No. 13-162

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

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether, assuming Respondent's allegation as true, the Tenth Circuit was correct in denying qualified immunity to Petitioners in their individual capacity for arresting Respondent without a warrant and holding him in the local jail for twelve days without filing criminal charges and without any probable cause hearing.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Michael Wilson was arrested on December 18, 2010 without a warrant and was held at the local jail without a lawful court order, without a probable cause hearing and without criminal charges being filed against him until being released on December 29th. He sued the arresting officer, the sheriff, and the warden for violating his constitutional rights, and the three defendants moved to dismiss the complaint on the basis of qualified immunity. The courts below denied the motion, based on their evaluation of the facts of the case.

Petitioners do not contest that it has been clearly established since 1991 that the Fourth Amendment requires a prompt probable cause hearing not later than 48 hours after a warrantless arrest. Petitioners do not contest that Mr. Wilson's Fourth Amendment rights were violated. Petitioner and arresting officer Montano does not appear to contest that, at a minimum, he is responsible for that violation. Yet Petitioners are asking this Court to create a blanket rule that, even where a warden or sheriff was personally involved in failing to provide a prompt probable cause determination, only the arresting officer can be held accountable. Such a decision would overturn decades of federal civil rights litigation that bases liability on a factual determination of who was personally involved in the constitutional violation. Because the court below rightly rejected Petitioners' theory and because the Circuits are in agreement as to the proper approach to analyzing claims of qualified

immunity in cases concerning failure to provide a prompt probable cause hearing, the petition should be denied.

STATEMENT OF THE CASE

On December 18, 2010 Mr. Wilson was arrested at his home, without a warrant or lawful court order, by petitioner Lawrence Montano. Montano placed Mr. Wilson in handcuffs and another officer, Deputy Torres, transported him to the Valencia County Sheriff's office. Complaint ¶¶ 19-21. Montano wrote a criminal complaint alleging a misdemeanor offense that he did not witness and, without filing the criminal complaint, had Mr. Wilson booked into the Valencia County Detention Center (VCDC). Complaint ¶¶ 15, 21-22.

A booking officer (a John Doe defendant here) accepted Mr. Wilson into VCDC without requiring a filed criminal complaint and without any court order authorizing Mr. Wilson's detention. At no time while Mr. Wilson was being held at VCDC were criminal charges ever filed against him, nor was there any order from any court authorizing his continued detention. Complaint ¶¶ 23, 30-31. Additionally, no one brought Mr. Wilson before a neutral magistrate court for a probable cause determination. Complaint ¶¶ 32-34. As alleged in the complaint, Petitioners deliberately held him at the local jail without bringing him to court. Complaint ¶ 42. Twelve days after being

booked into VCDC and spending the Christmas holiday in custody, Mr. Wilson was released as a result of an order captioned "no complaint filed." Complaint ¶¶ 24-27. A criminal complaint was eventually filed on January 4, 2011 and on April 11, 2011 the criminal complaint was dismissed by the Assistant District Attorney assigned to the case for insufficient evidence. Complaint ¶¶ 29, 35.

Mr. Wilson's circumstances are not unusual. Numerous citizens in Valencia County, New Mexico have been arrested and held for periods ranging from a few days to a few weeks without any court order or criminal charges being filed against them and without those individuals being taken before a magistrate judge. Complaint ¶ 51. This common practice was well known by law enforcement officers, jail officers, and the heads of those departments.

Mr. Wilson alleges that Petitioner Rene Rivera, the former sheriff, had a practice and policy of not filing criminal complaints timely and allowing his officers to arrest people and wait before filing charges. Complaint ¶ 64. In some circumstances this policy and/or custom resulted in individuals being arrested and held at VCDC without charges ever being filed. Complaint ¶ 65. Petitioner Rivera acted with deliberate indifference and this policy was a significant moving force behind the constitutional violation. Complaint ¶¶ 62-72.

