not merely granted 'discretion to hire and fire employees' by the commissioners court. . . . Rather, the Texas legislature has vested sheriffs with such discretion, and the sheriff's exercise of that discretion is unreviewable by any other official or governmental body in the county. Texas sheriffs therefore exercise final policymaking authority with respect to the determination of how to fill employment positions in the county sheriff's department. . . . [T]he fact that under Texas law, no other official or governmental entity of the county exerts any control over the sheriff's discretion in filling available deputy positions is what indicates that the sheriff constitutes the county's final policymaker in this area.") (citations and footnotes omitted).

Roach v. Bandera County, 2004 WL 1304952 at *9 (W.D. Tex. June 9, 2004) ("To the extent that the defendants sued in their official capacities assert immunity under the Eleventh Amendment, the Court concludes that the County and the Sheriff's Department are not arms of the state and thus are not entitled to Eleventh Amendment immunity from suit. . . . Sheriff MacMillan is the County's official policymaker with regard to county-related law enforcement. . . . Thus, the County can be held liable for MacMillan's intentional conduct, to the extent it constitutes the 'moving force' behind the alleged injury. . . . However, Plaintiff has offered no summary judgment evidence regarding any conduct or policy by Sheriff MacMillan, much less any conduct that was a moving force behind his injuries. Accordingly, summary judgment for Bandera County and the Bandera County Sheriff's Department is granted.") (citations omitted).

VI. SIXTH CIRCUIT

A. Kentucky

Johnson v. Karnes, 398 F.3d 868, 877 (6th Cir. 2005) ("A suit against Sheriff Karnes in his official capacity is permissible under § 1983, and is equivalent to a suit against the entity on whose behalf he acts—Franklin County.") (footnote omitted).

Johnson v. Fink, 1999 WL 33603131 at *3 (W.D. Ky. Sept. 17, 1999) ("Whether a public employee is a state or county government official is a matter of federal law, informed by provisions of state law involving sheriffs. The Court should look at several factors, including 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' Analyzing these factors, the Court concludes that the sheriffs act as local government officials rather than acting as an arm of the state in their daily operations. The Kentucky Constitution defines sheriffs as county officials. . . . The sheriffs are elected by county residents. They act autonomously with little or no state oversight. The sheriffs' autonomy from the county does not preclude county liability. Because sheriffs receive most of their funding from the county and its residents, . . . the county presumably will bear financial responsibility for the judgment. . . . There is no evidence that a judgment would be paid from the state treasury. Furthermore, the sheriffs are not defended by attorneys from the state. Kentucky sheriffs are county officials. However, the particular actions at issue are attributable to the state, and thus, the sheriffs were acting as state officials when they were executing the search warrant. 'Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the state.' *Brotherton* at 566. In this case, the sheriffs' deputies were executing a search warrant signed by a state judge which stated 'you are commanded to make immediate search of the premises.' . . . By acting under the direct order of a state court, the sheriffs and their deputies in this case were acting as state officials. . . . Since the deputies were acting as arms of the state, they are entitled to Eleventh Amendment immunity in their official capacities.") (citations omitted).

B. Michigan

Beck v. Haik, 234 F.3d 1267 (table), 2000 WL 1597942 at *4 (6th Cir. Oct. 17, 2000) ("As a matter of well-settled Michigan law, Sheriff Haik's policies are those of the County.").

Bergeron v. Fischer, 2004 WL 350577 at *5 (E.D. Mich. Feb. 19, 2004) ("The plaintiff here alleges that defendant Fischer, in his

official capacity as sheriff of Iosco County and in his individual capacity, was deliberately indifferent to his needs as a diabetic, and that he 'almost died as a result thereof because of the acts and omissions of the jail Booking Officer, and indirectly as the result of Fischer's inaction.' . . . The plaintiff also alleges that Fischer failed to enforce county jail policies regarding medical treatment for prisoners and failed to properly supervise his jail staff. . . . As the magistrate judge correctly stated, in an official-capacity suit against a local governmental official, the real party in interest is not the named official but the local government entity of which the official is an agent. . . . Therefore, the claims asserted against Fischer in his official capacity are duplicative of the claims asserted against Iosco County and these claims will be dismissed. The Court also agrees with the magistrate judge that Fischer is entitled to summary judgment on the claims brought against him in his individual capacity. Fischer has submitted an affidavit in which he avers that not only was he not present at the Iosco County Jail on December 27, 2000, the day the plaintiff arrived, he was not even the county sheriff on that date.").

HRSS, Inc. v. Wayne County Treasurer, 279 F. Supp. 2d 846, 857–858 (E.D. Mich. 2003) ("The Sixth Circuit has looked at several factors to determine whether a local government and its officials acted as arms of the state, and are thus entitled to sovereign immunity from § 1983 claims. . . . These factors include: 'how state law defines the entity, what degree of control the state maintains over the entity, where funds for the entity are derived, and who is responsible for judgment against the entity.' . . . The most important factor is whether the county or the state would be financially liable for any judgment that could result from the suit. . . . Analyzing the above factors, the court finds that the County, including its Treasurer and Sheriff, acted as a local government in this case rather than an arm of the state. First, under the Michigan Constitution, the Sheriff and Treasurer are treated as elected officials for the county. . . . Further, the Sheriff and Treasurer are to hold their principal offices in the county seat. . . . Thus, Michigan law clearly contemplates that the county Sheriff and Treasurer are to be treated as local, rather than state, officials. Second, there is no evidence that the state maintained control over the Sheriff or Treasurer. Although the foreclosure

sales are governed by state law, the Sheriff and Treasurer still can act autonomously under the law, just as any other local official that is bound and/or guided by state law. Further, as discussed above, state law is silent with respect to the interest earned on overbid surpluses. Thus, the county officials were not required by the statute to retain the interest. Third, the county pays the salary of the Sheriff and Treasurer from the county treasury. . . . Finally, and most importantly, the county will presumably bear financial responsibility for any judgment that may result in this case. Inasmuch as the above factors weigh against treating the County or its officials as arms of the state, Defendants will not be granted sovereign immunity.").

C. Tennessee

Spurlock v. Sumner County, 42 S.W.3d 75, 80–81 (Tenn. 2001) ("Because we find the legislature's statutory grant of law enforcement authority to the sheriff to be of limited significance, we conclude that this argument fails to outweigh the support found in the Tennessee Constitution, case law, and statutes in favor of the proposition that a sheriff acts as a county officer when enforcing the state's laws.").

VII. SEVENTH CIRCUIT

A. Illinois

DeGenova v. Sheriff of DuPage County, 209 F.3d 973, 975–977 (7th Cir. 2000) ("In *Franklin*, we concluded that the Sheriff is not a State agent when he performs general law enforcement duties. But we have also recognized that sometimes the Sheriff may act on behalf of the State, as when he executes a judicial Writ of Assistance. *Scott*, 975 F.2d at 371. Here, we must decide whether the Sheriff is an officer for the State or a local entity when he manages the jail. . . . Illinois sheriffs have final policymaking authority over jail operations. . . . Illinois statutes make it clear . . . that when the Sheriff manages the jail, he is a county officer. . . . The Sheriff . . . argues that because we have held that Illinois sheriffs are not county employees, by default they must be agents of the State. We rejected this argument in *Franklin*, and

do so again today. . . . In conclusion, since Illinois sheriffs are county officers when they manage the jail, the Eleventh Amendment does not bar this official capacity suit.").

