No. _____

In The
Supreme Court of the United States

DEPUTY LAWRENCE MONTANO,
WARDEN JOE CHAVEZ, and
FORMER SHERIFF RENE RIVERA,

Petitioners,

v.

MICHAEL WILSON, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1991, this Court held that probable cause determinations made within 48 hours were presumptively constitutional and those made beyond 48 hours were presumptively unconstitutional. See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). This Court implied that the duty to ensure the prompt probable cause determination rested with the arresting officer, but left the method of conducting the determination open to the States.

The Questions Presented are:

1. Whether the Tenth Circuit erred when it held that the obligation to ensure *Gerstein v. Pugh*, 420 U.S. 103 (1975) probable cause determinations rests independently on the arresting officer, the elected sheriff, and the detention center warden, in their individual capacities, in contradiction of state law, the directive of the New Mexico Administrative Office of the Courts, the authority of other circuits, and common law, thereby subjecting all detention center wardens, sheriffs, and officers in the Tenth Circuit to potential punitive damages and voluminous litigation.

2. Under *County of Riverside*, absent clear state authority to the contrary, does the duty to ensure a prompt probable cause determination rest exclusively with the arresting officer?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Tenth Circuit, whose judgment is sought to be reviewed, are:

- Michael Wilson Sr., plaintiff, appellee below, and respondent here.
- Deputy Sheriff Lawrence Montano, former elected Sheriff Rene Rivera, and detention center warden Joe Chavez, defendants, appellants below, and petitioners here.

Deputy Sheriff Fred Torres was a defendant in the underlying action and an appellant below, but is not a party to this petition.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Lawrence Montano, Joe Chavez, and Rene Rivera respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 715 F. 3d 847 and is reprinted in the Appendix hereto at 1-25.

The memorandum opinion of the United States District Court for the District of New Mexico granting in part and denying in part petitioners' motion to dismiss has not been reported. It is reprinted in the Appendix hereto at 26-59.

JURISDICTION

The Tenth Circuit filed its decision and entered judgment on May 3, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Respondent filed his original complaint in New Mexico state district court. Petitioners removed the case to the federal district court for the District of New Mexico based on federal question jurisdiction, 28 U.S.C. § 1331. The petitioners filed a motion to dismiss based on Fed. R. Civ. P. 12 and the doctrine of qualified immunity. The district court granted the

motion in part and denied it in part. The petitioners took interlocutory appeal to the United States Court of Appeals for the Tenth Circuit; the Tenth Circuit exercised jurisdiction under 28 U.S.C. § 1291.

Because the constitutionality and enforceability of New Mexico Statutes and Rules of Criminal Procedure are drawn into question in the instant action, 28 U.S.C. § 2403(b) may be applicable, and hence, petitioners have served the New Mexico Attorney General with this petition. Neither any of the parties, nor the lower federal courts in this case have certified to the Attorney General for the State of New Mexico the fact that the constitutionality of New Mexico statutes has been drawn into question by the instant litigation pursuant to 28 U.S.C. § 2403(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

> proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that petitioners violated his rights under the United States Constitution's Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

New Mexico Statute § 35-5-1 states:

> Whenever a peace officer makes an arrest without warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the peace officer and a copy given to the defendant at or before the time he is brought before the magistrate.

New Mexico Statute § 33-3-12 states:

> A. Every public officer who has power to order the imprisonment of any person for violation of law shall, on making such order, transmit to the sheriff, jail administrator or independent contractor of his respective county a true copy of the order so that the person imprisoned may be considered under his custody until expiration of the commitment or until further steps, as provided by law, are taken to obtain the prisoner's liberty, of which he shall, in due time, notify the sheriff, jail administrator or independent contractor in writing.
>
> B. Any jailer who deliberately and knowingly releases a prisoner without an order of release as provided in this section, except upon expiration of the prisoner's term of commitment, is guilty of a misdemeanor and shall be removed from office.

New Mexico Rule of Criminal Procedure for the Magistrate Courts 6-203 states:

> A. General Rule. In all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release a probable cause determination shall be made to determine if a person shall remain in custody. The probable cause determination shall be made by a magistrate,

metropolitan or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier.

B. Conduct of Determination. The probable cause determination shall be nonadversarial and may be held in the absence of the defendant and of counsel. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. No witnesses shall be required to appear unless the court determines there is a basis for believing the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier with sufficient facts to show probable cause for detaining the defendant.

C. Probable Cause Determination; Conclusion. If the court finds that the complaint

> fails to establish probable cause to believe that the defendant has committed an offense and no amendment is filed with sufficient facts to show probable cause for detaining the defendant, the court shall dismiss the complaint without prejudice and order the immediate release of the defendant. If the court finds probable cause that the defendant committed an offense, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court shall set conditions of release in accordance with Rule 6-401 NMRA. If the court finds that there is probable cause the court shall make such finding in writing.

STATEMENT OF THE CASE

Respondent's complaint alleged the following facts: Petitioner Deputy Lawrence Montano arrested the respondent, Michael Wilson, on December 18, 2010. Montano prepared a criminal complaint against Wilson alleging a misdemeanor offense. Respondent was booked in the Valencia County Detention Center. Petitioner Joe Chavez is the warden of the detention center. Petitioner Montano did not file the criminal complaint with the local magistrate court until after the respondent was released from custody. Respondent was released from the detention center on December 29, 2010 when the magistrate court issued an order

which stated "no complaint filed." The criminal complaint reached the magistrate court on January 4, 2011. The local district attorney dismissed the criminal complaint on April 11, 2011.

Respondent brought a claim against the arresting deputy (petitioner Montano), the sheriff of the county (petitioner Rivera), the transport officer (deputy Torres), the warden of the detention center (petitioner Chavez), and the John Doe booking clerks at the detention center. The petitioners recognized that respondent had stated an official capacity claim for the deprivation of a *Gerstein* determination, but moved to dismiss the claims against them in their individual capacities under the doctrine of qualified immunity arguing that, under established law, none of them had a clearly established duty to ensure a *Gerstein* determination. They also moved to dismiss a number of other claims for failure to state a claim.

The district court granted the motion in part, dismissing certain claims for failure to state a claim under which relief could be granted, but denied the individual capacity defendants qualified immunity on the *Gerstein* claim. The district court held that the arresting officer had a duty to ensure the *Gerstein* determination under N.M. Stat. Ann. § 35-5-1, *supra*. App. 42. The court then concluded that the sheriff and the warden had a duty to ensure the determination because N.M. Stat. Ann. § 4-37-4(A)(1) states: "[i]t is the duty of every county sheriff, deputy sheriff, constable and other county law enforcement officer to . . . enforce the provisions of all county ordinances"

and N.M. Stat. Ann. § 33-3-28 "provides that jailers and any other employee of a local or county jail shall have the authority and status of a peace officer." App. 44. The court made those decisions notwithstanding N.M. Stat. Ann. § 33-3-12(B) which states that it is a crime for a jailer to release a detainee without a court order and despite *Scull v. New Mexico*, 236 F.3d 588 (10th Cir. 2000), which held that New Mexico jailers were not required to investigate detainees' legal status. *Id.* at 598. The court held that the arresting officers, the sheriff, and the warden all had a clearly established duty to ensure a prompt *Gerstein* determination despite stating in its most recent case on *Gerstein*:

> Although Supreme Court opinions have clearly established the right to a prompt probable cause determination, they have not established that the duty to ensure that right rests with the arresting officer. Nor have any Tenth Circuit cases – or the majority of cases from other circuits – so held."

Strepka v. Miller, 28 Fed. Appx. 823, 830 (10th Cir. 2001) (unpublished).

The petitioners appealed to the Tenth Circuit on the basis of qualified immunity. Specifically, they argued that the precedent and the status of the law in New Mexico failed to provide them with sufficient information such that they would know the duty to ensure a prompt *Gerstein* determination was theirs and thus subject them to individual liability. The Tenth Circuit dismissed the transport officer for lack

of any allegations of personal participation in a constitutional deprivation, but affirmed the district court as to the warden, the sheriff, and the arresting officer. App. 25. The Tenth Circuit stated that the individual defendants could not rely on the *Strepka* case to support their argument that they could not have known that the breakdown in pretrial process for Mr. Wilson was their individual responsibility, despite *Strepka*'s language to the contrary. App. 10-12. The court also concluded that a memo from the New Mexico Administrative Office of the Courts, the administrative arm of the New Mexico Supreme Court, did not support the petitioners' claims that they could not have known the duty was theirs because of "the memo's silence on the duties of parties other than the magistrate courts. . . ." App. 24, fn. 8. The memo's directive to the courts stated that the provision of *Gerstein* determinations "is not the responsibility of the police or the jail; it falls squarely onto the court." Finally, the Tenth Circuit held that N.M. Stat. Ann. § 33-3-12, which prohibits jailers from releasing detainees without a court order to do so, was not relevant because it did not address *Gerstein* determinations and that respondent was not making a claim for the failure to release him; again, the court made this determination in contradiction of *Scull*, which stated that the jailer had no duty to investigate the status of a detainee whose warrant had been quashed. *Scull v. New Mexico*, 236 F.3d 588. App. 24-25.

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REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE, IN THE 22 YEARS SINCE *COUNTY OF RIVERSIDE*, THE LOWER COURTS HAVE DIVIDED ON THE ISSUE OF WHO HAS THE DUTY TO ENSURE A *GERSTEIN* DETERMINATION, THEREBY CREATING AMBIGUITY AND CONFUSION.

In its May 3, 2013, opinion, the Tenth Circuit held that it was clearly established that the duty to ensure a prompt probable cause determination, for a detainee arrested without a warrant, rests on the arresting deputy sheriff, the elected sheriff, and the warden of the detention center in their individual capacities. In its decision, the Court relied on *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The Court also looked to the decisions of other circuits, including the Sixth, Seventh, and Ninth Circuits to support its holding that the obligation to ensure a prompt probable cause determination is sufficiently clear that each individual capacity petitioner had an independent duty to ensure the determination.

In *Gerstein*, an individual was arrested and held based on a prosecutor's determination of probable cause. That plaintiff brought a claim arguing that he should be entitled to test probable cause shortly after his arrest. Florida law allowed for detention of about 30 days based solely on the discretion of the prosecutor. During the pendency of the case in the federal district court, the Florida legislature considered a

revision to the rules on pretrial procedure, and apparently made no changes. The federal district court eventually required the submission of a plan to provide pretrial probable cause determinations. The local officials submitted a plan; the plan allowed four days for a pretrial hearing. The plan was approved by the court. Florida appealed the case to the Fifth Circuit; the Fifth Circuit stayed the rulings pending appeal. During that time, the local state courts revised their own rules to provide for a procedure similar to the one ordered by the federal district court. The Fifth Circuit remanded to the district court for a determination of the new policy's constitutionality. Before the district court could conduct that analysis, the Florida Supreme Court revised the statewide criminal process. The new process required a hearing within 24 hours, but did not call for a probable cause determination. The federal district court found the new procedure to be unconstitutional; the Fifth Circuit affirmed and certiorari was granted. This Court held that individuals subjected to warrantless arrests must be provided a prompt probable cause determination. However, this Court did not comment on how "prompt" should be defined or interpreted. This Court did imply that the duty to obtain the determination may rest with the arresting officer when it noted the detention is acceptable during the time it takes "police [to] submit their evidence to the magistrate." *Id.* at 863.

