

**In The  
Supreme Court of the United States**

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

*Petitioners,*

v.

MICHAEL WILSON, SR.,

*Respondent.*

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

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**REPLY TO BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS

	Page
REPLY TO BRIEF IN OPPOSITION .....	1
I. Mr. Wilson's argument regarding the sufficiency of supervisory allegations overlooks the fact that supervisory claims fail when there is no unconstitutional conduct by a subordinate .....	1
II. Mr. Wilson's attempt to illustrate conformity amongst the circuits fails; the circuits diverge on who has the responsibility to ensure prompt probable cause determinations .....	6
CONCLUSION .....	7

## TABLE OF AUTHORITIES

## Page

## CASES

<i>Drogosch v. Metcalf</i> , 557 F.3d 372 (6th Cir. 2009) .....	7
<i>Jones v. Lowndes County, Miss.</i> , 678 F.3d 344 (5th Cir. 2012) .....	6
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009) .....	5
<i>Scull v. New Mexico</i> , 236 F.3d 588 (10th Cir. 2000) .....	2, 3, 4, 5
<i>Strepka v. Miller</i> , 28 Fed. Appx. 823 (10th Cir. 2001) .....	2, 4, 5

## STATUTES

New Mexico Statute § 33-3-12 .....	3, 4
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## REPLY TO BRIEF IN OPPOSITION

Petitioners Lawrence Montano, Joe Chavez, and Rene Rivera respectfully submit this reply to respondent's brief in opposition to petitioners' petition for certiorari.

**I. Mr. Wilson's argument regarding the sufficiency of supervisory allegations overlooks the fact that supervisory claims fail when there is no unconstitutional conduct by a subordinate.**

The Tenth Circuit erred when it held that plaintiff has stated an individual capacity claim against all defendants; that decision and Mr. Wilson's argument overlook the fact that there is no supervisory liability for the constitutional conduct of subordinates. Here, the supervisory liability alleged against the detention center warden cannot illustrate unconstitutional conduct of subordinates because the detention center staff did not have the obligation to ensure a *Gerstein* determination under any case or statute. The Tenth Circuit erred when it held that a sufficient claim had been stated despite its prior statement that:

[a]lthough 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). Highlighting the confusion is the New Mexico Administrative Office of the Courts’ Memorandum<sup>1</sup> which states that the duty to ensure *Gerstein* determinations in New Mexico “is not the responsibility of the police or the jail; it falls squarely onto the court.” The *Wilson* decision contradicted other Tenth Circuit precedent, which held that a jail did not have a clearly established duty to investigate the status of a detainee. *Scull v. New Mexico*, 236 F.3d 588 (10th Cir. 2000) (granting qualified immunity to jail officials who failed to investigate a detainee’s claims that he was being held erroneously and should have been released pursuant to a valid court order).

In *Scull*, a detainee (Mr. Scull) was picked up in New Mexico on a warrant for a parole violation from Ohio. He was booked into a detention center in Taos, New Mexico. He filed a petition for a writ of habeas corpus arguing that he had fled Ohio out of fear for his safety and should not be extradited to Ohio. The New Mexico state district court granted the petition and issued the writ; the state appealed. The writ directed the Taos detention center to release Mr. Scull. Eventually, the New Mexico Supreme Court affirmed

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<sup>1</sup> Mr. Wilson argues that the Memo is not part of the record; however, the Memo is part of the record and was discussed by the Tenth Circuit in its decision.

the district court's grant of the writ. In the meantime, while free pursuant to the writ, Mr. Scull was involved in a minor traffic accident in Albuquerque, New Mexico. When the police checked his background, they identified the warrant from Ohio and booked him into the Bernalillo County Detention Center. He protested and asked them repeatedly to check into the status of the writ; they declined. Mr. Scull called a lawyer who showed the writ to a number of Bernalillo County Detention Center employees. Despite the writ ordering Mr. Scull's release from the Taos Detention Center, the Bernalillo County Detention Center refused to release Mr. Scull or to make any inquiry into his legal status. About 30 days later, a different district court judge ordered Mr. Scull's release based on the prior writ directed at the Taos detention center. Mr. Scull brought suit under Section 1983 based on the alleged illegality in the hold. The federal District Court for the District of New Mexico granted summary judgment and held that the Bernalillo County Detention Center staff was entitled to qualified immunity because there was no clearly established duty to investigate the status of a detainee and the detention center staff was barred by NMSA § 33-3-12 from releasing Mr. Scull even if they knew he was held erroneously. The Tenth Circuit affirmed.