Additionally, Petitioner Warden Chavez had a practice and policy of accepting individuals into

custody at VCDC without filed charges and without any court order that the person be held. Complaint ¶¶ 51-60. Warden Chavez was aware that Mr. Wilson and others like him were being held at VCDC without pending charges or lawful court orders. Mr. Wilson further alleged that Warden Chavez established a policy or custom of holding individuals without pending criminal charges knowing that charges may not get filed until a court filed release orders sua sponte. Complaint ¶¶ 52-53. Warden Chavez trained his staff to hold individuals in these circumstances. Complaint ¶ 54. Warden Chavez acted with deliberate indifference when he failed to train or supervise his employees to prevent citizens from being held illegally when no criminal charges were filed. Complaint ¶ 56. This policy was a significant moving force behind Mr. Wilson's illegal detention. Complaint ¶ 59.

REASONS FOR DENYING THE WRIT

Petitioners argue that this Court should grant certiorari because the federal circuit courts are split on the issue decided by the Tenth Circuit in this case and because, as a result of the alleged conflict, there has been a surge in litigation. Both claims are inaccurate. This Court should deny the petition.

I. The Tenth Circuit was correct in affirming the district court's ruling that the Petitioners were not entitled to qualified immunity.

The Tenth Circuit was correct when it held that the petitioners are not entitled to qualified immunity because the complaint sufficiently alleges the personal involvement of each petitioner in the Fourth Amendment violation. There is nothing unique or novel about this holding and it is entirely consistent with the opinions of other circuits.

One of the significant problems with addressing the erroneous contentions in Petitioners' Writ of Certiorari is the manner in which the petition fragments the decisions of the circuit opinions as well as the decision in Mr. Wilson's case. The fragments used give a flawed impression of the holdings in those cases. In an attempt to remedy this misimpression, Mr. Wilson will first give a brief analysis of the holding from the Tenth Circuit, and then demonstrate the consistency between its holding and those decisions reached in the other circuit cases cited by Petitioners.

A. Petitioners concede petitioner Montano's liability.

Petitioner Montano appears to concede that the Tenth Circuit's denial of his qualified immunity was appropriate as his analysis is strikingly similar to that of the Tenth Circuit. In affirming the denial of qualified immunity against Montano the Tenth Circuit

focused on N.M. Stat. Ann. § 35-5-1 which requires a peace officer who makes a warrantless misdemeanor arrest to take "the arrested person to the nearest available magistrate court without unnecessary delay." Additionally, the statute requires the officer to file the complaint "forthwith." NMSA § 35-5-1.

Mr. Wilson alleges in his complaint that Montano arrested him without a warrant for a misdemeanor offense but never filed the complaint relating to the arrest with any court during the time he was being held in jail. Furthermore, Mr. Wilson alleges that Montano never brought Mr. Wilson before a magistrate judge for a probable cause hearing during the twelve days he was in custody. "Thus, the complaint alleges Montano, in contravention of his duties under New Mexico Law, deprived Wilson of his clearly established constitutional rights." Pet. App 15. The Tenth Circuit held, based on the facts alleged, that the allegations are sufficient to state a plausible claim for relief under § 1983.

B. The Tenth Circuit was correct when it found that Mr. Wilson's complaint adequately pled the personal involvement of the supervisory petitioners.

Regarding Petitioners Chavez and Rivera, the basic question of whether Mr. Wilson sufficiently allege their personal involvement is the same. The Tenth Circuit was correct when it answered that question in the affirmative.

To establish liability against Chavez and Rivera, Mr. Wilson had to plead that each, through their "'own individual actions, has violated the Constitution.' *Id.*" *Dodds v. Richardson*, 614 F.3d 1185, 1197-98 (10th Cir. 2010) (certiorari denied, 131 S. Ct. 2150, 179 L.Ed.2d 935 (2011)), citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The Tenth Circuit correctly applied the legal requirements to the facts as alleged by Mr. Wilson. In order to find a supervisory defendant personally responsible in a § 1983 suit, the plaintiff must demonstrate: "(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." *Dodds* at 1199; *see Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997) (in discussing individual liability for supervisory defendants stated "we will find supervisory liability if the supervisor, with knowledge of the subordinate's conduct, approves of the conduct and the basis for it."); *Grullon v. City of New Haven*, 720 F.3d 133, 138-39 (2d Cir. 2013) (setting out five (5) circumstances in which a supervisory defendant can be found personally liable including create or allowing a practice and policy of unconstitutional practices to occur and showing deliberate indifference by failing to act knowing constitutional violations were occurring); *see also*, *Smith v. Packnett*, 339 F. App'x 389, 393 (5th Cir. 2009) (discussing individual liability for a supervisors failure to train). Mr. Wilson sufficiently alleged all of these requirements and as