In 1991, this Court explained the *Gerstein* requirement further in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). A detainee sued the County of

Riverside California and alleged that the process for providing probable cause determinations violated *Gerstein*. There, the policy was to provide the determinations within two days. However, no determinations were made during weekends and holidays such that it was possible that determinations would not be made for up to seven days in certain circumstances. This Court held that there is a rebuttable presumption of sufficient promptness if the probable cause determinations are made within forty-eight hours; this Court also held weekends and holidays would not extend the time for the determinations. As in *Gerstein*, this Court did not specifically state who had the duty to procure the probable cause determination from the local court. However, this Court implied that it was the police and the magistrate judges, but left the matter open for interpretation. See *County of Riverside* at 57 (noting that a more burdensome requirement would impair local resources "by allotting local tax dollars to hire additional police officers and magistrates"). That statement is in accord with the New Mexico Administrative Office of the Courts Memo which stated the duty "is not the responsibility of the police or the jail; it falls squarely onto the court." See also *id.* at 58 (stating "[e]veryone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail."). Justice Scalia reiterated the implication in the dissent when he stated:

> [T]he Fourth Amendment's prohibition of "unreasonable seizures," insofar as it applies to

seizure of the person, preserves for our citizens the traditional protections against unlawful arrest afforded by the common law. See *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991). One of those – one of the most important of those – was that a person arresting a suspect without a warrant must deliver the arrestee to a magistrate "as soon as he reasonably can." 2 M. Hale, Pleas of the Crown 95, n. 13 (1st Am. ed. 1847). See also 4 W. Blackstone, Commentaries * 289, * 293; *Wright v. Court*, 107 Eng.Rep. 1182 (K. B. 1825) ("[I]t is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can"); 1 R. Burn, Justice of the Peace 276-277 (1837) ("When a constable arrests a party for treason or felony, he must take him before a magistrate to be examined as soon as he reasonably can") (emphasis omitted). The practice in the United States was the same. See e.g., 5 Am.Jur.2d, Arrest, §§ 76, 77 (1962); *Venable v. Huddy*, 77 N.J.L. 351, 72 A. 10, 11 (1909); *Atchison, T. & S.F.R. Co. v. Hinsdell*, 76 Kan. 74, 76, 90 P. 800, 801 (1907); *Ocean S.S. Co. v. Williams*, 69 Ga. 251, 262 (1883); *Johnson v. Mayor and City Council of Americus*, 46 Ga. 80, 86-87 (1872); *Low v. Evans*, 16 Ind. 486, 489 (1861); *Tubbs v. Tukey*, 57 Mass. 438, 440 (1849) (warrant); Perkins, The Law of Arrest, 25 Iowa L.Rev. 201, 254 (1940). Cf. *Pepper v. Mayes*, 81 Ky. 673 (1884). It was clear, moreover, that the only element bearing upon the reasonableness of delay was not such

> circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention. 5 Am.Jur.2d, Arrest, supra, §§ 76, 77 (1962); 1 Restatement of Torts § 134, Comment b (1934); *Keefe v. Hart*, 213 Mass. 476, 482, 100 N.E. 558, 559 (1913); *Leger v. Warren*, 62 Ohio St. 500, 57 N.E. 506, 508 (1900); *Burk v. Howley*, 179 Pa. 539, 551, 36 A. 327, 329 (1897); *Kirk & Son v. Garrett*, 84 Md. 383, 405, 35 A. 1089, 1091 (1896); *Simmons v. Vandyke*, 138 Ind. 380, 384, 37 N.E. 973, 974 (1894) (dictum); *Ocean S.S. Co. v. Williams*, supra, at 263; *Hayes v. Mitchell*, 69 Ala. 452, 455 (1881); *Kenerson v. Bacon*, 41 Vt. 573, 577 (1869); *Green v. Kennedy*, 48 N.Y. 653, 654 (1871); *Schneider v. McLane*, 3 Keyes 568 (NY App. 1867); Annot., 51 L.R.A. 216 (1901). Cf. *Wheeler v. Nesbitt*, 24 How. 544, 552, 16 L.Ed. 765 (1860). Any detention beyond the period within which a warrant could have been obtained rendered the officer liable for false imprisonment. See, e.g., **1673 *Twilley v. Perkins*, 77 Md. 252, 265, 26 A. 286, 289 (1893); *Wiggins v. Norton*, 83 Ga. 148, 152, 9 S.E. 607, 608-609 (1889); *Brock v. Stimson*, 108 Mass. 520 (1871); Annot., 98 A.L.R.2d 966 (1964).1

Id. at 60-62 (Scalia, J., dissenting). The dissent continued by stating:

> In my view, absent extraordinary circumstances, it is an "unreasonable seizure"

> within the meaning of the Fourth Amendment for the police, having arrested a suspect without a warrant, to delay a determination of probable cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest. Like the Court, I would treat the time limit as a presumption; when the 24 hours are exceeded the burden shifts to the police to adduce unforeseeable circumstances justifying the additional delay.

Id. at 70 (Scalia, J., dissenting). Both the majority and the dissent implied that it is the arresting officer who has the duty to attempt to obtain a *Gerstein* determination.

However, since *County of Riverside*, the circuits have diverged in their analysis. In *Drogosch v. Metcalf*, 557 F.3d 372 (6th Cir. 2009), a parole agent with the Michigan Department of Corrections placed Edward Drogosch under arrest based on the mistaken belief that Drogosch had violated the terms of his probation. Because the agent did not have the proper type of paperwork with him to place Drogosch in the custody of the county jail as a probation violator, he decided to lodge Drogosch in the jail using a type of form that identified him as a parole violator, a class of prisoners that the agent knew would not be entitled to a prompt probable-cause hearing before a judge. As a result, Drogosch was held in jail for 13 days before being released. Drogosch sued the parole officer, a police officer, and the county. The district court

dismissed all but the parole officer who actually arrested Drogosch. The district court then denied immunity to the officer for the *Gerstein* claims; the agent appealed to the Sixth Circuit.

In affirming the district court, the Sixth Circuit held that, as the arresting officer, the agent was the individual responsible for ensuring that the detainee received a prompt *Gerstein* determination. *Id.* at 378-379. The Sixth Circuit relied on *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003) for the Sixth Circuit rule that one looks to state law to determine who is liable for the failure to provide a prompt probable cause determination. The Sixth Circuit held that Mich. Comp. Laws § 764.13 established that the obligation fell on the arresting officer. Mich. Comp. Laws Ann. § 764.13 states:

> [a] peace officer who has arrested a person for an offense without a warrant shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed, and shall present to the magistrate a complaint stating the charge against the person arrested.

Id. at 379.

Here, in *Wilson*, the Tenth Circuit relied on *Drogosch* and its analysis to deny immunity to individual capacity petitioners. In its analysis, the Tenth Circuit quoted N.M. Stat. Ann. § 35-5-1 which provides:

> Whenever a peace officer makes an arrest without warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the peace officer and a copy given to the defendant at or before the time he is brought before the magistrate.

Notwithstanding the nearly identical language of the statutes, the Tenth Circuit held that the obligation fell on, not only the arresting deputy, but also the sheriff, and the warden of the county detention center. Accordingly, a conflict between the Sixth and Tenth Circuits has developed despite similar statutory schemes. Further, as recognized by *County of Riverside*, the common law obligation rested with the arresting officer and there is no authority creating an obligation on anyone else to ensure the determination. Accordingly, the *Wilson* decision creates constitutional obligations on parties without any source of the requirement; thus, the obligation was not clearly established on the petitioners. The Tenth Circuit erred in its holding that each individual petitioner had the duty to ensure the *Gerstein* determination, in their individual capacities. That holding split from other circuits and from the dicta in *County of Riverside* and created an unpredictable and unmanageable rule.

In *Luck v. Rovenstine*, 168 F.3d 323 (7th Cir. 1999), the Seventh Circuit held that the official capacity

party who had physical custody over the detainee has the duty to ensure the probable cause determination, but held that the individual capacity defendants were entitled to qualified immunity. In *Luck*, an individual was arrested by the Indiana State Police when he admitted that he was involved in some thefts. The state police officer booked the detainee into a county detention center, under the custody of the county sheriff. The detainee was held for eight days without a probable cause determination, while continuously asking about his status. On the eighth day, the sheriff was informed that Luck had been held for eight days without a probable cause determination. The sheriff contacted the prosecutor's office who told the sheriff to release Luck; he was released the same day.

Luck brought a claim against the arresting officer and the sheriff. The officer settled with Luck and the sheriff sought qualified immunity and summary judgment. The district court granted summary judgment in favor of the sheriff in both individual and official capacities. Luck appealed to the Seventh Circuit. The Seventh Circuit reversed the district court as to the official capacity claim, but affirmed the grant of immunity on the individual capacity claims based on arguments nearly identical to those raised by the petitioners in *Wilson*. Thus, the Tenth Circuit's analysis conflicts with the Seventh Circuit.

The Fifth Circuit has also held that it is the arresting officer's duty to ensure a probable cause determination. In *Jones v. Lowndes County, Miss.*, 678 F.3d 344 (5th Cir. 2012), the Fifth Circuit affirmed

qualified immunity for the arresting officer in a *Gerstein* case. There, two individuals were arrested for suspicion of purchasing precursors for methamphetamine; they were arrested on a Saturday. The following Monday, the officer was unavailable to take the suspects before a magistrate due to his second job. They were held for three days without a probable cause determination. The arresting officer moved for summary judgment based on qualified immunity. The district court granted immunity and the detainees appealed. The Fifth Circuit held that Mississippi statutes, which read "every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case," and "every person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance" established that the duty fell on the arresting officer. *Id.* at 352. However, the Fifth Circuit granted qualified immunity based on the lack of an available judge over the weekend and the officer's second job interfering with his ability to get the detainees before a magistrate. This is in direct conflict with the *Wilson* decision because the statutes establishing the duty are very similar, yet the Fifth Circuit held that a second job and a closed court was sufficient to establish immunity, while the Tenth Circuit held that even a statute barring the warden from releasing an individual who has not had a probable cause determination, and a memo by the New Mexico Administrative Office of the Courts declaring that it was the magistrate court's obligation to

ensure the determination, was insufficient to illustrate the entitlement to immunity.

The Ninth Circuit, instead of looking directly to state law for some method of identifying the responsible party, has held that *Gerstein* and *County of Riverside* create the established obligation without a state requirement. In *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir. 1993), the Ninth Circuit reversed a grant of qualified immunity to a jail commander in a *Gerstein* claim. There, a person was arrested for driving without a license. She repeatedly requested presentation before a magistrate and she refused to answer questions. She was charged with traffic offenses and obstruction of justice; she was not provided with a probable cause determination for four days. She was eventually released on bail. She subsequently brought a *Gerstein* claim against various county and city officials. The district court granted qualified immunity to the jail commander. In its reversal of qualified immunity, the Ninth Circuit noted, "the police should make every attempt to minimize the time a presumptively innocent individual spends in jail." *Id.* at 1481. The Ninth Circuit then went on to reverse the grant of qualified immunity to the jail commander and to remand for a determination on immunity for the arresting officers without citation to any state statute or rule establishing that the commander had a duty to ensure the probable cause determination.

As illustrated above, the outcome of a *Gerstein* claim depends on which circuit rules on the question.

That outcome runs afoul of federalism as recognized by *County of Riverside* in which, this Court stated:

> Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. In so doing, we gave proper deference to the demands of federalism. We recognized that state systems of criminal procedure vary widely in the nature and number of pretrial procedures they provide, and we noted that there is no single preferred approach. We explained further that flexibility and experimentation by the States with respect to integrating probable cause determinations was desirable and that each State should settle upon an approach to accord with the State's pretrial procedure viewed as a whole. Our purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways.

Id. at 53 (internal citation and quotation removed).

County of Riverside stands for the proposition that the arresting officer has the duty to ensure a prompt probable cause determination, but the method in which the State conducts the procedure is a State procedural matter. In New Mexico, the statutory obligations, which are very similar to those in Michigan, express a clear intent to relieve the warden and the

sheriff, in their individual capacities, from the obligation to obtain probable cause determinations for warrantless arrestees. Accordingly, the Tenth Circuit erred when it held that there was a clearly established obligation for individual capacity defendants to ensure a prompt probable cause determination or face claims for punitive damages. The Tenth Circuit so held despite its most recent decision on *Gerstein* stating that it is "not established that the duty to ensure [prompt probable cause determinations] rests with the arresting officer." *Strepka v. Miller*, 28 Fed. Appx. 823, 830 (10th Cir. 2001) (unpublished). *Strepka* was written after *Luck* and *Drogosch* and stood for the proposition that neither this Court, nor the majority of circuits, had established who had the duty to ensure prompt probable cause determination.

Given that statement, and the memo of the New Mexico Administrative Office of the Courts' affirmation that the provision of *Gerstein* determinations "is not the responsibility of the police or the jail; it falls squarely onto the [magistrate] court," it is difficult to understand how the individual capacity petitioners could have had sufficient warning that they had the duty to ensure the determination or face individual liability. This is especially true when they are powerless to force the courts to act and are barred by law from releasing the detainees if the court does not act. See generally Memo from New Mexico Administrative Office of the Courts to all New Mexico Magistrate Judges. The result in *Wilson* illustrates the circuit split regarding who, in fact, may be named in an individual capacity if a detainee is deprived of a

Gerstein determination. This issue is of great significance to the States to be able to determine the process by which *Gerstein* determinations are made; the outcome likewise has a profound impact on state criminal procedural rules. Further, this issue is of national importance because the lack of clarity on this issue has the opportunity to create unnecessary delays due to the ambiguity in who shall obtain the determination. Wherefore, the petitioners request that this Court grant the writ to address this issue which has been developing for the last 22 years within the Circuits.