Franklin v. Zaruba, 150 F.3d 682, 684–686 (7th Cir. 1998) ("The Sheriff asserted Eleventh Amendment immunity, which the district court refused to grant on the basis that sheriffs in Illinois are county officials, not state officials. The sole issue in this appeal is whether Sheriff Doria was acting as an agent of the state, in which case the Eleventh Amendment would bar the plaintiff's suit, or as the agent of some other governmental entity, in which case the Eleventh Amendment does not apply. . . . We have previously held that sheriffs in Illinois are county officials and therefore generally do not receive immunity under the Eleventh Amendment. . . . Eleventh Amendment immunity will extend to county sheriffs, however, when the sheriff (although a county officer) exercises duties on behalf of the state. . . . In this case, however, the Sheriff does not argue that the deputies who exercised custody over the plaintiffs were executing a state judicial order or performing any similar function for the state that would render them state agents for the limited purposes of that action. Nor does the Sheriff argue that formulating policies to govern the conduct of deputies in their law enforcement functions is an action on behalf of the state akin to enforcing a judicial writ. Rather, the Sheriff contests the general proposition established by *Scott* that sheriffs in Illinois are county officers, not state officers, when performing law enforcement functions. . . . There are numerous differences between the law of Alabama and the law of Illinois, and we point to one that is particularly significant in distinguishing Alabama sheriffs from their Illinois counterparts: the treatment of those officials under the relevant state constitutions, as interpreted by the respective state supreme courts. . . . Indeed, as we noted in *Scott*, . . . a sheriff's status as a county officer is explicitly stated in the Illinois constitution. . . . One wrinkle in this analysis is that the Illinois Supreme Court, like the Alabama Supreme Court in *Parker v. Amerson*, has held that counties may not be held liable under *respondeat superior* for the actions of their sheriffs even though Illinois sheriffs are county officers. See *Moy*, 203 Ill. Dec. 776, 640 N.E. 2d at 931. According to the defendant, if sheriffs in Illinois are not agents of the county for pur-

poses of holding the county liable under *respondeat superior*, then sheriffs must therefore be agents of the state. This argument overlooks a crucial third possibility that we have found to be dispositive in other cases—namely, that the sheriff is an agent of the county sheriff's department, an independently-elected office that is not subject to the control of the county in most respects. . . . Admittedly, sheriffs occupy a somewhat unique position under Illinois law. As *Moy* indicates, sheriffs are agents of the county, but they are separate from the county boards to such a degree that the county boards cannot be held liable for their actions under *respondeat superior*. Furthermore, as *Ryan* held, the lack of identity between the county sheriff's department and the general county government indicates that § 1983 suits against sheriffs in their official capacities are in reality suits against the county sheriff's department rather than the county board. Although the relationship between county boards and county sheriffs is a complicated one, the relevant feature of that relationship for purposes of this case is the lack of any suggestion that the sheriff is an agent of the state in performing general law enforcement duties.") (emphasis in original).

Ryan v. County of DuPage, 45 F.3d 1090, 1092 (7th Cir. 1995) (Although the sheriff was the policymaker for the county sheriff's office, the county was properly dismissed because "Illinois sheriffs are independently elected officials not subject to the control of the county.").

McGrath v. Gillis, 44 F.3d 567, 572 (7th Cir. 1995) ("Employees of the state government are not transformed into county employees simply because the county government participates in budgeting and paying of their salaries . . . that State's Attorneys are elected for and perform their duties within one county does not suggest that they are county employees.").

Ruehman v. Sheahan, 34 F.3d 525, 529 (7th Cir. 1994) ("Sheriff Sheahan contends that in designing and implementing the [SPWA computer warrant-tracking system] he is equally an agent of Illinois. Well, would holding him liable for errors in the design and operation of the warrant-tracking system interfere with state policy (as opposed to county policy)? . . . A county agency, under

the president of the county board, specified the design of SPWA. The system, then, is designed and supervised from top to bottom by the Sheriff and the county government. State law requires the Sheriff to arrest the right people but says nothing about how he should do it. Design and auditing decisions have been left entirely to him. He could junk SPWA tomorrow, or alter its every detail, without thwarting any state policy or law. . . . It follows that in designing and implementing SPWA the Sheriff is not acting as the State of Illinois.").

Scott v. O'Grady, 975 F.2d 366, 371 (7th Cir. 1992) ("[W]hen a county sheriff in Illinois performs his duties as the principal executive officer or chief law enforcement officer of the county, he acts as a county official and does not get the benefit of the Eleventh Amendment. But this conclusion does not end our inquiry. . . . The county sheriff acts as an arm of the Illinois state judicial system in executing Writs of Assistance and other state court orders. When fulfilling this statutory duty, the sheriff and his deputies must be deemed state officials for the purposes of Eleventh Amendment immunity.").

Wallace v. Masterson, 345 F. Supp. 2d 917, 925–927 (N.D. Ill. 2004) ("The question in this case, then, is whether the *Carver* cases mandate that the County must pay for a tort judgment entered against Masterson for which the Sheriff is directed to pay by § 9-102 or is found vicariously liable under the doctrine *respondeat superior*. If so, the County is a necessary party to the litigation and should not be dismissed from the suit. Defendants seek to distinguish the case at bar from the *Carver* cases because, rather than suing the Sheriff in his official capacity directly, Plaintiff sues Masterson in his personal capacity, seeking compensation by the Sheriff and the County under principles of indirect liability. . . . Ultimately, . . . Plaintiff's argument that *Carver* should apply to this case prevails. Plaintiff urges the Court to apply *Carver* because a suit or theory imposing liability on the Sheriff for Masterson's actions (whether under § 9-102 or through *respondeat superior* as to the Sheriff) cannot be anything *other* than a suit or liability against the Sheriff in his official capacity. . . . Once one concludes that Count V seeks recovery against the Sheriff in his official capacity, the Court cannot, with princi-

ple, distinguish *Carver*. The Illinois Supreme Court explicitly held that § 9-102 operates to require the county to pay for judgments entered against a sheriff in his official capacity. Indeed, other courts in this district have already held that *Carver* applies to *respondeat superior* suits against a sheriff. . . . [T]o the extent that Cook County remains in the lawsuit only for the purpose of paying any judgment that may be entered against the Sheriff in his official capacity, the Court grants the County's request that it not be subject to discovery.") (emphasis in original).

Cooper v. Office of the Sheriff of Will County, 333 F. Supp. 2d 728, 736–737 (N.D. Ill. 2004) ("Defendants argue that although Will County may be a named defendant because it has a financial interest in the outcome of the judgment, it cannot be held liable for *respondeat superior* liability arising from claims against the Sheriff's Office or the Deputies. Defendants are correct that Will County is a proper defendant in the instant suit. In an answer to a certified question from the Seventh Circuit, the Illinois Supreme Court determined that, 'because the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff's office in an official capacity.' After the court's ruling, the Seventh Circuit additionally noted that the Supreme Court of Illinois' answer 'implied an additional point of federal law: that a county in Illinois is a necessary party in any suit seeking damages from an independently elected county officer (sheriff, assessor, clerk of court, and so on) in an official capacity.' Based on *Carver I*, Will County will be obligated to provide funds to pay any judgments that may be entered against the Sheriff's Office. Because Will County has a financial interest in the outcome of the litigation, it is a necessary party to the litigation and must not be dismissed. . . . Although Will County must be a named party, it cannot be liable for claims against the Sheriff's Office on the basis of the *respondeat superior* doctrine, however.") (citations omitted).

McRoy v. Sheahan, 2004 WL 1375527 at *6 (N.D. Ill. June 17, 2004) ("Under Illinois law, sheriffs are classified as county officials, and when the sheriff 'performs his duties as the principal executive officer or chief law enforcement officer of the county' he is a suable entity under § 1983.").

Fairley v. Andrews, 300 F. Supp. 2d 660, 669–670 (N.D. Ill. 2004) ("The Cook County Jail, and the Cook County Department of Corrections, are solely under the supervision and control of the Sheriff of Cook County. . . . The Sheriff is an independently-elected constitutional officer who answers only to the electorate, not to the Cook County Board of Commissioners. . . . Thus, we find that *Thompson* remains controlling Seventh Circuit law and hold that Cook County cannot be directly liable because it has no authority over the Cook County Sheriff or his deputies.") (citation omitted).

Horstman v. County of DuPage, 284 F. Supp. 2d 1125, 1130 (N.D. Ill. 2003) ("Mr. Horstman alleges that his injuries came about because the sheriff and state's attorney followed a policy of harassing and arresting law-abiding gun owners. However, even if true, this would not render the county liable. While a sheriff is a county officer, a 'county is given no authority to control the office of the sheriff,' and the Illinois Supreme Court has ruled that the status of sheriffs in relation to their counties is analogous to that of an independent contractor. *Moy v. County of Cook,* 640 N.E. 2d 926, 929 (Ill.1994). The Seventh Circuit has explicitly ruled that Illinois counties are not liable for their sheriffs' actions under *Monell,* stating that 'Illinois sheriffs are independently elected officials not subject to the control of the county.'").