such the Tenth Circuit was correct when it held that Respondent's complaint sufficiently plead facts, if proven true, to support a finding of personal liability for Petitioner Chavez and Rivera.

Warden Chavez knew Mr. Wilson was being held in his jail: 1) without any lawful court order; 2) without any criminal charges being filed; and 3) without being brought before a magistrate for a probable cause hearing. The complaint alleges that he had both actual knowledge of Mr. Wilson and that he had a practice and policy of accepting individuals into custody at VCDC without filed charges and without any court order that the person be held. Complaint ¶¶ 51-60. Mr. Wilson further alleged that Warden Chavez established a policy or custom of holding individuals without pending criminal charges knowing that charges may not get filed until a court filed release orders sua sponte. Complaint ¶¶ 52-53. Warden Chavez trained his staff to hold individuals in these circumstances. Complaint ¶ 54. And he acted with deliberate indifference when he failed to train or supervise his employees to prevent citizens from being held illegally when no criminal charges were filed. Complaint ¶ 56. It was this policy that was a significant moving force behind Mr. Wilson's illegal detention. Complaint ¶ 59.

Additionally, the complaint alleges that Rivera, the former sheriff, had a practice and policy of not filing criminal complaints in a timely manner and allowing his officers to arrest people and wait before filing charges. Complaint ¶ 64. In some circumstances

this policy and/or custom resulted in people being arrested and held at VCDC without charges ever being filed. Complaint ¶ 65. Rivera's policy was a significant moving force behind the violation of Mr. Wilson's constitutional rights. Complaint ¶¶ 62-72.

The Tenth Circuit outlined in detail the various New Mexico statutes, which imposed responsibilities on Chavez and Rivera.

> 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. Pet. App. 18-20.

Chavez and Rivera have thus directly participated in the constitutional violations. "Personal involvement is not limited solely to situations where a defendant violates a plaintiff's rights by physically placing hands on him." *Fogarty v. Gallegos,* 523 F.3d

1147, 1162 (10th Cir. 2008). A plaintiff could establish, as Mr. Wilson alleges in his complaint, the defendant-supervisor's personal involvement by demonstrating his "'personal participation, his exercise of control or direction, or his failure to supervise,'" *Poolaw v. Marcantel,* 565 F.3d 721, 732 (10th Cir. 2009) (quoting *Green v. Branson,* 108 F.3d 1296, 1302 (10th Cir. 1997)), or his "knowledge of the violation and acquiesce[nce] in its continuance." *Jenkins v. Wood*, 81 F.3d 988, 995 (10th Cir. 1996)). A defendant-supervisor's promulgation, creation, implementation, or utilization of a policy that caused a deprivation of plaintiff's rights also could have constituted sufficient personal involvement. *See Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) (stating § 1983 liability may be imposed on a supervisor who either "established or utilized an unconstitutional policy or custom" or "breached a duty imposed by state or local law which caused the constitutional violation"). *Id*.

II. The Circuit Courts consistently apply this Court's holding in *County of Riverside v. McLaughlin*, and this case does not implicate any conflict among the circuits.

Petitioners claim that the circuits are split on the question who is responsible for a failure to provide a probable cause hearing. But any differences in the outcomes of the cases they cite is due to differences in the facts of those cases. Despite factual differences the federal courts of appeals all interpret this Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103 (1975) and

County of Riverside, 500 U.S. 44 (1991) consistently, namely, when a law enforcement officer, sheriff, or warden is personally involved in an individual not receiving a timely probable cause hearing, that officer, sheriff or warden is not entitled to qualified immunity.