II. *GERSTEIN*, *RIVERSIDE*, AND THE CONFLICTING OPINIONS OF THE CIRCUIT COURTS HAVE CREATED A SURGE IN LITIGATION AND THE *WILSON* HOLDING CREATES A SIGNIFICANT LIKELIHOOD OF VOLUMINOUS LITIGATION SEEKING PUNITIVE DAMAGES.

A surge in the volume of *Gerstein* and *Riverside* litigation is evident by even a cursory review of federal court opinions at all levels. See *Lingenfelter v. Bd. of Cnty. Comm'rs of Reno Cnty., Kan.*, 359 F. Supp. 2d 1163, 1166 (D. Kan. 2005) (Sheriff of Reno County as the County officer is directly responsible for law enforcement in Reno County and for the operation of the jail; therefore, the sheriff was not entitled to qualified immunity when plaintiff was held for eight days without a probable cause determination); *Spencer v. Boysen*, 1:13-CV-105, 2013 WL 3805734

(W.D. Mich. July 22, 2013) (In Michigan, it is the arresting officer's duty to bring the arrestee before the magistrate for a determination of probable cause. See *Oxford v. Berry*, 170 N.W. 83 (Mich. 1918); Mich. Comp. Laws § 764.13); *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003) (Holding it is possible that either the police chief and private investigator had a duty under Ohio law to see that plaintiff was promptly brought before a magistrate for a determination of probable cause); *Jones v. Lowndes Cnty., Miss*., 678 F.3d 344 (5th Cir. 2012) (As arresting officer, defendant was responsible for ensuring the arrestees were promptly brought before a magistrate); *Stone v. Holzberger*, 807 F. Supp. 1325 (S.D. Ohio 1992), *aff'd*, 23 F.3d 408 (6th Cir. 1994) (As the arresting officer, sheriff had the burden of ensuring that plaintiff was taken before a magistrate without unreasonable delay); *Austin v. Hamilton*, 945 F.2d 1155 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones*, 515 U.S. 304 (1995) (defendants, who effected the plaintiffs' arrests and detentions, could be held liable for the plaintiffs' prolonged detentions without probable cause).

In addition, a number of alleged class actions have arisen with significant claims for punitive damages, including the member case which has been consolidated with *Wilson*, *Sarrett et al. v. Valencia County et al*. See, e.g., *S.L. v. Pierce Tp. Bd. of Trustees*, 1:07-CV-986 (S.D. Ohio May 17, 2013); *Donovan v. St. Joseph Cnty. Sheriff*, 3:11-CV-133-TLS (N.D. Ind. May 3, 2012); and *Lewis v. Dart*, 1:10-CV-04247 (N.D. Ill. July 22, 2010). Respondent has made a claim for punitive

damages against the petitioners in their individual capacity status. Since *County of Riverside*, the circumstances in which a plaintiff may state a *Gerstein* claim has expanded. Specifically, some courts have held that court closure and magistrate unavailability does not excuse a violation. See, e.g., *Deaton v. McMillin*, 3:08-CV-763-DPJ-FKB, 2012 WL 393087 (S.D. Miss. Feb. 6, 2012). Other courts have held that subsequent plea or conviction does not bar *Gerstein* claims. See, e.g., *Wishom v. Hill*, 5:01-CV-03035-KHV, 2004 WL 303571 (D. Kan. Feb. 13, 2004). Because these claims are raised against individual capacity parties, respondent has sought punitive damages. See *Smith v. Wade*, 461 U.S. 30 (1983) (recognizing that punitive damages may be recoverable against municipal employees when sued in their individual capacities pursuant to a § 1983 claim). The availability of class action claims for punitive damages is especially troubling when, as in the member case, plaintiffs bring claims against wardens on behalf of alleged classes which have not been arrested by the local law enforcement, but instead are simply housed in the county jail awaiting process by other law enforcement agencies. The status of the law nationally leaves open the question of who has the duty to ensure *Gerstein* determinations. That open question subjects individual capacity defendants to unpredictable standards, some of which result in claims for punitive damages where the defendant is prohibited by law from releasing a detainee if the local magistrate refuses to act or the officer fails to obtain the determination from the judge.

Given the potential for punitive damages, the use of class actions, the continuously expanding circumstances in which courts are recognizing the availability of the claim, and the lack of any predictability even in States with nearly identical probable cause statutes, this Court should grant the writ of certiorari to resolve the question as to who is responsible to ensure *Gerstein* determinations and provide a clear predictable rule of law.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals.

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MICHAEL WILSON, Sr.,

Plaintiff-Appellee,

JESSE ORTIZ; OSCAR LEYVA; PATRICK MARQUEZ; MARK SANCHEZ; DUSTN SARRETT,

Plaintiffs,

v.

LAWRENCE MONTANO, Deputy; FRED TORRES, Deputy; JOE CHAVEz, Warden; RENE RIVERA, former Sheriff;

Defendants-Appellants,

JOHN DOE, VCDC booking officer or employee; MARTIN BENAVIDEZ, Officer; MIKE CHAVEZ, former Chief of Police; BRENT WOODARD; NICK BALIDO, former Los Lunas Police Department, Chief of Police; LOUIS BURKHARD, Sheriff; DELINDA CHAVEZ; JOSEPH CHAVEZ; ROY A. CORDOVA; GREG JONES, Bosque Farms Police Department, Police Chief; ROY MELNICK, Los Lunas Police

No. 12-2051

(Filed May 3, 2013

Department, Chief of Police; DAN ROBB, Belen Police Department, Chief of Police; STEVEN ROBERTS; DEREK WILLIAMS; JOE STIDHAM, Former Bosque Farms Police Department, Police Chief,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. NO. 1:11-CV-00658-BB-KBM)

Brandon Huss, Wallin, Huss & Mendez, LLC, Moriarty, New Mexico (Dennis K. Wallin, Wallin, Huss & Mendez, LLC, Moriarty, New Mexico, and Mary T. Torres, Beall & Biehler, Albuquerque, New Mexico, with him on the briefs), for Defendants-Appellants.

Matthew Coyte, Coyte Law P.C., Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **MATHESON**, **EBEL**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

Appellants seek reversal of the district court's order denying their motion to dismiss claims asserted against them by Michael Wilson, Sr. under 42 U.S.C. § 1983. Wilson alleges he was unlawfully detained and deprived of his constitutional right to a prompt probable cause determination. Appellants claim they are entitled to qualified immunity. The district court concluded Wilson's complaint alleged sufficient facts to state a plausible claim against each of the appellants for violating his Fourth Amendment rights. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court **affirms** in part and **reverses** in part.

II. Background[1]

On December 18, 2010, Wilson was arrested without a warrant by Lawrence Montano, a deputy with the Valencia County Sheriff's Office ("VCSO") in New Mexico. Montano asked Deputy Fred Torres to transport Wilson to the Valencia County Detention Center ("VCDC"). Prior to booking Wilson into the VCDC, Montano prepared a criminal complaint listing the charge against Wilson as a misdemeanor offense. Neither Montano nor Torres ever filed the criminal complaint in a court with jurisdiction or

[1] The facts set forth here are drawn from the allegations in Wilson's complaint, which must be taken as true when considering a motion to dismiss. *Brown v. Montoya,* 662 F.3d 1152, 1162 (10th Cir. 2011).

brought Wilson before a judicial officer for a probable cause determination during the time he was held at the VCDC. On December 29, 2010, eleven days after his arrest, Wilson was released from the VCDC by order of a magistrate judge. In the order, the magistrate noted no complaint had been filed. On January 4, 2010, after Wilson was released, Montano filed the misdemeanor criminal charge in an appropriate court. On April 11, 2011, the district attorney's office dismissed the charge due to insufficient evidence.

Wilson brought suit under 42 U.S.C. § 1983. His complaint named as defendants Deputies Montano and Torres; Joe Chavez, the warden of VCDC; and Rene Rivera, the Valencia County Sheriff during the time of Wilson's detention. Chavez and Rivera were named in both their individual and official capacities. Count I of the complaint alleged the defendants engaged in "Illegal and Unreasonable Detention in Violation of the Fourth Amendment." Counts III and IV alleged Warden Chavez and Sheriff Rivera, respectively, were liable for establishing an unconstitutional policy or custom and deliberate indifference.[2] Wilson alleged the deputies deliberately detained him without filing a criminal complaint or bringing him before a judicial officer for a probable cause determination. He further asserted that, prior to his detention, there

[2] The complaint also alleged violations of the Fifth and Fourteenth Amendments and the New Mexico State Tort Claims Act and requested injunctive and declaratory relief. Those claims are not at issue in this appeal.

were numerous incidents in which VCDC held individuals without filing criminal charges or otherwise allowing them to appear before a magistrate judge. Wilson thus alleged his detention was the result of a policy established by Warden Chavez in which individuals were routinely held without the filing of criminal charges until they were released by *sua sponte* court orders, and that Warden Chavez trained his staff to accept inmates without the filing of charges. Wilson also asserted Warden Chavez was deliberately indifferent to the unconstitutional policy of incarcerating citizens without pending charges.

Wilson made substantially similar claims against Sheriff Rivera. He alleged there were numerous prior incidents in which VCSO deputies arrested individuals without a warrant and thereafter failed to file criminal complaints or provide prompt probable cause determinations. He asserted these illegal detentions, including his own, were the result of a policy or custom established by Sheriff Rivera. He also alleged Sheriff Rivera failed to train his staff, which resulted in the routine incarceration of individuals without legal process. In addition, Wilson alleged Sheriff Rivera was deliberately indifferent to the constitutional violations which resulted from his policies, customs, and/or failure to train his employees.[3]

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[3] In addition to Wilson's, two other suits were filed relating to the detention of individuals at the VCDC. In *Ortiz v. Benavidez*, No. 11-cv-0951, Jesse Ortiz alleged he was arrested without a warrant and detained at the VCDC for twelve days

(Continued on following page)

Appellants jointly filed a motion to dismiss Wilson's claims, arguing, *inter alia,* Wilson's complaint failed to state a claim against any of the defendants in their individual capacities[4] and each of the defendants was entitled to qualified immunity. The district court denied the motion, and this appeal followed.[5]

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without a probable cause hearing. The *Ortiz* complaint alleged Warden Chavez established a policy or custom of holding citizens without pending charges, trained his staff to accept detainees without the filing of charges or a probable cause hearing, and was deliberately indifferent to the violations of detainees' constitutional rights. In *Sarrett v. Cordova*, No. 11-cv-1021, four plaintiffs made similar allegations of warrantless arrest and subsequent detention at the VCDC without a probable cause hearing. The *Sarrett* complaint alleged Warden Chavez and Sheriff Rivera implemented a policy or practice of holding citizens without criminal complaints or probable cause determinations. Due to common questions of law and fact, the district court consolidated *Ortiz* and *Sarrett* with Wilson's case.

[4] Appellants did not move to dismiss Wilson's claims against them in their official capacities.

[5] Wilson's complaint also includes as a defendant "John Doe VCDC Booking Officer or Employee." On appeal, the parties proceed as though the district court denied qualified immunity to Doe and Doe subsequently appealed. The district court, however, did not resolve any of the claims against Doe. Further, while appellants purport to raise arguments on Doe's behalf in their brief, neither counsel for Montano, Torres, and Chavez nor counsel for Rivera have claimed to represent Doe. Wilson's claims against Doe are therefore not properly before this court, and we express no opinion on their merits.

III. Discussion

A. Jurisdiction and Standard of Review

Although an order denying a motion to dismiss based on qualified immunity is not a final judgment, this court has jurisdiction under 28 U.S.C. § 1291 to review the order "to the extent that it turns on an issue of law." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). This court reviews the district court's denial of a motion to dismiss based on qualified immunity de novo, accepting as true all well-pleaded factual allegations in the complaint and viewing the allegations in the light most favorable to the non-moving party. *Brown v. Montoya,* 662 F.3d 1152, 1162 (10th Cir. 2011). The Supreme Court recently articulated in detail the standard for evaluating a motion to dismiss based on qualified immunity:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555-57 (2007)). In the context of a § 1983 action against multiple individual governmental actors, "it is particularly important . . . that the complaint make clear exactly *who* is alleged to have done *what to whom*, to provide each individual with fair notice as to the basis of the claims against him or her." *Robbins v. Oklahoma,* 519 F.3d 1242, 1250 (10th Cir. 2008).