Potochney v. Doe, 2002 WL 31628214 at *2 n. 3 (N.D. Ill. Nov. 21, 2002) ("Plaintiffs allege that the County had a policy of failing to train (deputy) sheriffs. This argument fails to state a claim against the County because the Seventh Circuit has ruled that in most circumstances Illinois sheriffs, while agents of the county for which they work, are independently elected officials not subject to a county's respective control. . . . While there may be an argument for liability against the County, the court declines to construct it for the plaintiffs. Rather, it applies the established principle that the Sheriff's Department is a separate entity from the County for purposes of § 1983.").

DeGenova v. Sheriff of DuPage County, 2001 WL 1345991 at *8 n. 8 (N.D. Ill. Oct. 31, 2001) ("Plaintiff sues the Sheriff of DuPage County (Richard P. Doria was the sheriff at the time of the incidents in question) in his official capacity. Claims against govern-

ment officers in their official capacities are actually claims against the government entity for which they work. . . . Thus, a suit against the Sheriff of DuPage County in his official capacity is a suit against the Sheriff's Office. Defendant argues, however, that plaintiff cannot sue the Sheriff's Office because it is not a suable entity. As pointed out by plaintiff, though, the Seventh Circuit already held in this case that 'the Sheriff's office has a legal existence separate from the county and the State, and is thus a suable entity.' *DeGenova v. Sheriff of DuPage County,* 209 F.3d 973, 977 n. 2 (7th Cir. 2000). . . . Defendant apparently confuses the Seventh Circuit's recognition that Illinois courts have not yet decided whether a judgment against the Sheriff's Office is collectible (which is a matter of first impression for Illinois courts), *see id.,* with whether the entity is suable. The question of whether a judgment is collectible has been certified to the Illinois Supreme Court. *See Carver v. Sheriff of LaSalle County, Illinois,* 243 F.3d 379, 386 (7th Cir. 2001).").

Stewart v. Rouse, 1999 WL 102774 at *7 (N.D. Ill. Feb. 22, 1999) ("Together, *Ruehman* and *McCurdy* indicate that the Eleventh Amendment does not shield the sheriff from liability where a deputy exercising discretion in the execution of a state court warrant exceeds the scope of delegated state authority.").

Buckley v. County of DuPage, 1997 WL 587594 **2–6 n.4 (N.D. Ill. Sept. 17, 1997) ("Given that sheriffs are the final policymakers for their counties with respect to their law enforcement functions, the next question is for whom is the sheriff the final policymaker—the state, the county, or the office of the sheriff? Stated differently, may an Illinois county be liable under § 1983 for actions of its sheriff? Two decisions of the Seventh Circuit Court of Appeals have concluded that they cannot. *See Ryan v. County of DuPage*, 45 F.3d 1090, 1092 (7th Cir.1995) (holding that county was properly dismissed from § 1983 complaint because it was not responsible for complained-of conduct of sheriff's employees); *Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (holding that plaintiff could not maintain § 1983 action against Cook County for policies, practices, and customs of Sheriff of Cook County related to Cook County Jail), *cert. denied*, 495 U.S. 929, (1990). . . . [A]fter consideration of the Supreme Court's recent decision in *McMil-*

lian v. Monroe County, Ala., 580 U.S. 781 (1997), the court concludes that the question of whether an Illinois sheriff is the final policymaker for the county must be subjected to a more searching analysis than was apparently applied in *Ryan* and *Thompson*. . . . In *McMillian*, it was undisputed that the sheriff was a 'policymaker' for purposes of § 1983; the question before the Court was whether he was a policymaker for the State of Alabama or for Monroe County. Based on an examination of Alabama law, the Court concluded that the sheriff represented the State of Alabama and was not a policymaker for the county. . . . Applying the *McMillian* Court's analysis to Illinois' treatment of the office of county sheriff, the court concludes that Illinois' sheriffs are county officials and that counties are therefore liable for the actions of those sheriffs and their departments. . . . While the court cannot say that Illinois counties exercise a great deal of control over county sheriffs, they clearly exercise more control over county sheriffs than do counties in Alabama. Moreover, the fact that the County Board has little or no direct control over an Illinois sheriff underscores the latter's role as final policymaker on law enforcement issues. It provides little help on answering the corollary question as to whether he is the final policymaker for the County or for some other entity. The overall organization of the county system in Illinois suggests that sheriffs, as county officials, make policy for the county and not for the State nor simply for their own departments. For these reasons, the court concludes that, based on Illinois law, a sheriff is the final policymaker (on law enforcement issues) for the county in which she is elected. . . . The court reads *McMillian* to hold that the proper analysis relates to whether the State or the County is the entity liable for the complained-of acts of the Sheriff, and not whether an independent third party (i.e., the Sheriff) is the proper *Monell* defendant.") (parallel citation omitted).

Woodget v. Cook County Department of Corrections, 1994 WL 695453 at *5 (N.D. Ill. Dec. 10, 1994) ("In *Ruehman v. Village of Palos Park*, . . . the court noted that, as the clerk of a circuit court is defined by state law as being an employee of the state, a damages suit against the Clerk of the Circuit Court in her official capacity is essentially a suit against the state despite the fact that Cook County may be required to pay any liability incurred. As the

state is not a person suable under § 1983, the *Ruehman* court concluded that the plaintiff's damages claim against the Circuit Court Clerk was not permitted. . . . Given the reasoning of *Ruehman*, this Court grants Defendants' Motion to Dismiss the § 1983 claim for damages against Defendant Pucinski in her official capacity.") (internal citations omitted).

Carver v. Sheriff of La Salle County, 787 N.E. 2d 127, 138–141 (Ill. 2003) ("[P]ursuant to section 9-102 of the Tort Immunity Act, a county sheriff, in his or her official capacity, is vested by the General Assembly with the authority to settle litigation filed against the sheriff's office and to direct the office to pay that settlement. However, the dilemma noted by the Seventh Circuit in its opinion in *Carver II* remains: although the sheriff has authority to settle claims filed against the sheriff's office pursuant to section 9-102, the statute is silent with respect to the specific mechanism for funding the judgment. As stated, although the office of sheriff is constitutionally created (Ill. Const., art. VII, § 4(c)), and the sheriff is an independently elected county officer, the county sheriff lacks the authority to levy taxes or establish a budget. Instead, the General Assembly has determined that the sheriff's office is to be financed by public funds appropriated to it by the county board. We conclude that, under this statutory scheme, the county is obligated to provide funds to the county sheriff to pay official capacity judgments entered against the sheriff's office. . . . For the foregoing reasons, we answer the question certified to us by the United States Court of Appeals for the Seventh Circuit as follows: we hold that under Illinois law a sheriff, in his or her official capacity, has the authority to settle and compromise claims brought against the sheriff's office. Because the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff's office in an official capacity. We further hold that this conclusion is not affected by whether the case was settled or litigated.") (citations omitted).

Alencastro v. Sheahan, 698 N.E.2d 1095, 1099–1100 (Ill. App. 1998) (holding that the "sheriff acts as an arm of the State of Illinois when executing court order for possession").

B. Indiana

Kujawski v. Board of Commissioners of Bartholomew County, 183 F.3d 734, 738 (7th Cir. 1999) ("[W]hen Officer Parker promulgated a policy about the confiscation of weapons from those detained at home, he was acting on authority delegated by the court which is part of the state government. By contrast, here, we must focus on Officer Parker's decisions relating to the employment of community corrections officers. Because the County has personnel authority over community corrections officers, we believe that the district court concluded correctly that, when Officer Parker made employment decisions concerning these employees, he acted as a decisionmaker for the County.").

Luck v. Rovenstine, 168 F.3d 323, 325–326 (7th Cir. 1999) ("We first address Luck's claim that Sheriff Rovenstine may be liable in his official capacity for the violation of Luck's constitutional rights. This is, in essence, a claim against the office of sheriff rather than a claim against Sheriff Rovenstine himself, and we therefore understand the claim to be directed against the county. . . . Indiana Code § 36-2-13-5(a) provides without further qualification that it is the sheriff's duty to take care of the jail and its prisoners. Thus, the sheriff's actions are not subject to any further scrutiny or ratification by the county, and the sheriff serves as the county's official decision-maker in matters involving the county jail.").