Notwithstanding *Scull*, and the cases cited in the petition for writ of certiorari, the Tenth Circuit held that the Valencia County detention center warden or staff had an obligation to ensure a *Gerstein*

determination. The Tenth Circuit ignored the effect of NMSA § 33-3-12 and simply commented that Mr. Wilson's claim was not for over-detention, but rather for the deprivation of a *Gerstein* determination. Not only is the alleged damage for the deprivation an over-detention, but there is no duty, clearly established or otherwise, on the detention center staff or warden to obtain a *Gerstein* determination in New Mexico, similar to *Scull*. Under *Scull*, detention center staff does not have any duty to investigate the legal status of a detainee booked by a legitimate law enforcement officer; neither does the warden. Assuming constructive knowledge of existing case law, it is unreasonable to assume that the warden or his staff would have known they had such a duty for purposes of a qualified immunity analysis when *Scull* and *Strepka* state otherwise. Mr. Wilson has not alleged that officer Montano lacked legal authority to arrest him and book him into the detention center. Accordingly, *Wilson* and *Scull* are in conflict. Mr. Wilson's claim that petitioners have admitted liability for Deputy Montano is false; petitioners simply argue that if the duty is clearly established on anyone, it is the arresting officer. However, *Strepka* itself found that officers would be entitled to qualified immunity.

Because there is no duty on the detention center staff, the supervisory allegations regarding the warden are irrelevant. The cases cited by the respondent regarding supervisory liability all illustrate an underlying constitutional violation by a subordinate is a necessary predicate for supervisory liability.

Allegations of personal supervisory involvement in conduct that does not rise to the level of a constitutional violation, or allegations of the unconstitutional conduct of non-subordinates, are insufficient to state an individual capacity claim against a supervisor, as a matter of law. Therefore, Mr. Wilson’s argument that his supervisory allegations are sufficient overlooks the fact that there is no valid claim against detention center staff and absent a clearly established claim against the subordinates, there is no valid claim against the supervisor. Therefore, the *Wilson* court erred when it held jail staff had a clearly established duty to do so. Allowing the claims against the jail staff to stand simply subjects the jail staff and the warden to potential punitive damages and unnecessary litigation when they are barred by New Mexico Statute from releasing anyone without a court order, even if they know the detainee has not had a *Gerstein* determination. The purpose of qualified immunity is to “shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Here, there can be no question that the warden and jail staff acted reasonably given the *Strepka* and *Scull* holdings and the memo by the New Mexico Administrative Office of the Courts. Mr. Wilson’s arguments regarding the proper pleading requirements for a supervisory claim do not support the denial of certiorari because they do not illustrate clarity regarding the provision of *Gerstein* determinations.



**II. Mr. Wilson’s attempt to illustrate conformity amongst the circuits fails; the circuits diverge on who has the responsibility to ensure prompt probable cause determinations.**

Mr. Wilson’s argument that the circuits are in conformity fails. The outcome of a *Gerstein* claim depends on which circuit encompasses the court which is hearing the claim. Mr. Wilson argues that *Jones v. Lowndes County, Miss.*, 678 F.3d 344 (5th Cir. 2012) follows from *Riverside* because its grant of immunity was based on magistrate unavailability. However, *Riverside* did not state that magistrate unavailability would extend the 48-hour time to provide a *Gerstein* determination. *Riverside* did note that late night magistrate unavailability was one reason that the determination did not need to be immediate, however in establishing the 48-hour time guideline, the *Riverside* Court noted that even weekends would not extend the time. In *Jones*, the Fifth Circuit found that despite delaying the *Gerstein* determination due to the arresting officer’s second job, the officer was entitled to qualified immunity. That holding is in conflict with the Tenth Circuit’s holding here that even a state statute barring the detention center employees from releasing Mr. Wilson would not entitle the defendants to qualified immunity. The fact that *Jones* was decided at summary judgment does not circumvent the Fifth Circuit’s holdings regarding the duty to ensure a *Gerstein* determination.

Mr. Wilson's argument regarding *Drogosch v. Metcalf*, 557 F.3d 372 (6th Cir. 2009) overlooks the fact that the district court had previously granted qualified immunity to all defendants other than the arresting parole officer. While it is true that the other defendants were not on appeal, the Sixth Circuit still held that under Michigan law, the parole agent was the person responsible for ensuring that arrestee received a prompt probable cause hearing after the agent detained him following a warrantless arrest for purported probation violation. That holding follows *Riverside* but conflicts with the Tenth Circuit's holding here that all of the individual defendants were personally liable for Mr. Wilson's deprivation.

As illustrated in the petition, the circuits split on who has the obligation to ensure a prompt probable cause determination. Further, they split on the method that should be used to identify the party with the responsibility. *Riverside* and *Gerstein* imply that the arresting officer is the most likely party, but as this issue has reached the courts for the last 20 years, the courts have used a variety of methods and allowed claims against an unpredictable selection of parties. This matter is ripe for clarification and uniform application.



## CONCLUSION

This Court should grant the petition and issue the writ of certiorari because there is a split in the

circuits regarding who has the obligation to ensure a *Gerstein* determination is conducted. There is a surge in litigation regarding this issue and a lack of a predictable rule. The lack of predictability creates a likelihood that individual capacity defendants will be sued for punitive damages and denied qualified immunity and its shield from the burdens of trial, when there is no statutory or common law basis placing the obligation on said party. Therefore, 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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