Consistent with Supreme Court precedent, this court requires a plaintiff to "allege sufficient facts that show – when taken as true – the defendant plausibly violated his constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker,* 702 F.3d 573, 579 (10th Cir. 2012). For a constitutional right to be clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Even when the plaintiff pleads a violation of a clearly established right, the court must sometimes consider "whether extraordinary circumstances – such as reliance on the advice of counsel or on a statute – so prevented the official from knowing that his or her actions were unconstitutional that he or she should not be imputed with knowledge of a clearly established right." *Shero v. City of Grove,* 510 F.3d 1196, 1204 (10th Cir. 2007). This court has discretion to decide which prong of the qualified immunity test to address first in light of the

circumstances of each particular case. *Brown,* 662 F.3d at 1164.

B. Duty to Ensure Prompt Probable Cause Determination

Appellants do not dispute that Wilson had a Fourth Amendment right to a prompt probable cause determination, and that such a right was clearly established at the time of Wilson's detention at the VCDC. *Cnty. of Riverside v. McLaughlin,* 500 U.S. 44, 56 (1991) (holding an arrestee is entitled to a probable cause determination within forty-eight hours absent "a bona fide emergency or other extraordinary circumstance"); *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."). Appellants nonetheless argue they are entitled to qualified immunity because there is no clearly established law delineating which of them had the obligation to provide Wilson with a probable cause hearing. In support of this argument, appellants rely heavily on an unpublished case from this circuit, *Strepka v. Miller,* 28 F. App'x. 823 (10th Cir. 2001). In *Strepka,* this court affirmed the dismissal of a § 1983 claim alleging officers violated the plaintiff's right to a prompt judicial determination of probable cause. *Id.* at 825-30. Analyzing the plaintiff's complaint against the officers in their individual capacities, we concluded: "Even under the most liberal construction, plaintiff's complaint was devoid of any allegations showing

that any of the arresting officers caused or participated in the delay in providing plaintiff a prompt probable cause determination." *Id.* at 828. We also affirmed the denial of the plaintiff's Rule 59(e) motion objecting to the dismissal and seeking leave to amend, concluding that although the proposed amended complaint would "probably" be sufficient to state a claim against the two arresting officers, remand would be futile because the officers would still be entitled to qualified immunity. *Id.* at 829-30. Specifically, we stated: "Although Supreme Court opinions have clearly established the right to a prompt probable cause determination, they have not established that the duty to ensure that right rests with the arresting officer. Nor have any Tenth Circuit cases – or the majority of cases from other circuits – so held." *Id.* at 830.

To the extent appellants rely on *Strepka* for the proposition that each of them is entitled to qualified immunity because it is not clearly established which of them is responsible for violating Wilson's constitutional rights, we are unpersuaded. First, as an unpublished decision, *Strepka* is not binding on this court. *See* 10th Cir. R. 32.1(A). Second, *Strepka*'s assertion this court has never held that an arresting officer has a duty to ensure an arrestee receives a prompt probable cause determination is inaccurate. In *Austin v. Hamilton,* 945 F.2d 1155, 1162-63 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones,* 515 U.S. 304, 309-20 (1995), this court affirmed the denial of summary judgment to federal

agents who refused to provide detainees with probable cause hearings.[6] Finally, we are persuaded by the opinions of other circuits which have rejected appellants' position that "someone else" had a duty to provide a prompt probable cause determination. *See Drogosch v. Metcalf,* 557 F.3d 372, 378-79 (6th Cir. 2009) (looking to state law to determine who is responsible for ensuring a prompt probable cause determination after arrest and concluding, in Michigan,

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[6] Appellants' attempts to distinguish *Austin* are unpersuasive. First, appellants argue *Austin* does not establish who has the duty to ensure a detainee receives a probable cause determination. *Austin* did, however, conclude the defendants, who effected the plaintiffs' arrests and detentions, could be held liable for the plaintiffs' prolonged detentions without probable cause. *Austin v. Hamilton,* 945 F.2d 1155, 1162-63 (10th Cir. 1991), *abrogated on other grounds by Johnson v. Jones,* 515 U.S. 304, 309-20 (1995). In so concluding, the court in *Austin* read *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), as sufficient authority to overcome the defendants' assertions of qualified immunity. *See id.* at 1162. At minimum, *Austin* undermines appellants' position that it is wholly unclear who has the duty to ensure a prompt probable cause determination. Second, appellants argue the additional allegations in *Austin* of excessive force and intentional detention without a probable cause determination somehow distinguish it from the present case. *Austin*'s analysis of the excessive force claims, however, is separate from its analysis of the intentional prolonged detention claims. Finally, appellants argue *Strepka* supercedes *Austin* or, at the very least, indicates the law is unclear as to who has the duty to ensure a prompt probable cause determination. *Strepka,* however, is not precedential. *See* 10th Cir. R. 32.1. Further, the court in *Austin* stated the plaintiffs' claims for prolonged detention "do not implicate unsettled law" and "invoke[d] settled fourth amendment principles predating the circumstances of this case." *Austin,* 945 F.2d at 1162.

responsibility lies with the arresting officer); *Cherrington v. Skeeter,* 344 F.3d 631, 642-45 (6th Cir. 2003) ("*County of Riverside* itself . . . would have alerted a reasonable official to . . . the existence of Cherrington's Fourth Amendment right to a judicial determination of probable cause within 48 hours. . . . Under the present record, therefore, the individual Defendants are not entitled to qualified immunity on Plaintiff Cherrington's Fourth Amendment claim. . . ."); *Luck v. Rovenstine,* 168 F.3d 323, 326 (7th Cir. 1999) ("We find unconvincing the sheriff's attempt to shrug off his federal constitutional responsibilities toward detainees . . . who have not yet had a probable cause hearing."); *Hallstrom v. City of Garden City,* 991 F.2d 1473, 1482-83 (9th Cir. 1993) (denying qualified immunity to sheriff and jail commander for holding plaintiff for four days without probable cause determination).

Although we reject appellants' argument that the law is insufficiently clear to hold any of them responsible for ensuring Wilson received a prompt probable cause determination after his detention, it does not follow that all are necessarily liable. "Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel,* 118 F.3d 1416, 1423 (10th Cir. 1997). Thus, we must examine the allegations in the complaint as to each individual appellant to determine whether a plausible claim for relief is stated. We consider New Mexico state law insofar as it bears on the scope of each appellant's responsibility to ensure

a prompt probable cause determination. *See Cherrington,* 344 F.3d at 644 ("[B]efore a defendant may be held liable under section 1983, that defendant must first *possess* power by virtue of state law, then *misuse* that power in a way that violates federal constitutional rights.").

C. Personal Involvement of Individual Defendants

1. Non-Supervisory Defendants

a. Torres

Wilson's allegations against Torres are limited. Wilson's complaint alleges Torres transported him from his home to the VCSO at Montano's request. The remainder of the allegations against Torres revolve around Torres' failure to file charges against Wilson or otherwise ensure Wilson received a probable cause hearing. Further, although Wilson refers to Torres as an "arresting officer" in his briefing before this court, his complaint does not indicate Torres was an arresting officer. At most, the complaint alleges Torres "assisted" Montano in effecting the arrest. Appellants' App. at 22. Further, Wilson is unable to cite any authority indicating Torres had a duty to ensure he received a prompt probable cause hearing. While Wilson cites ample authority defining the scope of an arresting officer's duties under New Mexico law related to ensuring an arrestee receives a prompt probable cause determination, *see infra* Part III.C.1.b, none of the cited authorities indicate such duties

extend to any officer who assists in an arrest. Wilson's complaint therefore lacks sufficient allegations to state a plausible claim that Torres was personally involved in the violation of his right to a prompt probable cause determination. The district court therefore erred in denying the motion to dismiss as to Torres.

b. Montano

The complaint alleges Montano arrested Wilson without a warrant. The complaint further alleges Montano wrote out a criminal complaint, but failed to file it in any court with jurisdiction to hear the misdemeanor charge until well after Wilson was released from the VCDC. Thus, the complaint alleges Montano was the arresting officer and that he failed to initiate the criminal process by filing criminal charges or otherwise ensure Wilson was brought before a judge for a prompt probable cause determination. New Mexico law makes clear an arresting officer has a duty to ensure an arrestee receives a prompt probable cause determination. N.M. Stat. Ann. § 35-5-1 provides:

> Whenever a peace officer makes an arrest without warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the peace officer and a copy

> given to the defendant at or before the time he is brought before the magistrate.

As discussed *supra* Part III.B, appellants concede an arrestee has a clearly established constitutional right to a prompt probable cause hearing, i.e., a hearing within forty-eight hours after arrest. *See Cnty. of Riverside,* 500 U.S. at 56; *Gerstein,* 420 U.S. at 114. Thus, the complaint alleges Montano, in contravention of his duties under New Mexico law, deprived Wilson of his clearly established constitutional rights.

These allegations, taken as true, are sufficient to overcome Montano's assertion of qualified immunity. *See Drogosch,* 557 F.3d at 378-79 (applying a substantially similar Michigan statute to conclude arresting officer was not entitled to qualified immunity for violating arrestee's rights under *Gerstein*); *Cherrington,* 344 F.3d at 644 (holding arresting officers potentially liable for violating arrestee's rights under *Gerstein* when Ohio law placed duty to ensure prompt probable cause determination on arresting officer); *Hallstrom,* 991 F.2d at 1478-82 & 1482 n.22 ("[T]he laws of Idaho guaranteeing timely presentation to a magistrate . . . place substantive limitations on official discretion and contain explicitly mandatory language sufficient to create a liberty interest protected by the Fourteenth Amendment and actionable under Section 1983." (quotations and alterations omitted)); *see also Cnty. of Riverside,* 500 U.S. at 52-53 (permitting states to develop their own specific procedures to ensure prompt probable cause determinations). Further, a reasonable official in Montano's

position "would understand that what he is doing violates" Wilson's right to a prompt probable cause hearing. *Anderson,* 483 U.S. at 640. The complaint therefore alleges sufficient personal involvement on Montano's part to state a plausible claim for relief under § 1983, and the district court correctly denied appellants' motion to dismiss as to Montano.[7]

[7] Appellants characterize Wilson's allegations against Montano as asserting he failed to timely file a complaint. Moreover, appellants argue, because New Mexico's Rules of Criminal Procedure for Magistrate Courts provide that a complaint can be filed more than forty-eight hours after arrest, *see* N.M.R.A. 6-201, the timely filing of a criminal complaint does not ensure a prompt probable cause determination in all cases. Appellants therefore assert Wilson's allegation that Montano failed to timely file a complaint is insufficient to show Montano's personal involvement in the violation of Wilson's right to a prompt probable cause determination. These arguments are unpersuasive. First, Wilson alleged not that Montano failed to timely file criminal charges, but that Montano failed to take any action whatsoever to ensure a prompt probable cause determination while Wilson was being held at the VCDC. Second, Wilson need not allege that the timely filing of a criminal complaint will always ensure a defendant receives a timely probable cause determination in every possible circumstance. It is sufficient to withstand a motion to dismiss that his allegations support an inference of causation in this case. Drawing all inferences in the light most favorable to Wilson, we can readily conclude the complaint sufficiently alleges Montano's failure to promptly file criminal charges caused Wilson's prolonged detention.

2. Supervisory Defendants

In *Dodds v. Richardson,* this court held a plaintiff may establish the individual liability of a supervisor for a constitutional violation under § 1983 by demonstrating: "(1) the defendant promulgated, created, implemented or possessed personal responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional violation." 614 F.3d 1185, 1199 (10th Cir. 2010). The plaintiff in *Dodds* brought a § 1983 suit, alleging a sheriff, acting in his individual capacity, "violated his Fourteenth Amendment due process rights by depriving him of his protected liberty interest in posting bail." *Id.* at 1189. The district court denied the sheriff's qualified-immunity based motion for summary judgment, and the sheriff appealed. *Id.* at 1190. This court recognized that "Oklahoma law charged Defendant as sheriff with the responsibilities of running the county jail and accepting bail from . . . arrestees." *Id.* at 1203. Thus, "Oklahoma law made Defendant responsible for the policies that operated and were enforced by his subordinates at the jail." *Id.* Moreover, the sheriff admitted that he allowed the policies, which caused the deprivation of Dodds' constitutional rights, to operate. *Id.* The facts showed the sheriff's conduct in maintaining these policies at the jail caused Dodds to be deprived of his due process rights and, therefore, showed the sheriff was personally involved in the constitutional deprivation. *Id.* at 1204.