McCurdy v. Sheriff of Madison County, 128 F.3d 1144, 1145–1146 (7th Cir. 1997) ("[T]he sheriff was acting as the agent of the state court system, which is, of course, a part of the state for purposes of the Eleventh Amendment. The warrant was issued by a state court, and merely served by the sheriff. It could as well have been served by a bailiff or other court employee, for the sheriff's duty to serve the warrant was mandatory . . . so the county was not interposed as a decision-making body between the state and him. *Lancaster v. Monroe County*, 116 F.3d 1419, 1429-1430 (11th Cir. 1997). As an agent of the state, though not an employee, the sheriff's office . . . was a part of state government rather than county government when serving the state court's warrant. . . . The added wrinkle here, however, is that by delaying the service of

the arrest warrant for so long, the sheriff's office may have exceeded the scope of its delegated state authority, may have ceased, therefore, to be an arm of the state. . . . If that is what happened here, this suit would probably be against the deputy in his personal capacity; but it would be (also or instead) against the sheriff in his official capacity if the deputy had been acting pursuant to a policy of the sheriff. . . . Conceivably, therefore, if improbably, the delay in serving the warrant on McCurdy was pursuant to official policy, and if so he would have an official-capacity suit that was not barred by the Eleventh Amendment.").

Bibbs v. Newman, 997 F. Supp. 1174, 1176, 1180–1181 (S.D. Ind. 1998) ("[W]hen an Indiana prosecuting attorney makes employment decisions concerning deputy prosecuting attorneys, the prosecuting attorney acts as a state official for purposes of the Eleventh Amendment to the United States Constitution and 42 U.S.C. § 1983. . . . In Indiana, a prosecuting attorney does not exercise county power and does not answer to county authorities except for seeking 'necessary' funds to operate the office. Weighing against the limited significance of the county appropriations for office operations are the prosecuting attorney's role as a state official under the state constitution, as well as the significant fact that any judgment in a lawsuit against a prosecutor would be paid by the State of Indiana. The decision to hire or fire a deputy prosecuting attorney is more of a state action than a county action. Although it is clear that a prosecuting attorney in Indiana does not act as a county official in this situation, it might be possible to argue that the prosecuting attorney holds neither a state nor a county office, but acts as a 'circuit official' for the relevant judicial circuit. A political subdivision cannot invoke a state's sovereign immunity under the Eleventh Amendment. A political subdivision, however, maintains a status independent of the state and generally has the power to levy taxes, pay judgments, and issue bonds. . . . A judicial circuit in Indiana has none of these attributes. Plaintiff therefore cannot avoid the Eleventh Amendment problem here by treating the prosecutor as a 'circuit' official.").

C. Wisconsin

Aleman v. Milwaukee County, 35 F. Supp. 2d 710, 717 n. 7, 721 (E.D. Wis. 1999) ("The court notes that Judge Adelman of this district court, in a well-reasoned opinion, recently addressed the issue of Wisconsin sheriffs' immunity under the Eleventh Amendment. *See Abraham v. Piechowski*, 13 F. Supp. 2d 870 (E.D. Wis. 1998). While this court concurs in much of Judge Adelman's reasoning, the sheriff's functions at issue here are distinct from those in *Abraham*, and thus require a separate analysis. . . . If plaintiffs prove their damages, Milwaukee County will have to pick up the Sheriff's share of the judgment. The County Defendants have not presented the court with any evidence that the State of Wisconsin may incur any financial liability for a judgment against the Sheriff. Accordingly, the court finds that the Sheriff is not entitled to Eleventh Amendment immunity for the claims in this action.").

Abraham v. Piechowski, 13 F. Supp. 2d 870, 871–879 (E.D. Wis. 1998) (concluding that "in view of Wisconsin constitutional and statutory changes, the Seventh Circuit's last pronouncement on the issue [in *Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987), no longer] has continuing force[,]" and "that when sheriffs perform law enforcement functions they represent the county not the state, and that sovereign immunity, therefore, does not bar this lawsuit.").

VIII. EIGHTH CIRCUIT

A. Iowa

Shepard v. Wapello County, 303 F. Supp. 2d 1004, 1017–1018 (S.D. Iowa 2003) ("The Sheriff's statutory authority over the removal of sheriff's department employees, the comprehensive policies adopted by Sheriff Kirkendall with respect to the retention, discipline and discharge of employees of his department, and the testimony of Supervisor Parker and Sheriff Kirkendall establish that the Sheriff was the final policy maker for his department with respect to the discharge of employees. Consequently the retaliatory discharge in violation of Shepard's rights under the First

Amendment was, in light of the jury's answer to the special interrogatory, the policy of Wapello County subjecting it to § 1983 liability for the decision.").

B. Nebraska

Poor Bear v. Nesbitt, 300 F. Supp. 2d 904, 916–917 (D. Neb. 2004) ("Nebraska law does not grant authority to counties or county sheriffs like Robbins to set policy regarding apprehension of individuals who violate the state's criminal laws. Neb. Rev. Stat. Ann. §§ 23-103–145, 23-1701–1737 (LexisNexis 1999 & Cum Supp. 2003). To the contrary, county sheriffs like defendant Robbins are bound by state law to exercise only those powers and duties 'conferred and imposed upon him or her by other statutes and by the common law,' including the duty to 'apprehend, on view or warrant, and bring to the court all felons and disturbers and violators of the criminal laws of this state, to suppress all riots, affrays, and unlawful assemblies which may come to his or her knowledge, and generally to keep the peace in his or her proper city.' Neb. Rev. Stat. Ann. §§ 23-1701.02 & 23-1701.03. *See also* Neb. Rev. Stat. Ann. § 23-1710 (sheriff has duty to preserve peace, ferret out crime, apprehend and arrest all criminals, secure evidence of crimes committed, present evidence to county attorney and grand jury, and file informations 'against all persons who he knows, or has reason to believe, have violated the laws of the state.') In this case, Poor Bear essentially alleges that Robbins violated Poor Bear's constitutional rights when Robbins participated in issuing an order preventing Poor Bear and others from engaging in a protest march down the main street of Whiteclay after having observed violence and destruction during a similar protest just a week earlier, apprehending Poor Bear when he violated such order, and pursuing prosecution for violation of the order, yet failing to zealously pursue crimes that have been committed against the Lakota people. The policies Sheriff Robbins is charged with carrying out—keeping peace, apprehending and arresting violators of the law, and pursuing prosecution of those who have violated state law—are set by the state legislature, and the implementation of these policies by a municipal official does not constitute formulation by a final policy-making body sufficient to impose liability upon the municipality. . . . In short, a 'county

sheriff acts pursuant to state-enacted restrictions in enforcing the criminal laws of Nebraska and is not himself a policy maker for the county for which he is sheriff.' *Branting v. Schneiderheinz*, 1996 WL 580457 at *3 (D. Neb. 1996). Accordingly, I shall grant defendant Robbins' motion to dismiss the causes of action asserted against him for failure to state a claim.").

IX. NINTH CIRCUIT

A. Arizona

Flanders v. Maricopa County, 54 P.3d 837, 847 (Ariz. App. Div. 2002) ("The Sheriff set the conditions of Flanders' confinement by establishing policies in his role as chief administrator for County jails. That the Sheriff may also be individually liable for conditions he established at this facility does not negate the County's liability for his actions as the person who exercises the County's governmental authority. . . . Because the judgment against the Sheriff was for constitutional violations committed in his official capacity, the County is liable as a matter of law. . . . Such a judgment imposes liability upon the public entity that the official represents, *whether or not* that entity is joined as a party, provided the public entity received notice and an opportunity to respond.") (citations omitted and emphasis in original).

B. California

Ceballos v. Garcetti, 361 F.3d 1168, 1182–1183 (9th Cir. 2004) ("Ordinarily, an official designated as an official of a county—as is the District Attorney of the County of Los Angeles—is a county official for all purposes. Some officials, however, serve two masters. Among them are California's 58 district attorneys: While these officers are elected by and for the counties, they prosecute cases on behalf of the state. In such mixed circumstances, we determine whether the officer is a state or a county official by examining state law to determine whether the particular acts the official is alleged to have committed fall within the range of his state or county functions. The California Supreme Court has held that a district attorney is a state official when he acts as a public prosecutor, while in other functions he acts on behalf of the

county. . . . Whether the District Attorney acted on behalf of the county or the state thus turns on whether the personnel actions alleged by Ceballos are part of the District Attorney's prosecutorial functions or whether he was performing administrative or other non-prosecutorial duties. The California courts have not defined the precise characteristics that distinguish a district attorney's prosecutorial function from his other functions. As *Bishop Paiute Tribe* noted, however, a similar issue as to whether a prosecutor was acting in his prosecutorial capacity, as opposed to an administrative or investigative capacity, arises in determining whether he is entitled to absolute or qualified immunity under § 1983; we may look for guidance to cases addressing that issue. . . . The individual defendants, including Garcetti, do not seek dismissal on the basis of absolute immunity for the acts they allegedly took against Ceballos. Instead, they seek qualified immunity, implicitly acknowledging that the actions were not prosecutorial, but administrative. In sum, the District Attorney's Office and its then-head, Garcetti, were carrying out their county functions when they allegedly engaged in the retaliatory acts Ceballos describes. Garcetti is, therefore, not entitled to Eleventh Amendment immunity, and thus the County may not seek summary adjudication on the ground that he was acting on behalf of the state.") (citations omitted).