As a preliminary matter, none of the cases cited by Petitioners was resolved at the pleading stage; they are decisions on motions for summary judgment made after discovery. In Mr. Wilson's case, discovery has not been completed and thus the Tenth Circuit's opinion was appropriately based solely on the allegations in Mr. Wilson's complaint.

A. The Fifth Circuit

Petitioners cite to cases from the Fifth, Sixth, Seventh and Ninth Circuits. Looking to the Fifth Circuit, Petitioners claim that *Jones v. Lowndes County, Miss.*, 678 F.3d 344 (5th Cir. 2012), conflicts with the decision below. In *Jones*, which unlike this case was decided on a motion for summary judgment, the court relied on the undisputed fact that the officer made reasonable attempts to arrange for the Plaintiff to see a magistrate within 48 hours. *Id.* at 350. Despite his attempts, a magistrate judge was not available, but the plaintiff saw the judge the following morning. *Id.* at 347-50. The court held as a factual matter that the officer was entitled to qualified immunity because he made reasonable efforts to bring the plaintiff before a magistrate within 48

hours. *Id*. *Jones* followed easily from this Court's opinion in *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), which gave as one example of a reasonable delay the unavailability of a magistrate judge.

The Fifth Circuit's decision is fully consistent with the decision below. Unlike the arresting officer in *Jones,* Petitioner Montano made no effort to bring Respondent before a magistrate court judge. Petitioner Montano never filed criminal charges against Mr. Wilson during his twelve days in custody. Thus, while both *Jones* and the court below applied the same law in the same manner, the different facts led to different outcomes.

Petitioners wrongfully suggest that *Jones* holds that only the arresting officer could be liable for the failure to provide a probable cause hearing. Pet. 18-19. The Fifth Circuit analyzed the sheriff's liability as the policymaker consistent with the Tenth Circuit's opinion here. In *Jones*, the policy was that officers were required to take detainees to see a judge "within 48 hours but no later than 72 hours and as soon as reasonably possible and without any unnecessary delay." *Jones*, 678 F.3d at 350. The court reasoned that since the facts in the case indicated that this policy was not "a moving force behind the delay . . . [i]t therefore cannot serve as the basis for plaintiffs' Section 1983 claim." *Id*. Moreover, the plaintiffs agreed that the delay was due to the lack of available judges. *Id*. The court did not hold that the sheriff could not be liable. Rather, it found that because all

parties agreed the policy did not cause the delay the sheriff was not liable on the facts of that case.

In contrast, here, Mr. Wilson alleges that the policy of Petitioner Chavez and Petitioner Rivera were moving forces behind the Fourth Amendment violation. Accepting that allegation as true, as is required in considering a motion to dismiss, the Tenth Circuit held that Mr. Wilson's complaint was sufficient to state a plausible claim against Petitioners in their individual capacity. This holding on these facts is entirely consistent with *Jones*.

B. The Sixth Circuit

Petitioners inexplicably assert that there is a conflict between the Sixth and Tenth Circuits. Their argument rests upon the Sixth Circuit's holding in *Drogosch v. Metcalf*, 557 F.3d 372 (6th Cir. 2009), that the arresting officer did not have qualified immunity in a case alleging that the plaintiff was not promptly brought to a magistrate judge after his arrest. As the Tenth Circuit likewise held that the arresting officer here is not entitled to qualified immunity, the cases are not in conflict on that point.

Nonetheless, Petitioners assert that the Sixth Circuit held that *only* the arresting officer could be liable for a failure to provide a prompt probable cause hearing. But in *Drogosch*, the arresting officer was the only individual discussed by the Sixth Circuit because he was the only defendant before the court. The plaintiff did not appeal the lower court's

dismissal of the other named defendants (other officers and county officials). *Drogosch*, 557 F.3d at 377. As a result, the Sixth Circuit did not have any opportunity to consider any defendant except the arresting officer.