This court also concluded: "Plaintiff's right to be free from unjustified detention after his bail was set was clearly established such that a reasonable official in Defendant's position [at the time] would have understood that his deliberately indifferent maintenance of the policies that prevented arrestees from posting preset bail for no legitimate reason violated the Constitution." *Id.* at 1206. In so concluding, this court noted that "other cases of ours and the great weight of authority from other circuits clearly established by 2007 that officials may be held individually liable for policies they promulgate, implement, or maintain that deprive persons of their federally protected rights." *Id.* at 1207. We therefore held the plaintiff had "shown facts that, if proven at trial, establish Defendant violated his clearly established rights." *Id.*

New Mexico law sets forth the respective duties of wardens and sheriffs in ensuring detainees receive a prompt probable cause determination. New Mexico law charged Sheriff Rivera with the responsibility of running the VCDC and ensuring arrestees received a prompt probable cause determination. *See, e.g.,* N.M. Stat. Ann. § 4-37-4(A) ("It is the duty of every county sheriff . . . to: (1) enforce the provisions of all county ordinances; [and] (2) diligently file a complaint or information alleging a violation if circumstances would indicate that action to a reasonably prudent person. . . ."); *id.* § 4-41-2 ("The sheriff shall be conservator of the peace within his county" and shall "cause all offenders to . . . appear at the next term of

the court and answer such charges as may be preferred against them."); *id.* § 29-1-1 (declaring it "the duty of every sheriff . . . to . . . diligently file a complaint or information, if the circumstances are such as to indicate to a reasonably prudent person that such action should be taken. . . ."); *id.* § 31-1-5(B) ("Every accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay."); *id.* § 33-3-1(A) ("The common jails shall be under the control of the respective sheriffs. . . ."). New Mexico law charged Warden Chavez with similar responsibilities. *See, e.g., id.* § 33-1-2(E) (stating " 'warden' . . . means the administrative director of a correctional facility"); *id.* § 33-2-15 ("The employees of the penitentiary shall perform such duties in the charge and oversight of the penitentiary, care of the property belonging thereto, and in the custody, government, employment and discipline of the convicts as shall be required of them by the corrections division [corrections department] or the warden, in conformity with law and rules and regulations prescribed for the government of the penitentiary."); *id.* § 33-3-1(A) ("The common jails shall be under the control of the respective . . . jail administrators hired by the board of county commissioners or other local public body or combination thereof. . . ."). Thus, under New Mexico law both Warden Chavez and Sheriff Rivera were responsible for the policies or customs that operated and were enforced by their subordinates at the VCDC and VCSO and for any failure to adequately train their subordinates. We therefore consider the allegations

against each supervisory defendant to determine whether they meet the *Dodds* requirements for imposing individual liability under § 1983.

a. Warden Chavez

The complaint alleges Warden Chavez "established a policy or custom of holding citizens without pending criminal charges until the court filed orders of release sua sponte." Allegedly, these policies or customs were "a significant moving force behind Plaintiff's illegal detention." The complaint further alleges Warden Chavez's policy of holding citizens without court orders caused the violation of Wilson's Fourth Amendment right to a prompt probable cause determination. That is, because Warden Chavez failed to require the filing of written complaints, detainees, including Wilson, were held at the VCDC without receiving prompt probable cause determinations. The complaint also alleges Warden Chavez inappropriately trained his employees, which led to the violation of Wilson's right to a prompt probable cause determination. Indeed, the complaint alleges there were numerous occasions where the VCDC and the VCSO held individuals for days and, on some occasions, weeks, without law enforcement taking those individuals before a magistrate judge.

These allegations, taken as true, sufficiently establish Warden Chavez promulgated policies which caused the constitutional harm of which Wilson complains, i.e., his prolonged detention without a

probable cause hearing. *See Dodds,* 614 F.3d at 1195-96 (stating a causal connection is alleged by claiming a supervisor defendant "set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive plaintiff of [his] constitutional rights" (quotations omitted)). That Wilson has not alleged he had any direct contact with Warden Chavez or that Warden Chavez actually knew of Wilson's specific circumstances is of no consequence. *See id.* at 1195 ("Personal involvement does not require direct participation because § 1983 states any official who 'causes' a citizen to be deprived of her constitutional rights can also be held liable." (quotations and alteration omitted)).

Finally, the complaint alleges sufficient facts to establish Warden Chavez acted with the requisite mental state. To establish a violation of § 1983 by a defendant-supervisor, the plaintiff must establish, at minimum, a deliberate and intentional act on the part of the supervisor to violate the plaintiff's legal rights. *Porro v. Barnes,* 624 F.3d 1322, 1327-28 (10th Cir. 2010). The complaint alleges Warden Chavez acted with deliberate indifference to routine constitutional violations occurring at the VCDC. This allegation is supported by Wilson's assertions that there were numerous prior occasions in which individuals at the VCDC and VCSO were subject to prolonged warrantless detention. *See supra* n.3. Appellants do not challenge the district court's conclusion that deliberate indifference is a sufficiently culpable mental state to impose supervisory liability under § 1983.

The complaint's allegations against Warden Chavez therefore state a plausible claim for relief under *Dodds,* and the district court did not err in denying the motion to dismiss as to Warden Chavez.

b. Sheriff Rivera

The allegations in the complaint as to Sheriff Rivera are similar to those against Warden Chavez. The complaint alleges Sheriff Rivera "established a policy or custom of allowing officers to arrest people and wait before filing charges;" that "[i]n some circumstances this policy or custom resulted in the arrest and detention of citizens with charges never being filed;" that Sheriff Rivera was deliberately indifferent to the ongoing constitutional violations which occurred under his supervision and due to his failure to adequately train his employees; that the "routine warrantless arrest and incarceration of citizens without charges being filed amounted to a policy or custom of VCSO which was set forth by [Sheriff] Rivera," and that such policy was "a significant moving force behind [Wilson's] illegal detention." As with Warden Chavez, these allegations, if proven, are sufficient to establish Sheriff Rivera's individual liability for Wilson's unconstitutional detention under *Dodds,* and the district court did not err in denying the motion to dismiss as to Sheriff Rivera.

D. Additional Arguments

1. Magistrate Court Rules

Notwithstanding the numerous New Mexico statutes which spell out in detail the duties of the arresting officers, warden, and sheriff as they relate to providing citizens with a prompt post-arrest probable cause determination, appellants cite to several provisions of New Mexico's Rules for Magistrate Courts in an attempt to argue it is unclear who has the responsibility for ensuring an arrestee ensures a prompt probable cause determination. *See* N.M.R.A. 6-201(D) ("If the court is not open at the time the copy of the complaint is given to the defendant, and the defendant remains in custody, the complaint shall be filed the next business day of the court."); N.M.R.A. 6-203(A) ("The probable cause determination shall be made by a magistrate, metropolitan or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier.") Appellants take the position that, because these provisions do not explicitly assign responsibility for ensuring a prompt probable cause determination is made to one particular party (e.g. the sheriff, warden, arresting officer, or court), it cannot be clearly established that any of them violated Wilson's constitutional rights. This argument is unavailing. The rules cited by appellants are not inconsistent with the numerous New Mexico statutes, discussed *supra* Part III.C, which delineate the duties of the arresting officers, sheriff, and warden to ensure

an arrestee receives a timely post-arrest probable cause determination. Thus, they do not undermine the conclusion that officials in the positions of Montano, Warden Chavez, or Sheriff Rivera would have known their actions violated Wilson's constitutional rights. *See Anderson,* 483 U.S. at 640, 107 S.Ct. 3034.[8]

2. N.M. Stat. Ann. § 33-3-12(B)

Finally, appellants argue it would have been impossible to provide Wilson with the relief he sought due to operation of N.M. Stat. Ann. § 33-3-12(B), which provides: "Any jailer who deliberately and knowingly releases a prisoner without an order of release . . . except upon expiration of the prisoner's term of commitment, is guilty of a misdemeanor and shall be removed from office." Before the district court, appellants argued the existence of § 33-3-12(B)

[8] Similarly unavailing is appellants' reliance on a memo from the New Mexico Administrative Office of the Courts discussing the requirements of Rule 6-203 and the importance of the magistrate courts establishing procedures to ensure arrestees receive a timely probable cause determination. The memo's silence on the duties of parties other than the magistrate courts is wholly unremarkable, as the memo was promulgated by the administrative arm of the New Mexico judiciary and concerns the rules of procedure for New Mexico courts. Moreover, nothing in the memo, or the rule it interprets, suggests a magistrate's independent obligation to make a probable cause determination within forty-eight hours of arrest somehow relieves other parties of their respective duties to ensure such a determination is possible.

amounted to an extraordinary circumstance which "so prevented [them] from knowing that [their] actions were unconstitutional that [they] should not be imputed with knowledge of a clearly established right." *Shero,* 510 F.3d at 1204. Before this court, appellants argue simply that § 33-3-12(B) contributes to a lack of clarity under New Mexico law as to which party is responsible for ensuring a prompt probable cause determination. In either case, this argument is unpersuasive. Wilson does not argue appellants had an obligation to release him. Rather, he argues they had a duty to provide him with a prompt probable cause determination. Those appellants with a duty to ensure Wilson received a prompt probable cause determination could have done so without releasing him in contravention of § 33-3-12. Thus, § 33-3-12 does not constitute an "extraordinary circumstance" which excuses appellants' violation of Wilson's constitutional rights, nor does it undermine the conclusion that those rights were clearly established.

IV. Conclusion

The district court erred in denying the motion to dismiss as to Torres. The district court correctly denied the motion to dismiss as to Montano, Chavez, and Rivera. For the foregoing reasons, the order of the district court is therefore **affirmed** in part, **reversed** in part, and **remanded** for further proceedings not inconsistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

MICHAEL WILSON, SR.,

Plaintiff,

v.

DEPUTY LAWRENCE MONTANO, DEPUTY TORRES, JOHN DOE VCDC BOOKING OFFICER OR EMPLOYEE, WARDEN JOE CHAVEZ, and FORMER SHERIFF RENE RIVERA,

Civ. No. 11-0658 BB-KBM

Defendants.

MEMORANDUM OPINION

This action arises out of the warrantless arrest of Michael Wilson, Sr., and his subsequent detention at the Valencia County Detention Center for 11 days without the filing of criminal charges in any court or a probable cause determination before any judicial officer. This matter is now before the Court on Defendants' motion to dismiss. Doc. 25. Having considered the briefs and relevant caselaw, the Court will grant in part and deny in part the motion.

Facts and Procedural Background

The Court derives the following facts from the Complaint, *see generally* Doc. 1, Ex. 1, and presumes them to be true for the sake of the present motions. *See Alvarado v. KOB-TV, L.L.*C., 493 F.3d 1210, 1215 (10th Cir. 2007).

On December 18, 2010, Michael Wilson, Sr. was arrested at his home by Deputy Lawrence Montano, an individual employed by the Valencia County Sheriff's Office ("VCSO"). Deputy Montano did not have an arrest warrant. After handcuffing Wilson, Montano asked Deputy Torres to transport Wilson to the Valencia County Detention Center ("VCDC"). Prior to booking Wilson into the VCDC, Deputy Montano prepared a criminal complaint listing the charge against Wilson as a misdemeanor offense. Allegedly, however, neither Deputy Montano nor Tones filed the criminal complaint in a court with jurisdiction or brought Wilson before a judicial officer for a probable cause determination. Indeed, it is undisputed that Wilson was never provided with a probable cause determination.

Eleven days after his arrest, Wilson was released from the VCDC by an order of Belen Magistrate Judge, Danny Hawkes. The release order stated that no complaint had been filed. Then, on January 4, 2010 – after Wilson had been released from jail – Deputy Montano filed the misdemeanor criminal charge in a court with jurisdiction. On April 11, 2011,

the district attorney's office dismissed the criminal complaint.

Three months later, Wilson filed the instant lawsuit naming as defendants, Deputies Montano and Tones, John Doe, a Booking Officer at the VCDC, Joe Chavez, the Warden at the VCDC, and former VCSO Sheriff Rene Rivera. In Count 1, Wilson asserts a violation of his Fourth Amendment right to a prompt judicial determination of probable cause. He claims that both Deputies deliberately detained him without filing a criminal complaint or bringing him before a judicial officer for a probable cause determination. Count II alleges that this same conduct violated Wilson's Fifth and Fourteenth Amendment rights. Both Counts are directed against the Deputies in their individual capacity only.

Count III is directed at Warden Chavez in his individual and official capacities. As background, the Complaint alleges that numerous individuals have been arrested without warrants and held at the VCDC without the filing of criminal charges or prompt probable cause determinations. In this light, the Complaint alleges that the Warden established a policy of holding individuals without the filing of criminal charges and/or trained his staff to accept inmates without the filing of any charges. As a result of these policies, customs, and/or the failure to train, Wilson was illegally detained at the VCDC. Given the number of other individuals so held, the Complaint alleges that the Warden was deliberately indifferent to the alleged constitutional violations, including the

detention of Wilson without a probable cause determination.