Cortez v. County of Los Angeles, 294 F.3d 1186, 1191–1192 (9th Cir. 2002) ("*Brewster* and *Bishop Paiute Tribe* demonstrate that California sheriffs are final policymakers for the county not only when managing the local jail, but also when performing some law enforcement functions. Therefore, even if we characterized the Sheriff's actions as taken in his law enforcement capacity to keep the peace, we could conclude that the County is subject to § 1983 liability for his actions. However, as previously discussed, we find that the Sheriff was acting in his administrative capacity, rather than as a law enforcement officer. Specifically, we find that the Sheriff's actions were taken pursuant to his policy of segregating inmates identified as gang members, which he established pursuant to his authority as the administrator of the county jail and custodian of the inmates within it. Accordingly, the County can be held liable for his decision to keep Avalos in the gang unit of the jail.").

Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549, 564–566 (9th Cir. 2002) ("[T]o allow the Attorney General's supervisory role to be dispositive on the issue of whether a law enforcement officer acts as a state official would prove too much. The California Constitution grants the Attorney General supervisory authority over all 'other law enforcement officers as may be designated by law.' Cal. Const. art. V, § 13. Under this provision, if taken to its logical extreme, *all* local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in *Monell,* which preserves § 1983 actions against local governments. . . . Whether a district attorney engages in prosecutorial conduct when obtaining and executing a search warrant has not been addressed by this Circuit in the context of whether a district attorney is a state or county officer. However, the Ninth Circuit has addressed whether this constitutes prosecutorial conduct as opposed to investigatory conduct in the context of a prosecutor's absolute versus qualified immunity. By analogy, these cases inform our decision. . . . Relying on *Fletcher* and *Buckley,* and recognizing the significant factual distinctions between this case and *Pitts,* we find that the District Attorney was engaging in investigatory, and not prosecutorial, acts when he obtained and executed a search warrant over the Tribe. This conclusion compels our finding that the District Attorney acted as a county officer when obtaining and executing a search warrant against the Tribe. . . . [In addition] we conclude that the Sheriff acted as a county officer when obtaining and executing a search warrant against the Tribe.") (emphasis in original), *vacated and remanded*, 538 U.S. 701 (2003).

Brewster v. Shasta County, 275 F.3d 803, 807–808 (9th Cir. 2001) ("It requires little extension of *Streit* for us to conclude that the Shasta County Sheriff acts for the County, not the state, when investigating crime in the county. . . . [T]he fact that the state legislature has determined that all county officials are to be indemnified by the county government—including the sheriff and the sheriff's department employees, and without exception for their crime investigation functions—indicates that the sheriff is considered a county actor. Further, unlike in *McMillian,* where Alabama sheriffs were required to attend all courts in the state, California sheriffs are required to attend only those courts within

their respective counties. We also note that unlike in *McMillian*, in which the Alabama Constitution made a county sheriff subject to impeachment on the authority of the Alabama Supreme Court, not the county, impeachment proceedings against a California county sheriff, as with other county officials, are initiated by a county grand jury, and the sheriff is not included among those officials identified in the California Constitution as subject to impeachment by the state Legislature. While this factor may be of somewhat limited weight because a state court appoints the prosecutor to conduct the impeachment proceedings, it nonetheless weighs toward the conclusion that the sheriff acts for the county when investigating crime as well as when administering the jails.") (citations omitted).

Streit v. County of Los Angeles, 236 F.3d 552, 564–565 (9th Cir. 2001) ("Upon examining the precise function at issue in conjunction with the state constitution, codes, and case law, we conclude that the [Los Angeles County Sheriff's Department (LASD)] acts as the final policymaker for the county when administering the County's release policy and not in its state law enforcement capacity. We therefore affirm the district court's holding that the LASD, when functioning as the administrator of the local jail, is a County actor, and that the County may therefore be subject to liability under 42 U.S.C. § 1983.").

Weiner v. San Diego County, 210 F.3d 1025, 1030–1031 (9th Cir. 2000) ("Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a county district attorney acts as a state official when deciding whether to prosecute an individual. The fact that California statutory law lists district attorneys as county officers is not dispositive because, as discussed in *McMillian*, the function of the district attorney, including who can control the district attorney's conduct is the issue. . . . [T]he only significant differences between California law applicable in this case and Alabama law applicable in *McMillian* are that under California law the county sets the district attorney's salary and the district attorney can be removed from office in a fashion similar to other county employees. These differences are not sufficient to produce a result in this case different from the result in *McMillian*. . . . Although a California

district attorney is a state officer when deciding whether to prosecute an individual, this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes.").

Green v. Baca, 306 F. Supp. 2d 903, 907 n. 31 (C.D. Cal. 2004) ("Because a state is not amenable to suit under § 1983, an official acting pursuant to a policy of the state government cannot be held liable under the statute. . . . The Ninth Circuit has held that, in exercising control of the county jail, the Sheriff acts as an official policy-maker for the County of Los Angeles, not for the state of California. The California Court of Appeal has reached a contrary result, concluding that the sheriff is not a 'person' under § 1983 because he acts as a state officer in exercising responsibility over the jail. The court, however, is bound by the Ninth Circuit's interpretation.") (internal and parallel citations omitted).

Benas v. Baca, 2001 WL 485168 at *7 (C.D. Cal. April 23, 2001) ("While case law in this area is inconsistent, the Ninth Circuit, both before and after *McMillian,* has found a California sheriff to be a local law enforcement agent, and therefore subject to section 1983 liability.").

Venegas v. County of Los Angeles, 87 P.3d 1, 21, 22, 27 (Cal. 2004) ("Because the Ninth Circuit considers California sheriffs performing law enforcement functions to be county officers, the majority's contrary conclusion here creates a split that results in immunizing sheriffs from section 1983 liability in actions brought in state court while exposing them to liability in identical actions filed in federal court. This effectively drives California civil rights plaintiffs with actions against a county sheriff out of our court system and into federal court. To ensure uniformity in the enforcement of federal civil rights law in both state and federal courts in California, the United States Supreme Court should decide which view is correct.") (Kenard, J., concurring in part and dissenting in part); ("Today's decision creates a direct conflict between this court and the federal Court of Appeals on the immunity of California sheriffs from liability on a federal cause of action. Both positions have some support in precedent and logic, suggesting that the anomaly

of conflicting decisions is likely to endure until resolved by a higher authority. Although dependent on an understanding of sheriffs' functions under state law, immunity from section 1983 liability is of course a federal question. . . . The conflict created today can, therefore, be resolved effectively only by the United States Supreme Court. . . . [T]he disputed point is the relevance and weight, *under federal law*, to be given a particular aspect of state law defining the relationship of California sheriffs to the state and county governments. Until this question is resolved, federal district courts in California will be required to follow one rule, permitting section 1983 suits against sheriffs' departments, while California superior courts will be required to follow the opposite rule, prohibiting such actions. I urge the United States Supreme Court to consider removing this anomaly by deciding the underlying issue of federal law.") (Werdegar, J., concurring in part and dissenting in part) (citations omitted) (emphasis in original).

C. Montana

Eggar v. City of Livingston, 40 F.3d 312, 315 (9th Cir. 1994) ("Officials can act on behalf of more than one government entity. That [municipal judge] allegedly performed his duty to advise indigents of their rights in a way that makes a mockery of those rights does not make that duty administrative. The Judge's failure to follow state law or federal constitutional law does not transform his 'cattle-call' method of counseling into municipal policymaking. As state law makes clear, the Judge's obligation to address the rights of defendants arises from his membership in the state judiciary. It is lamentable, but irrelevant, that he failed miserably to meet this obligation under both state and federal standards: he simply is not a municipal decision maker in this context.") (internal citation omitted).