Another Sixth Circuit decision further demonstrates the consistency between the Sixth and Tenth Circuits. In *Cherrington v. Skeeter*, 344 F.3d 631 (6th Cir. 2003), two individuals were named as defendants in their individual capacity, Officer Skeeter, one the arresting officers, and Police Chief Kinney, a supervisory defendant. The Sixth Circuit held that neither was entitled to qualified immunity. *Id.* at 644-45.

In addressing the issue of the arresting officer's and Police Chief's liability, the Sixth Circuit appropriately stated that such a determination required a factual analysis to conclude if either or both individuals caused the constitutional violation. *Id.* at 644-45. The Sixth Circuit remanded the causation issue back to the district court because it lacked the information necessary to determine whether the violation was the result of one or both of the defendants. *Id.* at 645.

> Under Ohio law, where an arrest is made without a warrant, it generally falls to the "arresting officer" to "bring the arrested person without unnecessary delay before a court having jurisdiction of the offense." Ohio Crim. R. 4(E)(2). In this case, the record establishes that Defendant Skeeter was one of the arresting officers, and there is some evidence of Defendant Kinney's involvement in

> the decisions to arrest Mary Cherrington and initially take her to a motel rather than the Circleville police station. The record is almost entirely silent, however, as to the roles played by these Defendants or other law enforcement officials in the roughly two-and-a-half-day period that Cherrington remained in jail without being brought before a magistrate.
>
> Under this record, it is possible that either or both of the named Defendants had a duty under Ohio law to see that Cherrington was promptly brought before a magistrate for a determination of probable cause to arrest her, and that either or both failed to take the necessary steps to discharge this obligation. It is equally possible, however, that one or both of these Defendants took some steps to ensure that there was a prompt judicial determination of probable cause, but that, through no fault of their own, this did not occur. In other words, we lack the information necessary to resolve the issue of causation – namely, whether the delay in Mary Cherrington's probable cause determination was attributable to the actions (or inaction) of one or both of the named Defendants. This matter must be determined upon remand to the District Court. *Id.* at 644-45 (internal citations omitted).

The court below applied the same law as in these Sixth Circuit cases, and, as in each case, the outcome turned in the specific facts before the court. Petitioners' claimed conflict does not exist.

C. The Seventh Circuit

Next, Petitioners claim that the Seventh Circuit's decision in *Luck v. Rovenstine*, 168 F.3d 323 (7th Cir. 1999) presents a conflict with the Tenth Circuit's decision. Specifically, Petitioners claim that the Seventh Circuit affirmed the granting of qualified immunity on the individual liability of the sheriff who was in charge of the jail on "arguments nearly identical to those raised by petitioners in *Wilson*." Pet. 18. This statement is inaccurate.

First, *Luck* was based on a summary judgment motion after discovery was conducted. The sheriff who was in charge of the jail asserted that he had no knowledge of the plaintiff's incarceration and the court relied on this fact in affirming the grant of qualified immunity to the sheriff. *Id.* at 327. At the same time, the Seventh Circuit said nothing to suggest a sheriff or warden could never be held personally liable to an individual who had not received a prompt probable cause hearing. Because Mr. Wilson has alleged that the warden actually knew that he was in jail without filed charges or any lawful court order and still did nothing to bring him before the magistrate court for a probable cause hearing during the twelve days he spent at the jail over the Christmas holiday, *Luck* presents no conflict here.

D. The Ninth Circuit

Petitioners next point to *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir. 1993). As a

preliminary matter the factual allegations in the case predate this Court's decision in *County of Riverside* as the arrest and detention of Ms. Hallstrom occurred in 1987. *Id.* at 1476. Thus, in terms of determining the clearly established law at the time of Ms. Hallstrom's arrest, *County of Riverside* was not applicable. Moreover, once again, the decision to deny qualified immunity to the jail commander was driven by the specific factual context of the case.