Count IV sets out nearly identical allegations directed at former Sheriff Rivera in his individual and official capacities. Again, the Complaint alleges that there were numerous incidents where VCSO officers arrested individuals without a warrant and failed to file a criminal complaint or provide the detainee with a judicial determination of probable cause. These illegal detentions, including the detention of Wilson, were the result of a policy or custom established by the Sheriff. The Complaint further alleges that the Sheriff failed to train his staff, resulting in the routine incarceration of individuals without legal process. Given the number of violations, the Complaint alleges that the Sheriff was deliberately indifferent to the constitutional violations, including the illegal detention of Wilson, caused by his policy, custom, and/or failure to train.

Count V alleges a state law claim of false imprisonment against the Deputies and the Booking Agent. Finally, Count VI seeks prospective relief, including an injunction requiring the Defendants to establish policies and implement training to prevent future constitutional violations.

In addition to this case, two other cases were filed regarding the detention of individuals at the VCDC. In *Ortiz v. Benavidez*, 11cv0951, Jesse Ortiz alleges that he was arrested without a warrant by two Belen Police Department officers and detained at

the VCDC for twelve days without a probable cause hearing. Doc. 1, Ex. 1 (filed in 11cv0951) ("Ortiz Complaint"). Among other things, Ortiz alleges that Warden Chavez established a custom or policy of holding citizens without pending charges or a probable cause hearing. The Ortiz Complaint further alleges that the Warden trained his staff to accept detainees without the filing of charges or probable cause hearings. In so doing, the Warden was deliberately indifferent to the violations of Ortiz and other detainees' constitutional rights.

In *Sarrett v. Cordova*, 11cv1021, four plaintiffs allege substantially similar circumstances regarding their warrantless arrest and subsequent detention at the VCDC without a probable cause hearing. Doc. 5 (filed in CIV. No. 11-1021) ("Sarrett Complaint"). For example, the Sarrett Complaint alleges that Dustin Sarrett was arrested without a warrant by Deputy Roy Cordova of the VCSO. Although Cordova prepared a criminal complaint, he did not file the complaint in any court of jurisdiction or provide Sarrett with a probable cause hearing before a judicial officer. Sarrett was held for eleven days at the VCDC and then released by an order of Magistrate Judge Hawkes. The same scenario allegedly repeated itself with Plaintiffs Oscar Levya, Mark Sanchez, and Patrick Marquez, all of whom were held at the VCDC without the filing of criminal complaints or probable cause determinations. Based on these four incidents, the Sarrett Complaint alleges that both Warden Chavez and Sheriff Rivera implemented a policy or

practice of holding citizens without filing criminal charges of providing prompt probable cause hearings. The Sarrett Complaint further alleges that both the Warden and Sheriff trained their employees to accept detainees without probable cause determinations or the filing of complaints. In so doing, the Sarrett Complaint alleges that both the Warden and Sheriff were deliberately indifferent to the constitutional violations suffered by the Sarrett plaintiffs and other detainees at the VCDC.

Due to the common questions of law and fact, this case, the *Ortiz* case, and the *Sarrett* case were consolidated. Doc. 35. In the instant order, however, the Court only considers the motion to dismiss filed by Deputies Montano and Tones, Warden Chavez, and Sheriff Rivera as it pertains to this, the Wilson case. Doc. 25.

Legal Standard

"[T]o withstand a motion to dismiss, a complaint must contain enough allegations of fact 'to state a claim to relief that is plausible on its face.'" *Robbins v. Oklahoma,* 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Accordingly, when reviewing the sufficiency of a complaint under Rule 12(b)(6), the Court "must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forest Guardians v. Forsgren,* 478

F.3d 1149, 1160 (10th Cir. 2007). This obligation to provide the factual "grounds" upon which the plaintiff is entitled to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly,* 550 U.S. at 555. Finally, in making its determination, the Court must accept all well-pleaded factual allegations as true, viewing them in the light most favorable to Wilson, and drawing reasonable inferences therefrom. *Id.* at 555-56; *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009).

In conjunction with their motion to dismiss, the individual Defendants also raise the defense of qualified immunity. "Although summary judgment provides the typical vehicle for asserting a qualified immunity defense," it may also be asserted in the context of Rule 12(b)(6). *Peterson v. Jensen,* 371 F.3d 1199, 1201 (10th Cir. 2004). Once a defendant asserts qualified immunity, the plaintiff bears the burden of satisfying a "strict two-part test." *McBeth v. Himes,* 598 F.3d 708, 716 (10th Cir. 2010) (quoting *Bowling v. Rector,* 584 F.3d 956, 964 (10th Cir. 2009)). The plaintiff must establish (1) that the defendant violated a constitutional or statutory right, and (2) that this right was clearly established at the time of the defendants' conduct. *Id.* Even if the law was clearly established, the Court must also determine whether "extraordinary circumstances – such as reliance on the advice of counsel or on a statute – so prevented the official from knowing that his or her actions were unconstitutional that he or she should not be imputed

with knowledge of a clearly established right." *Shero v. City of Grove,* 510 F.3d 1196, 1204 (10th Cir. 2007).

Analysis

I. Fourth Amendment Claim

Defendants present the Court with three separate bases for dismissing Wilson's Fourth Amendment claim against the Defendants in their individual capacity,[1] any one of which may be dispositive. The Court addresses these arguments through the three-step qualified immunity analysis set forth in *Shero,* 510 F.3d at 1204.

A. Whether Defendants Violated A Constitutional Right

In applying the qualified immunity test, the Court first addresses the question of whether Wilson has adequately alleged that Deputies Montano and Torres, former Sheriff Rivera, and Warden Chavez violated his constitutional rights; if not, the claim must be dismissed. *Id.*

The Supreme Court's decisions in *County of Riverside v. McLaughlin,* 500 U.S. 44 (1991), and *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), provide the basis for Wilson's Fourth Amendment claim. *Gerstein* held that the Fourth Amendment requires a

[1] The official capacity claims against the Warden and Sheriff are not before the Court in the instant motion to dismiss.

determination of probable cause by a judicial officer "promptly" after a warrantless arrest. Sixteen years later, in *County of Riverside,* 500 U.S. at 44, the Supreme Court revisited *Gerstein* because its "promptness" standard had proven to be unworkably vague. The Supreme Court then held that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein.*" *Id.* at 56; *see also Powell v. Nevada,* 511 U.S. at 80 ("prompt generally means within 48 hours of the warrantless arrest") (quotations omitted).[2]

It is apparent that Wilson was denied his right to a prompt probable cause determination. The Complaint alleges that Wilson was arrested without a warrant by Deputy Montano and taken to the VCDC by Deputy Torres. Even though Deputy Montano prepared a criminal complaint listing a misdemeanor offense, he failed to file the complaint in any court with jurisdiction. As a result, the criminal process was never initiated and Wilson was detained at VCDC for eleven days without a prompt probable cause determination. These allegations, taken as true, are sufficient to establish a violation of Wilson's rights under the Fourth Amendment.

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[2] While a delay of over 48 hours is not per se unlawful, the Government bears the burden in such cases to "demonstrate the existence of a bona fide emergency or other extraordinary circumstance" that led to the delayed probable cause determination. *County of Riverside,* 500 U.S. at 57.

Nonetheless, Defendants argue that the Complaint fails to allege sufficient facts to establish the personal and/or supervisory liability of the Deputies, Warden, and/or Sheriff. A § 1983 defendant sued in an individual capacity may be subject to personal and/or supervisory liability. To establish personal liability, Wilson must show that the Defendants "caused the deprivation of a federal right." *Hafer v. Melo,* 502 U.S. 21, 25 (1991); *Foote v. Spiegel,* 118 F.3d 1416, 1423 (10th Cir. 1997) ("Individual liability under § 1983 must be based on personal involvement in the alleged constitutional violation."). The Complaint thus alleges the personal involvement of Deputies Torres and Montano in the warrantless arrest, and subsequent transportation of Wilson to the VCDC. Doc. 1, Ex. 1, ¶¶ 20-23. The Complaint further alleges that both Deputies failed to file a criminal charge against Wilson or bring him before a judge for a prompt probable cause determination. *Id.* at ¶¶ 30-34. This is not therefore a case where the complaint fails to allege facts showing which defendants deprived the plaintiff of a prompt probable cause determination. *See, e.g., Strepka v. Miller,* 28 Fed. Appx. 823, 828 (10th Cir. 2001) ("complaint was devoid of any allegations showing that any of the arresting officers caused or participated in the delay in providing plaintiff a prompt probable cause determination"); *Carpenter v. Oklahoma County,* 2009 WL 2778445, *5 (W.D. Okla. 2009) (same). To the contrary, accepting the allegations in the Complaint as true, the Court concludes that Wilson has alleged sufficient facts to establish the personal liability of the Deputies for

failing to file a complaint, initiate the criminal process, and provide a prompt probable cause determination.

Even though the Deputies may be liable for their personal involvement, it does not necessarily follow that the Sheriff and Warden are also liable in their capacity as supervisors. The Supreme Court has made it clear that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal, supra,* 129 S.Ct. at 1948. That is not to say, however, that the Supreme Court completely abolished supervisory liability. According to the Tenth Circuit, § 1983 still "allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or [his] subordinates) of which subjects, or causes to be subjected that plaintiff to the deprivation of any rights secured by the Constitution." *Dodds v. Richardson,* 614 F.3d 1185, 1199 (10th Cir. 2010). A plaintiff may establish a § 1983 claim against a defendant-supervisor by demonstrating that "(1) the defendant promulgated, created, implemented or possessed responsibility for the continued operation of a policy that (2) caused the complained of constitutional harm, and (3) acted with the state of mind required to establish the alleged constitutional deprivation." *Id.*

Wilson contends that both the Sheriff and Warden's personal conduct caused the failure to provide

him with a prompt probable cause determination. Specifically, the Complaint alleges that the Warden "established a policy or custom of holding citizens without pending criminal charges until the court filed orders of release sua sponte." Doc 1, Ex. 1, ¶ 52. Similarly, the Complaint alleges that the Sheriff "established a policy or custom of allowing officers to arrest people and wait before filing charges." *Id.* at ¶ 64. Allegedly, these policies or customs were "a significant moving force behind Plaintiff's illegal detention." *Id.* at ¶¶ 59, 71. That is, because the Warden and Sheriff failed to require the filing of a written complaint, detainees were never brought before a judge, but rather were held at VCDC without ever receiving a probable cause determination. Finally, the Complaint alleges that both the Sheriff and Warden failed to train or inappropriately trained their employees, again leading to the violations of Wilson's constitutional rights. *Id.* at ¶¶ 54, 69.

When these allegations are taken as true, the Court concludes that Wilson has alleged sufficient facts to support a claim of individual supervisory liability against both the Sheriff and Warden. The Tenth Circuit has recognized that "[a] plaintiff could establish the defendant-supervisor's personal involvement by demonstrating his personal participation, his exercise of control or direction, or his failure to supervise, or his knowledge of the violation and acquiesce [nce] in its continuance." *Dodds,* 614 F.3d at 1195 (quotations omitted). The use of the conjunction 'or' demonstrates that there are various ways – at the

least four according to *Dodds* – to establish a supervisor's personal involvement. Here, the Complaint alleges that the Sheriff and Warden both implemented policies or customs that resulted in Wilson's illegal detention without a probable cause determination. Alternatively, the Complaint alleges that the Sheriff and Warden were personally involved due to a failure to train their employees. These allegations are sufficient to establish the personal involvement of the Warden and Sheriff. *Id.* at 1209 (Tymkovich, J., concurring) (explaining that a failure-to-train theory has been seen as a supervisory liability claim that, at bottom, implicates a supervisor's implementation of a policy).

What is more, the Complaint alleges that the Sheriff and Warden's personal involvement caused the alleged constitutional violation. While there are no allegations that either the Sheriff or Warden were physically involved in Wilson's detention,[3] they knew or should have known that their conduct – the failure to insure the filing of criminal charges in a court with jurisdiction – would result in the subsequent failure

[3] Similarly, Plaintiff has not alleged that he had any contact with either the Sheriff or Warden, nor has Plaintiff alleged that either the Sheriff or Warden had any specific knowledge or notice of Plaintiff's circumstances. The lack of such allegations does not, however, defeat Plaintiff's supervisory liability claim. *Dodds,* 614 F.3d at 1195 ("Personal involvement does not require direct participation because § 1983 states "'[a]ny official who "causes" a citizen to be deprived of her constitutional rights can also be held liable.'").

to provide detainees with prompt probable cause determinations, thereby violating the Fourth Amendment. This chain of events is sufficient to satisfy the causal connection necessary for supervisory liability. *Id.* at 1195-96 (a "causal connection" is alleged by claiming that a supervisor defendant "set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive plaintiff of [his or] her constitutional rights") (quoting *Snell v. Tunnell,* 920 F.2d 673, 700 (10th Cir. 1990)).