D. Nevada

Webb v. Sloan, 330 F.3d 1158, 1165–1166 (9th Cir. 2003) ("Nevada district attorneys are final policymakers in the particular area or particular issue relevant here: the decision to continue to imprison and to prosecute. The state attorney general exercises

supervisory power over county district attorneys, but this does not remove final policymaking authority even from principal district attorneys. . . . Both this court and the Nevada Supreme Court, however, have emphasized the discretionary and permissive nature of that [supervisory power] . . . and in the absence of any evidence in the record that the attorney general in fact ever exercises that supervisory power, we hold that principal district attorneys are final policymakers for the municipality with respect to the conduct of criminal prosecutions. . . . [T]he Nevada legislature confers the same final policymaking authority on deputy district attorneys. . . . Because of the distinctions between Nevada's deputy district attorneys and the Hawaiian deputy prosecutors in *Christie*, *Christie* does not control the outcome of this case. The district court correctly held that deputy district attorneys in Nevada are final policymakers whose actions can be the acts of the municipality for the purposes of attaching liability under § 1983.") (emphasis in original).

E. Oregon

Kleinman v. Multnomah County, 2004 WL 2359959 at *5 (D. Or. Oct. 15, 2004) ("In *Bishop*, the Circuit analyzed the California constitution, statutes and case law to determine whether the Inyo County District Attorney was a state or a county official. The court concluded that the district attorney is a county officer when doing certain activities. Notwithstanding the Ninth Circuit's ultimate conclusion in the case, there are several differences between California law and Oregon law that support defendants' position. For example, the California constitution and statutes designate district attorneys as local government officials. . . . California district attorneys may not be removed by the legislature, as other California officials are. . . . California law gives the counties the authority to supervise the district attorneys' conduct and the use of public funds. . . . Under California law, the county sets the salaries for district attorneys. . . . These factors cut the other way in Oregon. Plaintiff argues that the court must recognize the dual nature of the district attorneys' offices in both state and county affairs in Oregon and consider the nature of the suit here. Plaintiff contends that the District Attorney's Office in this case is being sued not for prosecutorial func-

tions, but instead in its administrative role of supervising and training county employees. In other words, plaintiff argues that he brings claims against the District Attorney's office in its 'county capacity.' There is some validity to plaintiff's point in that the case law on state immunity and prosecutorial immunity often focuses on the acts at issue, not just on the entity being sued. However, I believe this argument is quite strained under Oregon law, particularly given the lack of authority for this proposition. I conclude that the Multnomah County District Attorney's Office is a state entity. As such, it is entitled to sovereign immunity. Defendants' motion to dismiss is granted and the Multnomah County District Attorney's Office is dismissed from this action. . . . If the District Attorney's office is deemed a state entity, plaintiff cannot sustain a claim for damages against District Attorney Schrunk in his official capacity.").

F. Washington

Whatcom County v. State of Washington, 993 P.2d 273, 277–278, 280 (Wash. App. Div. 1st 2000) ("The *McMillian* and *Pitts* decisions provide us with guidance in determining whether the State or the County is responsible for [County Prosecutor] Graham's defense and indemnification. However, there are two notable differences between those cases and the case at bar. First, in *McMillian* and *Pitts*, the issue was whether counties could be held liable under § 1983 for the actions of certain government officials. Thus, the question of whether the officials acted with 'final policymaking authority' was relevant to the decision. Here, we are not concerned with the ultimate question of which government entity (if any) is liable for Graham's acts, but only with the narrow issue of whether Graham is a state officer or employee entitled to a state defense and indemnification. Second, in *McMillian* and *Pitts*, the question of how to properly characterize the officials' functions was not at issue. However, in this case the parties disagree sharply on whether Graham's actions constituted 'advice to a county official' or 'prosecution under state law.' . . . We conclude that (1) Graham was 'prosecuting state law' when he advised Weisenburger that Monroe could be released from jail, and, (2) county prosecutors in Washington represent the State, not their counties, when prosecuting violations of state law. Thus, we

hold that Graham is a 'state officer' or 'state employee' under RCW 4.92.060, .070, .075, and .130, entitling him to defense and indemnification from the State. . . . Lastly, we note that Graham should not be deprived of state defense and indemnification merely because there may be questions as to which state fund should be used for that purpose.") (footnotes omitted).

X. TENTH CIRCUIT

A. Kansas

Schroeder v. Kochanowski, 311 F. Supp. 2d 1241, 1250 n. 23 (D. Kan. 2004) ("The Court disagrees with the Saline County defendants' argument that a county sheriff is a 'state official' and thus plaintiff's claim is barred by the Eleventh Amendment. Defendants fail to cite, nor was the Court able to find, Tenth Circuit cases holding that a county sheriff was a state official.").

Wishom v. Hill, 2004 WL 303571 at **5, 8–9 (D. Kan. Feb. 13, 2004) ("Defendants admit that plaintiff may sue former Sheriff Hill and current Sheriff Steed, but correctly note that plaintiff may not sue the SCDF because it is a subordinate governmental agency. *Fuguate v. Unified Gov't of Wyandotte County/Kan. City, Kan.,* 161 F. Supp. 2d 1261, 1266 (D. Kan.2001) (absent specific statue, subordinate governmental agencies lack capacity to sue or be sued); *Wright v. Wyandotte County Sheriff's Dept.*, 963 F. Supp. 1029, 1034 (D. Kan.1997) (county sheriff's department is agency of county and not capable of being sued); *Murphy v. City of Topeka,* 6 Kan. App. 2d 488, 491, 630 P.2d 186, 190 (1981) (absent express statutory or ordinance authority, agency does not have capacity to sue or be sued). The SCDF lacks the capacity to sue or be sued. The Court therefore sustains defendants' motion for summary judgment as to plaintiff's claims against the SCDF. . . . In seeking summary judgment on plaintiff's official capacity claims, defendant argues that at the time of plaintiff's arrest, the county had a policy and practice which afforded detainees a probable cause hearing within 48 hours of incarceration, as required by *McLaughlin,* 500 U.S. 44. . . . As stated above, however, liability may also arise from the act of an ultimate county decision-maker. *Pembaur,* 475 U.S. at 480. Plaintiff's offi-

cial capacity claims can therefore survive summary judgment if he can show a genuine issue of material fact that an ultimate county decision-maker caused the violation of his right to be free from unconstitutional detention under the Fourth Amendment. Under Kansas law, the sheriff is responsible for taking care of the jail of his county and its prisoners. K.S.A § 19-811. He therefore serves as an ultimate county decision-maker in matters involving the county jail. . . . To prevail on his official capacity claim, plaintiff must show a genuine issue of material fact whether Sheriff Hill caused him to be detained without a probable cause hearing. Viewing the evidence in the light most favorable to plaintiff, a reasonable jury could so find. As stated above, the record indicates that Sheriff Hill incarcerated plaintiff for six days without a probable cause hearing or bond.").

B. Oklahoma

Reid v. Hamby, 124 F.3d 217 (table), 1997 WL 537909 at *5 n. 1, *6 (10th Cir. 1997) ("We conclude, even under the *McMillian* standard, that an Oklahoma sheriff is the policymaker for his county for law enforcement purposes. . . . We now hold that an Oklahoma 'sheriff's department' is not a proper entity for purposes of a § 1983 suit.").

C. Wyoming

Ginest v. Board of County Commissioners of Carbon County, 333 F. Supp. 2d 1190, 1195 (D. Wyo. 2004) ("Carbon County is a named defendant in this action for two reasons. First, although the Board's role regarding the jail is quite limited, it has fiscal obligations under state law to adequately fund the jail. . . . In addition, Carbon County is a proper defendant whenever one of its policymakers, such as its sheriff, is alleged to have engaged in unconstitutional activity for which the county would bear responsibility. . . . In the present case, the sheriff of Carbon County is such a policymaker, and he is empowered to establish policies that are binding on the County. The Court persists in its conclusion that the Carbon County Board of Commissioners is a proper defendant in this action.").