Petitioners omit from their description of *Hallstrom,* facts that demonstrated the personal involvement of the jail commander. In *Hallstrom* the Plaintiff, after being arrested without a warrant, refused to answer any booking questions or comply with the jail's booking procedures. *Id*. The county officials, which included the jail commander, "ignored her [Ms. Hallstrom's] demands to be taken before a magistrate, and simply incarcerated her until she agreed to cooperate with the county booking procedures." *Id*. This was the only reason given by the county for the delay in providing a probable cause determination. *Id.* at 1480. The county defendants argued, in effect, that they could hold her indefinitely if she did not comply because they had the right to book arrested individuals. The Ninth Circuit appropriately rejected this argument declaring it was "simply wrong." *Id.* at 1481. "While the booking process itself (and its attendant fingerprinting and photographing) may be entirely proper, it does not trump the Fourth Amendment proscription against

over-long detention based solely on a probable cause determination made by the arresting officer." *Id*.

This reasoning is consistent with that of the other Circuits, including the decision below. In each case, the courts looked to the specific facts before them to assess the personal involvement of the specific defendant. Where the defendant is involved in the constitutional violation, qualified immunity is properly denied.

III. Petitioners' heavy reliance on NMSA § 33-3-12 and an administrative memo to magistrate judges months after Mr. Wilson's illegal detention is misplaced and does not warrant review.

Petitioners refer to a statute regarding the release of inmates lawfully held by a court order, and a memorandum from the administrative office of the courts to magistrate judges, to argue the Tenth Circuit decision was in error. The memo, however, was never properly before any court. The Petitioners filed this memo *after* the district court had published its written ruling denying qualified immunity. It was therefore not part of the record on review before the district court when it made its decision and, consequently, is not properly before this Court. The document contains unchallenged factual assertions, and Mr. Wilson has not had an opportunity to cross examine Petitioners about their knowledge of the memo, including whether they relied on it in making their

decisions to hold Mr. Wilson without charges being filed. Moreover, the memo is dated approximately six months *after* Mr. Wilson's illegal detention, making its relevance to the case difficult to discern.

Similarly, Petitioners' reliance on NMSA § 33-3-12 is flawed. As recognized by the Tenth Circuit, Petitioners have made two separate arguments regarding the applicability of this statute, one before the district court and one before the Tenth Circuit.

> Before the district court, appellants argued the existence of § 33-3-12(B) 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. Pet. App. 24-25.

The Tenth Circuit rejected both arguments.

Now, before this Court, Petitioners appear to argue a combination to the two. As the Tenth Circuit correctly pointed out, however, "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." Pet. App. 25.

Of course, whether the statute would apply under any circumstances in Mr. Wilson's case is questionable. As Mr. Wilson argued below, NMSA § 33-3-12 requires as a prerequisite that the individual who is being held in the jail be held under a lawful court order, NMSA § 33-3-12(A), but it is undisputed that Mr. Wilson was arrested without a warrant and held without any lawful court order. As this Court said over 200 years ago in *Ex Parte Burford*, 7 U.S. 448, 452 (1806) where this Court ordered the release of Burford where the "warrant of commitment" did not state that Burford had committed any criminal offense or had been convicted of any crime:

> The question is, what authority has the jailor to detain him? To ascertain this, we must look to the warrant of commitment only. It is that only which can justify his detention. That warrant states no offence. It does not allege that he was convicted of any crime. . . . It does not charge him of their own knowledge, or suspicion, or upon the oath of any person whomsoever . . . If the prisoner had broken jail, it would have been no escape. . . .

IV. The small handful of cases cited by Petitioners since *Gerstein* was decided in 1975 does not amount to a surge in litigation.

Petitioners cite to twelve cases since the Court's 1975 decision in *Gerstein* to claim that a surge in litigation surrounding law enforcements failure to provide prompt probable cause determinations. The litigation in this area is not, however, the result of appellate decisions, but rather the appropriate consequence of police officers, jail supervisors and the heads of law enforcement agencies failing to do what the law has required since *Gerstein*, namely, provide those citizens who have been arrested without a warrant with a prompt probable cause determination.

The policy argument Petitioners put forth is that allowing wardens and sheriffs to be individually liable would expose them to punitive damages. That question has no bearing on whether Mr. Wilson's complaint alleged sufficient facts to support Petitioners personal involvement in the constitutional violation. Therefore, the possibility of a punitive damages award down the road does not warrant a review of the denial of qualified immunity at the pleading stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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