Finally, and most importantly, the Complaint alleges sufficient facts to establish the requisite state of mind for supervisory liability. The state of mind required to establish a § 1983 claim based on supervisory liability is the state of mind requirement that is tied to the underlying constitutional provision at issue. *Iqbal,* 129 S. Ct. at 1948. To establish a violation of § 1983 by a supervisor, the plaintiff must establish at a minimum a deliberate and intentional act on the part of the defendant-supervisor to violate the plaintiff's legal rights. *Porro v. Barnes,* 624 F.3d 1322, 1327-1328 (10th Cir. 2010). A plaintiff can satisfy this prong by alleging that the defendant-supervisor had knowledge of the violation and acquiesced in its continuance. *Dodds,* 614 F.3d at 1195.

The Complaint alleges that both the Warden and Sheriff acted with deliberate indifference to the routine constitutional violations occurring at the VCDC. This conclusion is supported by Wilson's specific allegations as well as the allegation that

there were numerous occasions where the VCDC and the VCSO held individuals for days and on some occasions weeks without law enforcement taking those individuals before a magistrate judge. Doc. 1, Ex. 1, ¶¶ 51, 62. Indeed, in the two companion cases, *Ortiz,* 11cv0951, and *Sarrett,* 11cv1021, it is alleged that five other individuals were arrested without warrants and detained at the VCDC without the filing of a criminal complaint or a prompt judicial determination of probable cause. These allegations, which are consistent across all three cases, and the inferences therefrom, are sufficient to establish that the Warden and Sheriff were deliberately indifferent to the violation of Wilson's constitutional rights, and that their conduct led to the deprivation of a prompt probable cause determination as guaranteed under the Fourth Amendment. *County of Riverside v. McLaughlin, supra,* 500 U.S. at 44; *Gerstein v. Pugh, supra,* 420 U.S. at 114.

B. Whether the Right Was Clearly Established

The next issue is whether Wilson's individual-capacity claims against the Deputies, Warden, and Sheriff survive scrutiny under the second prong of the qualified immunity inquiry. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Currier v. Doran,* 242 F.3d 905, 923 (10th

Cir. 2001) (quotation and citation omitted). This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent. *Anderson v. Creighton,* 483 U.S. 635, 640 (1987). Thus, the relevant, dispositive inquiry is whether "[t]he contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

The constitutional right to a prompt probable cause determination was clearly established at the time of the events in question; indeed, that right had been established more than three decades before Wilson's detention on December 18, 2010. *See Gerstein v. Pugh, supra,* 420 U.S. at 114 (1975); *County of Riverside v. McLaughlin, supra,* 500 U.S. at 44 (1991). Nonetheless, Wilson must do more than identify a clearly established constitutional right in the abstract and assert that the Defendants violated it: He must "articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity." *Green v. Post,* 574 F.3d 1294, 1300 (10th Cir. 2009) (quoting *Tonkovich v. Kansas Bd. of Regents,* 159 F.3d 504, 516 (10th Cir. 1998)). Accordingly, the Court's task is to determine whether a reasonable officer would have understood that the detention of Wilson for multiple days without the filing of a criminal complaint or a prompt probable cause determination violated the Fourth Amendment.

County of Riverside imposes a constitutional duty on the police to provide a prompt probable cause determination. There, the Supreme Court indicated that "the *police* should make every attempt to minimize the time a presumptively innocent individual spends in jail." *County of Riverside,* 500 U.S. at 58 (emphasis added). It follows that the police have a constitutional duty to provide a prompt probable cause determination. *See Hallstrom v. City of Garden City,* 991 F.2d 1473, 1478 (9th Cir. 1993) (officers were subject to a constitutional duty to ensure that detainee be taken before a judicial officer "promptly after arrest.").

The Supreme Court further explained in *County of Riverside* that states are allowed to develop their own specific procedures to provide prompt probable cause determinations. 500 U.S. at 52-53. Two provisions of the New Mexico Code spell out post-arrest procedures for all law enforcement officers. Section 35-5-1 imposes a general duty on all peace officers to ensure that an individual, arrested without a warrant, is brought before a magistrate judge:

> Whenever a peace officer makes an arrest without warrant for a misdemeanor within magistrate trial jurisdiction, he shall take the arrested person to the nearest available magistrate court without unnecessary delay.

NMSA 1978, § 35-5-1. Section 35-5-1 further requires that "a complaint shall be filed forthwith by the peace officer and a copy given to the defendant at or before the time he is brought before the magistrate." *Id.*.

Similarly, section 29-1-1 declares it the duty of every officer to "diligently file a complaint or information." NMSA 1978, § 29-1-1.[4] The law is thus clearly established in New Mexico – peace officers must file a criminal complaint and subsequently ensure that an individual arrested without a warrant receives a prompt probable cause hearing before a magistrate judge.

In the instant case, Deputies Torres and Montano participated in the arrest and transportation of Wilson to the VCDC. They were thus charged with both a constitutional and statutory duty to ensure that a criminal complaint was filed and that Wilson received a prompt probable cause determination. While Deputy Montano did complete a criminal complaint charging Wilson with a misdemeanor, neither he nor Deputy Torres filed the complaint in a court with jurisdiction or brought Wilson before a magistrate judge for a probable cause determination. Both Deputies should have realized that this alleged conduct violated their clear duties under the Fourth Amendment and New Mexico law.

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[4] Section 31-1-5 also states that "[e]very accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." NMSA 1978, § 31-1-5; *see also State v. Gibby,* 432 P.2d 258, 261 (N.M. 1967). And section 3-13-2(A)(4)(d) provides that "[t]he police officer of a municipality shall . . . apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial." NMSA 1978, § 3-13-2(A)(4)(d).

Similarly, the Sheriff and Warden also had a statutory duty to ensure that a criminal complaint was filed and that Wilson received a probable cause determination. Section 4-37-4(A)(1) states, in relevant part, that "[i]t is the duty of *every* county sheriff, deputy sheriff, constable and other county law enforcement officer to . . . enforce the provisions of all county ordinances." § 4-37-4(A)(1), NMSA 1978 (emphasis added). Section 33-3-28 further provides that jailers and any other employee of a local or county jail shall have the authority and status of a peace officer. § 33-3-28, NMSA 1978. Thus, both the Sheriff and Warden had a duty to carry out their statutory duties under section 35-5-1 as well as their constitutional obligations under *Gerstein* and *County of Riverside*. They should thus have understood that the detention of Wilson, along with numerous other detainees, for multiple days without any probable cause determination violated their duties under the Fourth Amendment and New Mexico law.

The Defendants, however, cite an unpublished opinion where the Tenth Circuit stated that it is unclear who has a duty to provide probable cause determinations.

> Although Supreme Court opinions have clearly established the right to a prompt probable cause determination, they have not established that the duty to ensure that right rests with the arresting officer. Nor have any Tenth Circuit cases – or the majority of cases from other circuits – so held.

See Strepka v. Miller, supra, 28 Fed. Appx. at 830. Defendants' reliance on *Strepka* is unpersuasive for three reasons.

First, in a decision published before *Strepka,* the Tenth Circuit stated that the right to a probable cause determination is clearly established. *See Austin v. Hamilton,* 945 F.2d 1155, 1162-63 (10th Cir. 1991) *abrogated on other grounds by Johnson v. Jones,* 515 U.S. 304 (1995). The Tenth Circuit thus proceeded in *Austin* to deny summary judgment to federal agents who refused to provide detainees with any probable cause hearings. *Id.* Contrary to the assertions in *Strepka* then, the Tenth Circuit has established that officers, including federal agents, have a constitutional duty to provide prompt probable cause determinations. In fact, the Court notes that *Strepka* did not mention the Circuit's prior decision in *Austin.*

Second, other courts have rejected Defendants' argument that "someone else" had a duty to provide a probable cause determination. The Seventh Circuit's decision in *Luck v. Rovenstine,* 168 F.3d 323 (7th Cir. 1999), provides one such example. There, the sheriff argued that he had no duty to ensure that detainees arrested without a warrant received a probable cause hearing or gained release. *Id.* (stating that the sheriff "believes that someone else, perhaps the arresting officer or the prosecutor, is responsible for the period of confinement between a warrantless arrest and a judicial determination of probable cause"). The court found "unconvincing" the sheriffs "attempt to shrug off his federal constitutional responsibilities," stating

that, "[i]n the final analysis, the sheriff is the custodian of the persons incarcerated in the jail, and as such, it is he who is answerable for the legality of their custody." *Id.* For the same reasons, this Court finds unconvincing the Defendants' attempts to shrug off their constitutional duty to provide prompt probable cause hearings, especially when New Mexico imposes a duty on all peace officers to promptly bring a person arrested without a warrant before a judicial officer. *See* NMSA 1978, § 35-5-1.

Finally, since *Strepka* was decided, the Sixth Circuit has twice held that officers have a clearly established duty to ensure an individual arrested without a warrant receives a prompt probable cause determination. *Cherrington v. Skeeter,* 344 F.3d 631, 644 (6th Cir. 2003) (explaining that *County of Riverside* would have alerted any reasonable officer to plaintiff's right to a prompt judicial determination of probable cause; thus, individual defendant officers were not entitled to qualified immunity); *Drogosch v. Metcalf,* 557 F.3d 372, 378-79 (6th Cir. 2009) (same). These holdings are consistent with the law long established in the Seventh Circuit. *Luck,* 168 F.3d at 326; *Haywood v. City of Chicago,* 378 F.3d 714, 718 (7th Cir. 2004); *Armstrong v. Squadrito,* 152 F.3d 564, 579 (7th Cir. 1998); *see also Lingenfelter v. Bd. of County Comm'rs of Reno County,* 359 F.Supp.2d 1163, 1173 (D. Kan. 2005). While these decisions are not binding on this Court, they are persuasive and further support the position that a reasonable officer would have understood that the detention of Wilson

for multiple days without the filing of a criminal complaint or any probable cause determination violated the Fourth Amendment. Accordingly, the Court concludes that Wilson has overcome the second hurdle of qualified immunity.

C. Extraordinary Circumstances

Even if the law was clear, Defendants argue that extraordinary circumstance justified their failure to provide Wilson with a prompt probable cause determination. *Shero v. City of Grove, supra,* 510 F.3d at 1204. Defendants assert that section 33-3-12, NMSA 1978, makes it a crime to release a detainee without a court order.[5] Accordingly, Defendants claim that no individually named Defendant could have released Wilson at the close of the 48 hour time limit articulated in *County of Riverside* without committing a crime. Defendants thus conclude that section 33-3-12 prevented them from realizing their clearly established duty to provide detainees with a prompt probable cause determination – an exceptional circumstance within the meaning of *Shero.*

In certain circumstances, qualified immunity may be warranted even if a defendant violates a

[5] NMSA 1978, § 33-3-12(B) provides: "Any jailer who deliberately and knowingly releases a prisoner without an order of release as provided in this section, except upon expiration of the prisoner's term of commitment, is guilty of a misdemeanor and shall be removed from office."

clearly established constitutional right. *See Roska v. Peterson,* 328 F.3d 1230, 1251-52 (10th Cir. 2003) (observing that when a right is clearly established, "a defendant should only rarely be able to succeed with a qualified immunity defense") (internal quotation marks omitted). "The circumstances must be such that the defendant was so prevented from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right." *Id.* (internal quotation marks omitted). For example, an officer's "reliance on a state statute, regulation, or official policy that explicitly sanctioned the conduct in question may absolve the officer from knowing that his conduct was unlawful." *Kay v. Bemis,* 500 F.3d 1214, 1221 n. 6 (10th Cir. 2007) (internal quotation marks omitted). However, an officer's reliance on those authorities is only "a factor which militates in favor of the conclusion that a reasonable official would find that conduct constitutional." *Roska,* 328 F.3d at 1252. An authorizing statute, regulation, or policy does not render the officer's conduct reasonable per se. *Id.*

Here, section 33-3-12 fails to absolve the individual Defendants from knowing that their conduct was unlawful. To begin, it is unclear whether section 33-3-12 even applies to the instant scenario. Section 33-3-12(A) clearly states that jailers have an obligation to retain custody over any person subject to an "order of imprisonment." However, no Deputy or other officer filed a criminal complaint that would have led to an order of imprisonment. It is thus unclear whether

section 33-3-12(A) required the Defendants to retain custody over Wilson and thus equally unclear whether section 33-3-12(B) prohibited any Defendant from releasing Wilson without an "order of release." *See Bickey v. Sheriff of Whitley County,* 2010 WL 1258165, *10-11 (N.D. Ind. 2010) (rejecting argument that sheriff could not release a detainee without judicial approval).