XI. ELEVENTH CIRCUIT

A. Alabama

Turquitt v. Jefferson County, 137 F.3d 1285, 1288, 1291 (11th Cir. 1998) (en banc) ("Alabama law provides that it is the sheriff who has the duty to ensure that inmates do not come to harm, to develop a policy of controlling inmate violence, and to staff the jail with appropriately trained jailors. . . . Because the parties agree that the sheriff possesses the authority to make final policy with respect to these actions, the contested issue is whether the sheriff functions as the County's policymaker when he takes those actions. Our answer to this question turns on state law, including state and local positive law, as well as custom and usage having the force of law. . . . Our review of Alabama law persuades us that an Alabama sheriff acts exclusively for the state rather than for the county in operating a county jail. . . . *Parker* is not in accord with controlling § 1983 jurisprudence, and we hereby overrule that decision, and any subsequent decisions following it, insofar as they held that Alabama sheriffs in their daily operation of county jails act as policymakers for the county.") (citations omitted).

McClure v. Houston County, 306 F. Supp. 2d 1160, 1163, 1166 (M.D. Ala. 2003) ("[T]he specific question in this case is whether the Houston County Sheriff and the Sheriff's Department are 'policymakers' for Houston County in the area of hiring, training, and supervising deputy sheriffs. Under Alabama law, sheriffs are state, and not county, officers. . . . McClure argues that, before granting summary judgment on Eleventh Amendment grounds, the court must determine whether the state or county would pay any damages awarded in this case. *See Carr v. City of Florence*, 916 F.2d 1521, 1527 (11th Cir.1990) (Clark, J., specially concurring). Even if the court were to find McClure's legal argument persuasive, however, summary judgment in Sheriff Glover's favor would still be appropriate because McClure has not offered any evidence to show that Houston County, and not the State, would be liable for any judgment against Sheriff Glover.").

B. Florida

Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1115 (11th Cir. 2005) ("When, as here, the defendant is the county sheriff, the suit is effectively an action against the governmental entity he represents—in this case, Monroe County.").

Brown v. Neumann, 188 F.3d 1289, 1290 n. 2 (11th Cir. 1999) ("We recognize that our decisions have not been entirely consistent on whether the relevant entity in an official-capacity suit against a sheriff in Florida is the County or the Sheriff's Department (as a unit operating autonomously from the County). *Compare Lucas v. O'Loughlin*, 831 F.2d 232, 235 (11th Cir. 1987) (County) . . . *with Wright v. Sheppard*, 919 F.2d 665, 674 (11th Cir. 1990) (implying that the Sheriff's Department would be the relevant entity). We do not address this point because our holding today is that whatever the relevant entity was, it is not liable under *Monell*.").

Hufford v. Rodgers, 912 F.2d 1338, 1341–1342 (11th Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (holding that a suit against a Florida sheriff was not barred by the Eleventh Amendment because the Florida constitution designates the sheriff as a county officer and the sheriff's budget, salary, and any judgment against him are paid by the county).

Samarco v. Neumann, 44 F. Supp. 2d 1276, 1287 (S.D. Fla. 1999) ("In light of Florida statutory authority, which designates county sheriffs as independent constitutional officials, the Court finds that Sheriff Neumann, as the county's chief law enforcement officer, was the final policymaker for matters concerning the Palm Beach County Sheriff's Office. . . . Thus, acts of Sheriff Neumann found violative of § 1983 are capable of imputing liability upon the Palm Beach County Sheriff's Office.") (citations omitted).

Jenne v. Maranto, 825 So. 2d 409, 416 (Fla. 4th Dist. App. 2002) ("Florida is divided into political subdivisions, the several Counties, and the Sheriff is a constitutional officer in each County. Art. VIII, § 1(a), (d), Fla. Const. The Counties are political subdivisions but they are not the State itself. The Florida Constitution

names the Sheriff as a county official, not as an official of the State. Art. VIII, § 1(d), Fla. Const. Although the Sheriff performs many functions—e.g., the Sheriff is responsible for serving process within the County—his budget is made up by the County from taxes levied only within the County. Moreover, the Sheriff is authorized to purchase liability insurance for, among other things, 'claims arising out of the performance of the duties of the Sheriff. . . .' Thus any money judgment in this case will be paid from the local county budget or by insurance purchased therefrom by the Sheriff. On balance therefore the Sheriff is an official of local government, rather than an arm of the State. We thus hold for purposes of this case that Sheriff Jenne is not an arm of the State and is not entitled to claim the constitutional immunity protected by the Eleventh Amendment.") (footnotes omitted)

C. Georgia

Manders v. Lee, 338 F.3d 1304, 1328 n. 54, 1331–1332, 1347–1348 (11th Cir. 2003) (en banc) ("Having applied the Eleventh Amendment factors, we conclude that Sheriff Peterson in his official capacity is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard. Therefore, Sheriff Peterson is entitled to Eleventh Amendment immunity in this case. We need not answer, and do not answer, today whether Sheriff Peterson wears a 'state hat' for any other functions he performs. . . . It has been suggested that the sheriff's office is an independent, constitutional, elected office that is neither the State nor the county. . . . Throughout this litigation the parties have briefed and framed the legal issue in this case *solely* as whether Sheriff Peterson in his official capacity acts on behalf of the State *or* Clinch County in the context of the Eleventh Amendment. Thus, we decide that controversy. No other issue is before us. In addition, while we agree that the sheriff's office is independent from and not controlled by the county, we conclude today only that the sheriff acts for the State in performing the particular functions at issue in this case.") (internal footnotes and citations omitted) (emphasis in original); ("I submit that the proper question is whether the sheriff has carried his burden of proving that he is an arm of the state. In other words, the issue is not the state versus

the county; rather, the issue is whether the sheriff is an arm of the state *vel non.* The mere fact that the sheriff is not the policymaker for the county commission, is not controlled by the county commission, and the fact that the county has no *respondeat superior* liability for judgments against the sheriff, do not, either singly or in combination, go very far toward establishing that a Georgia sheriff is an arm of the state. The Seventh Circuit recognized this in *Franklin v. Zaruba,* 150 F.3d 682 (7 th Cir. 1998).")) (Anderson, Tjoflat, Birch & Wilson, J.J., dissenting); ("In this case, each of the factors we normally apply to determine whether a defendant is entitled to *Eleventh Amendment* immunity weighs against extending such protection to Sheriff Peterson. Georgia law clearly defines Sheriff Peterson as a county officer and jails as county institutions; the state's corrections authorities exercise no control over Sheriff Peterson in his operation of the county jail; Clinch County appropriates Sheriff Peterson's operating budget and pays for the jail's construction and upkeep; and there is no indication that a judgment against Sheriff Peterson would operate against the state of Georgia. . . . A correct reading of Georgia law shows that county sheriffs operate county jails for the counties in which they serve. In every sense, a suit under 42 U.S.C. § 1983 against a county sheriff alleging mistreatment in a county jail is a suit against a local government. The *Eleventh Amendment*, which protects states, is inapplicable, and the decision of the district court should therefore be affirmed.") (Barkett, Tjoflat, Birch & Wilson, JJ., dissenting; Anderson, J., dissenting in part) (emphasis in original).

Grech v. Clayton County, Georgia, 335 F.3d 1326, 1331–1332, 1347 n. 46 (11th Cir. 2003) ("[T]he appropriate § 1983 inquiry under federal law is whether defendant Clayton County, under Georgia law, has control over the Sheriff in his law enforcement function, particularly for the entry and validation of warrants on the CJIS systems and the training and supervision of his employees in that regard. . . . In Georgia, a county has no authority and control over the sheriff's law enforcement function. Clayton County does not, and cannot, direct the Sheriff how to arrest a criminal, how to hire, train, supervise, or discipline his deputies, what polices to adopt, or how to operate his office, much less how to record criminal information on, or remove it from, the CJIS

systems involved in this case. Instead, the sheriff acts on behalf of the State in his function as a law enforcement officer and keeper of the peace in general and in relation to the CJIS systems in particular. . . . Judge Anderson's concurring opinion more narrowly concludes that as 'to the particular function at issue in this case, the Sheriff is acting on behalf of the state, and thus . . . Clayton County is not liable in this case.' . . . Because no opinion obtained a majority of the Court, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'").