Regardless, even if section 33-3-12 applies, it is of little assistance to Defendants. To be clear, Wilson is not arguing that the Defendants had an obligation to release him after the 48 hour time limit articulated in *County of Riverside* expired. Rather, Wilson is arguing that the individual Defendants had a more basic duty, namely the duty to file a criminal complaint and provide him with a prompt probable cause hearing within the 48 hour time limit articulated in *County of Riverside.* This request does not run afoul of section 33-3-12's prohibition on releasing a prisoner without a court order. That is, the individual Defendants could have complied with their duty to provide a *County of Riverside*/*Gerstein* hearing without ever being forced to release Wilson in contravention of section 33-3-12. As such, the Defendants cannot claim that section 33-3-12 prevented them from realizing their clearly established statutory and constitutional duties to file a criminal complaint and provide a detainee with a prompt probable cause

determination.[6] Therefore, the Court concludes that the Defendants are not entitled to qualified immunity on the Fourth Amendment claim.

II. Fifth And Fourteenth Amendment Claims

Wilson alleges that Defendants' conduct violated his Fifth and Fourteenth Amendment rights to not be denied life, liberty, or property without due process of law.

A. Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment states that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Wilson asserts that his detention without a probable cause determination ran afoul of this clause, which protects against improper use of the "formal constraints imposed by the criminal process." *Board of Regents v. Roth,* 408 U.S. 564, 572 (1972). Wilson's reliance on the Fourteenth Amendment is misplaced.

The U.S. Supreme Court has made it clear that the Fourth Amendment, not the Fourteenth, governs claims regarding prompt probable cause hearings.

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[6] Indeed, if the Defendants had brought Wilson before a judge for a probable cause hearing, the presiding judge may have issued an order to release Wilson due to the lack of probable cause.

The Court stated in *Gerstein* that the Fourth Amendment "define[s] the 'process that is due' for seizures of persons or property in criminal cases, including the detention of suspects pending trial." *Gerstein,* 420 U.S. at 125 n. 27. Thus, in *Gerstein,* the Court dispensed with a separate analysis of the plaintiffs' detention without prompt probable cause determinations under the Due Process Clause. *See Albright v. Oliver,* 510 U.S. 266, 288 n.2 (1994) (Souter, J., concurring) (noting that the Court dispensed with a separate analysis under the Due Process Clause in *Gerstein*). The Court adopted the same approach in *County of Riverside,* analyzing plaintiffs' challenge to the manner in which the County of Riverside provided probable cause determinations under the Fourth Amendment, not the Fourteenth Amendment. 500 U.S. at 53-58.

The Tenth Circuit has further stated that the Fourth Amendment governs the amount of process required for suspects detained on criminal charges prior to a *Gerstein* hearing. That is, "the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause." *Gaylor v. Does,* 105 F.3d 572, 574-75 (10th Cir. 1997) (emphasis in original and quotations omitted); *see also Luck v. Rovenstine, supra,* 168 F.3d at 326 (Fourth Amendment applies before

the probable cause hearing and Due Process Clause applies after).

In the instant case, Wilson alleges that he was never provided a probable cause determination as required by *Gerstein.* His allegations thus properly invoke the protections of the Fourth Amendment, not the more general procedural due process guarantees of the Fourteenth Amendment. *See Gaylor,* 105 F.3d at 574-75. The Court will therefore dismiss the Fourteenth Amendment procedural due process claim[7] and focus its analysis on the Fourth Amendment as interpreted in *Gerstein* and *County of Riverside.*

B. Fifth Amendment

Wilson has no Fifth Amendment claim for the simple reason that the Fifth Amendment due process clause only protects against due process violations caused by federal government actors. *See San*

[7] To the extent Wilson raises a substantive due process claim under the Fourteenth Amendment, the Court also dismisses it. "Substantive due process analysis is . . . inappropriate . . . [where a] claim is 'covered by' the Fourth Amendment." *County of Sacramento v. Lewis,* 523 U.S. 833, 843 (1998). Here, Wilson's claim falls within the Fourth Amendment; thus, the Court need not consider the implications of substantive due process. *Id.; see also Albright v. Oliver, supra,* 510 U.S. at 274-75 (holding that a plaintiff's allegation that he was taken into custody and subjected to criminal prosecution without probable cause did not state a claim under the Fourteenth Amendment because matters of pretrial deprivations of liberty are governed solely by the Fourth Amendment).

Francisco Arts & Athletics, Inc. v. US. Olympic Comm., 483 U.S. 522, 542 n. 21 (1987) (explaining that the Fifth Amendment applies to federal actions while the Fourteenth Amendment applies to state actions); *Smith v. Kitchen,* 156 F.3d 1025, 1028 (10th Cir. 1997) ("From the earliest interpretations of this amendment, courts have agreed that the Fifth Amendment protects against actions by the federal government."); *Riley v. Camp,* 130 F.3d 958, 972 n. 19 (11th Cir. 1997) ("The Fifth Amendment obviously does not apply here – the acts complained of were committed by state rather than federal officials."); *Jones v. City of Jackson,* 203 F.3d 875, 880 (5th Cir. 2000) ("The Fifth Amendment applies only to violations of constitutional rights by the United States or a federal actor."). Here, Wilson has not alleged that any of the Defendants acted under authority of the federal government. Rather, all of the Defendants are state government actors, or put another way, acted under the color of state law. Hence, the Fifth Amendment does not apply.

III. State Law False Imprisonment Claim

The tort of false imprisonment occurs when a person intentionally confines or restrains another person without consent and with knowledge that he has no lawful authority to do so. § 30-4-3, NMSA 1987; *Diaz v. Lockheed Elecs.,* 618 P.2d 372, 375-76 (N.M. App. 1980) (Sutin, J., specially concurring). The Complaint alleges that Defendant Montano deliberately chose not to file a criminal complaint against or

bring Wilson before a magistrate judge for a probable cause hearing. Doc. 1, Ex. 1, ¶ 77. Despite allegedly knowing that this violated the law, both Deputies ignored their legal duties and imprisoned Wilson at the VCDC without legal process. *Id.* at ¶¶ 77-79. These allegations, taken as true, are sufficient to set forth a claim of false imprisonment.[8] *Cf Wallace v. Kato,* 549 U.S. 384, 389 (2007) (noting that the constitutional tort of false arrest/false imprisonment stems from unlawful "detention without legal process") (emphasis omitted); *Mondragon v. Thompson,* 519 F.3d 1078, 1082 (10th Cir. 2008) ("If [an individual] has been imprisoned without legal process he has a claim under the Fourth Amendment analogous to a tort claim for false arrest or false imprisonment.").

Nonetheless, Defendants move to dismiss Wilson's false imprisonment claim on the grounds that (1) Wilson failed to plead a lack of probable cause, and (2) § 33-3-12 prohibited the Defendants from releasing Wilson without a court order. Neither of these arguments is availing. To begin, Wilson has alleged that the Deputies deliberately denied him legal process. More specifically, the claim focuses on the imprisonment of Wilson without *a probable cause hearing before a judicial officer,* not whether Wilson was initially arrested without probable cause. Given

[8] Plaintiff's false imprisonment claim is also directed at Defendant Doe, the unknown booking officer(s) at the VCDC. In the instant opinion, the Court expresses no opinion as to the merits of this claim against Defendant Doe.

this focus, the claim does not turn on the existence or absence of probable cause for the initial arrest. Put another way, even if Wilson's initial arrest was lawful and based on probable cause, liability for false imprisonment could still exist if, as alleged, the Defendants detained him at the VCDC without the required legal process – a probable cause hearing before a judicial officer. *See* § 30-4-3; *Wallace,* 549 U.S. at 388-89.

Nor does section 33-3-12 relieve the Defendants of potential liability for false imprisonment. Wilson claims that the Defendants should have filed a criminal complaint and provided him with a prompt probable cause hearing: the failure to do so constituted false imprisonment. Clearly then, this claim does not turn on whether the Defendants had authority to release Wilson. Thus, even though section 33-3-12 prohibits any public officer from releasing an individual held under an order of imprisonment,[9] it does not prevent public officers from providing legal process – such as the filing of a criminal complaint as required by section 35-5-1. In this light, section 33-3-12 does not justify Defendants' conduct, let alone bar the claim of false imprisonment.

For the foregoing reasons, the Court will deny the Defendants' motion to dismiss the state law claim for false imprisonment.

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[9] As noted previously, it is unclear whether section 33-3-12 even applies in the instant case. *See supra,* section I.C.

IV. Standing to Seek Injunctive Relief

In addition to compensatory damages, Wilson seeks prospective relief in the form of an injunction requiring the Defendants to establish policies and undertake training to ensure that future detainees receive prompt probable cause hearings. Doc. 1, Ex. 1, ¶ 84. Defendants move to dismiss this claim on the grounds that Wilson lacks standing. Specifically, Defendants argue that Wilson cannot establish the requisite injury-in-fact to bring a claim for prospective relief.[10] The Court agrees.

To establish Article III standing, a plaintiff must show that: (1) he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). The injury-in-fact requirement, at issue in the Defendants' motion to dismiss, is satisfied differently depending on whether the plaintiff seeks retrospective or prospective relief. *See City of Los Angeles v. Lyons,* 461 U.S. 95, 101-02 (1983). To seek prospective relief, a plaintiff must be "suffering a continuing injury or be under a real and immediate

[10] To be clear, the issue here is not whether Wilson can establish standing to seek compensatory damages, but rather whether he meets the preconditions for asserting an injunctive claim in a federal forum. *See Lyons,* 461 U.S. at 109.

threat of being injured in the future." *Tandy v. City of Wichita,* 380 F.3d 1277, 1283 (10th Cir. 2004). This is so because, logically, "a prospective remedy will provide no relief for an injury that is, and likely will remain, entirely in the past." *American Postal Workers Union v. Frank,* 968 F.2d 1373, 1376 (1st Cir. 1992).

Here, it is undisputed that Wilson was released from the VCDC on December 29, 2010. Doc. 1, Ex. 1, ¶ 24. Therefore, Wilson is no longer suffering "a continuing injury" that would confer standing to seek injunctive relief. *Tandy,* 380 F.3d at 1283. As a result, Wilson must establish "a real and immediate threat of being injured in the future" in order to seek prospective relief. *Id.* To meet this requirement, Wilson alleges that he was detained at the VCDC in the past without a probable cause hearing; the Defendants have a continuing and ongoing practice of detaining individuals without probable cause hearings; and he could still be arrested and held at the VCDC for the same allegations on which he was originally held.

The possibility that the Plaintiff could be arrested again and detained at the VCDC without a probable cause hearing is insufficient to establish standing. In *Lyons,* the U.S. Supreme Court rejected similarly speculative allegations of future harm. 461 U.S. at 102. There, the plaintiff, Adolph Lyons, sought to enjoin the use of "chokeholds" by police officers. *Id.* at 105. The Court stated that Lyons' standing to seek such prospective relief hinged on "whether he was likely to suffer future injury from the use of the

chokeholds by police officers." *Id.* Even though Lyons had been choked by the police, the Court explained that this past harm did "nothing to establish a real and immediate threat that [Lyons] would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Id.* The Court further emphasized that it was mere "conjecture" to believe that Lyons would again be involved with the police and subject to a chokehold. *Id.* at 108. In this light, the Court reasoned that Lyons' standing rested on the mere speculation that the police *might* stop him again and that, if stopped, the arresting officers *might* apply an unconstitutional chokehold. Because it was no more than speculative that Lyons would again be subject to a chokehold, the Court held that he lacked standing to seek prospective relief. *Id.* at 110. The reasoning in *Lyons* applies with equal force to the instant case.

The rule that a claim does not become moot where it is capable of repetition, yet evades review, is likewise inapposite. "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." *Id.* at 109. As we have explained, Wilson has not made such a demonstration. Accordingly, because Wilson has failed to show that he is likely to be subjected again to the unconstitutional

conduct at the VCDC, the Court will dismiss the claim for injunctive relief.

Conclusion

In conclusion, the Court will deny the Defendants' motion to dismiss the Fourth Amendment and state law false imprisonment claims. The Court will, however, grant the motion to dismiss the Fifth and Fourteenth Amendment Claims, as well as the claim for injunctive relief.

Dated this 23rd day of March, 2012.

/s/ Bruce D. Black
BRUCE D. BLACK
UNITED STATES
DISTRICT JUDGE