Mladek v. Day, 293 F. Supp. 2d 1297, 1304 (M.D. Ga. 2003) ("The Eleventh Circuit has recently held in a divided decision that Georgia sheriffs and their deputies are entitled to official immunity under the Eleventh Amendment to the Constitution for claims arising from their use of 'force policies' in the operation of county jails. *Manders v. Lee,* 338 F.3d 1304 (11th Cir. 2003). The Eleventh Circuit's ruling, however, is clearly not limited to the operation of jails. Based upon an exhaustive review of Georgia law, the Eleventh Circuit found that Georgia sheriffs act as 'state officers' in a variety of functions and when they 'wear these state hats,' they are entitled to official immunity. The Eleventh Circuit explained that the proper inquiry is whether the Sheriff (or his deputy) acted for the state in the particular function at issue in the case. *Id.* at 1308–1309. Although the precise function at issue in *Manders* was the implementation of a force policy in the operation of a county jail, the Eleventh Circuit made it clear that it found no distinction between that function and the law enforcement function performed by sheriffs when they arrest citizens for violations of the law. *Id.* at 1310, 1313. Therefore, the Court finds in this case that, based upon the rationale of *Manders,* Defendant Day was wearing a 'state hat' at the time of Mr. Mladek's arrest and subsequent detention. The Court further finds that, insofar as Plaintiffs allege that Sheriff Yarbrough is liable for the manner in which Mr. Mladek was treated by Deputy Day, Sheriff Yarbrough was likewise wearing a 'state hat.' Therefore, both Day and Yarbrough are entitled to official immunity under the Eleventh Amendment for any claims brought against them in their official capacity. Moreover, the Court finds that Walton County is likewise entitled to such immunity based upon the rationale ex-

pressed in *Manders.* 338 F.3d at 1308–1309. Accordingly, Defendant Walton County's motion to dismiss Plaintiff Michael Mladek's Fourth Amendment claim against it is granted. Plaintiff Michael Mladek's Fourth Amendment claims against Deputy Day and Sheriff Yarbrough in their official capacities are likewise dismissed.").

Bunyon v. Burke County, 306 F. Supp. 2d 1240, 1251–1255 (S.D. Ga. 2004) ("Even if Burke County may be directly liable for its practice of failing to bring detainees before a judicial officer within three days and of not accepting bail from detainees in violation of Bunyon's constitutional rights, it may be immune from suit under the *Eleventh Amendment* for Sheriff Coursey's and his deputies' actions. . . . In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality. . . . Whether a defendant is an 'arm of the state' is determined by examining his or her function in a particular context. This entails analyzing four factors: 1) how state law defines the entity; 2) what degree of control the state maintains over the entity; 3) where the entity derives its funds; and 4) who is responsible for judgments against the entity. *Id.* (citations omitted). After a lengthy review of these factors, the Eleventh Circuit has recently held that Georgia sheriffs act as 'state officers' in a variety of functions. *Id.* In this case, the relevant inquiry is whether Sheriff Coursey and his deputies and jailers were acting as agents of the State in establishing and implementing bail and release procedures for inmates being held on charges pending in a municipality. . . . Based on the fact that Sheriff Coursey's authority over inmates such as Bunyon flow from the State and not Burke County, and those functions and duties pertain chiefly to affairs of the State, *see Manders*, 338 F.3d at 1319 n. 35, I conclude that this first factor weighs strongly in favor of Eleventh Amendment immunity. . . . Because of Georgia's direct control over Sheriff Coursey's duty to accept bail and bring a detainee before a judicial officer within seventy-two hours, and Burke County's total lack thereof, this control factor weighs heavily in favor of *Eleventh Amendment* immunity. . . . In this case, Bunyon was not a convicted state offender, so state funds would not have been directly

involved. Instead, he was a pre-trial offender and detained pursuant to an agreement with the City of Midville whereby Midville paid Burke County a per diem rate for his incarceration. . . . As Burke County has failed to show whether it actually spent any of its own funds on Bunyon's incarceration, as mandated by the state, I am hesitant to find any state involvement as it pertains to this aspect of the *Manders* analysis. . . . The final factor in the *Eleventh Amendment* analysis is the source of funds that will pay any adverse judgment against Sheriff Coursey or his deputies in their official capacities. . . . Apparently, Sheriff Coursey would have to pay any adverse judgment out of the sheriff's office budget, and as a result, both county and state funds would be implicated by an adverse judgment. Sheriff Coursey would need an increased budget from the county for his office and an increased daily per diem rate for convicted detainees held in the Burke County Jail from Georgia. . . . When faced with this dual county/state obligation, the Eleventh Circuit noted that the State's sovereignty and integrity are affected when lawsuits interfere with a state function, and therefore, 'at a minimum, the liability-for-adverse-judgment factor does not defeat [Sheriff Coursey's] immunity claim.' . . . Although not a bright line decision, weighing all of the factors discussed above, I find that Sheriff Coursey is entitled to *Eleventh Amendment* immunity. His authority over Bunyon flowed directly from the state, his functions and duties pertained chiefly to affairs of the state, and the state directly controlled his duty to accept bail and release prisoners within seventy-two hours of arrest. That the state may not have provided funds for Bunyon's incarceration and may not provide much money for a judgment against him does not preclude this finding. Sheriff Coursey, in his official capacity, was acting as an arm of the state in establishing bail and release policies at the jail, and is therefore entitled to *Eleventh Amendment* immunity. Like Sheriff Coursey, his deputies are also entitled to *Eleventh Amendment* immunity. Although *Manders* involved only the immunity of the Sheriff in his official capacity, its factors are similarly applicable to deputy sheriffs as well. . . . Based upon the foregoing, Sheriff Coursey and his deputies are entitled to *Eleventh Amendment* immunity. Even if Burke County is directly liable for its unconstitutional policy and practice of denying bail and release to detainees, it is not liable for any constitutional vio-

lations related to these policies committed by Sheriff Coursey and the other Burke County defendants.") (emphasis in original).

Bunyon v. Burke County, 285 F. Supp. 2d 1310, 1328–1329, 1329 n. 12 (S.D. Ga. 2003) ("Federal Rule of Civil Procedure 17 states, in pertinent part, the following: '(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued should be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held.' Fed. R. Civ. P. 17(b). In *Georgia Insurers Insolvency Pool v. Elbert County*, 368 S.E. 2d 500 (Ga. 1988), the Georgia Supreme Court set forth the following explanation of which entities could sue and be sued in Georgia courts: '[T]his court [has] said, in every suit there must be a legal entity as the real plaintiff and the real defendant. This state recognizes only three classes as legal entities, namely: (1) natural persons; (2) an artificial person (a corporation); and (3) such quasi-artificial persons as the law recognizes as being capable to sue.' *Georgia Insurers Insolvency Pool*, 368 S.E. 2d at 502 (quoting *Cravey v. Southeastern Underwriters Ass'n*, 105 S.E. 2d 497, 500 (Ga. 1958)). The Eleventh Circuit has advised that '[s]heriff's departments and police departments are not usually considered legal entities subject to suit.' *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992). In *Shelby v. City of Atlanta*, the Northern District of Georgia stated that a claim could not be brought against a police department: Plaintiff cannot state a claim against the City of Atlanta Police Department because the Department is not a proper party defendant. The Department is an integral part of the City of Atlanta government and is merely the vehicle through which the City government fulfills its policing functions. For this reason, the Department is not an entity subject to suit and plaintiff's claim against it is hereby dismissed. . . . Based upon Georgia law and cases from this circuit, the Court can find no basis for allowing Plaintiff to sue the Midville Police Department. Therefore, it is DISMISSED. . . . The Court dismissed the Burke County Sheriff's Department on June 6, 2002 because it is not a legal entity amenable to suit.") (alterations in original).

Neville v. Classic Gardens, 141 F. Supp. 2d 1377, 1382 (S.D. Ga. 2001) ("Engaging in a prosecutorial function is the act of a *State,* not a county, official. . . . Accordingly, Neville's claims against Higgins in her official capacity, and thus, the county, face dismissal.") (emphasis in original).

Frazier v. Smith, 12 F. Supp. 2d 1362, 1369 (S.D. Ga. 1998) ("Under Georgia law, sheriffs are vested with ultimate authority in employment decisions. . . . There is no evidence before the Court to support the conclusion that Sheriff Smith is an agent of Camden County, or that the County ultimately is liable for his misconduct. Construing the facts in the light most favorable to Plaintiff, the actions brought against Sheriff Smith, in his official capacity, and the Camden County Board of Commissioners are not redundant, and both should proceed.").