IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-60690

JESSICA JAUCH,

Plaintiff-Appellant

v.

CHOCTAW COUNTY; CLOYD HALFORD, in his Individual Capacity,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Mississippi

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(Filed Oct. 24, 2017)

Before REAVLEY, HAYNES, and COSTA, Circuit Judges.

REAVLEY, Circuit Judge:

Jessica Jauch was indicted by a grand jury, arrested, and put in jail—where she waited for 96 days to be brought before a judge and was effectively denied bail. The district court found this constitutionally permissible. It is not. A pre-trial detainee denied access to the judicial system for a prolonged period has been denied basic procedural due process, and we therefore reverse the district court's judgment.

I. BACKGROUND

Upon the word of a confidential informant, a grand jury indicted Jessica Jauch for the sale of a Schedule IV controlled substance on January 24, 2012. That same day, the Choctaw County Circuit Clerk issued a capias warrant. The capias reads:

> You are hereby commanded to take ***Jessica Jauch*** if to be found in your County, and him/her safely keep, so that you have his/her body before the ***Circuit Court of the County of Choctaw***, in said State, at the Courthouse in the town of Ackerman, MS, on the ***31st day of January, 2012***, then and there to answer the State of Mississippi on an ***indictment found against him/her on the 24th day of January, 2012, for***:
>
> Ct. 1: ***Sale of a Schedule IV Controlled Substance***

On April 26, 2012, Starkville Police Department officers pulled Jauch over, issued her several traffic tickets, and informed her of an outstanding misdemeanor warrant in Choctaw County. Choctaw County deputies took custody of Jauch and transported her to the Choctaw County Jail where, the next morning, she was served with the misdemeanor warrant and the capias. Jauch cleared the misdemeanor warrant within a few days. She nonetheless remained detained on the capias, and her requests to be brought before a judge and allowed to post bail were denied. Jail officials informed Jauch that Sheriff Halford had confirmed she could not be taken before a judge until August when

the next term of the Circuit Court commenced. When a friend of Jauch's reached the sheriff on the telephone, he told her the same thing. Jauch's protestations of innocence were ineffectual.

Ninety-six days after being taken into custody, Jauch's case moved forward. She received an appointed attorney, waived formal arraignment, had bail set, and had a trial date set. Six days later, on August 6, 2012, she posted bail. Before the end of the month, the prosecutor reviewed the evidence against Jauch and promptly moved to dismiss the charge. On January 29, 2013, the Circuit Court of Choctaw County entered the dismissal. It is undisputed that Jauch was innocent all along, as she had claimed from behind bars.

On April 21, 2015, Jauch sued under 42 U.S.C. § 1983 alleging Sheriff Halford and Choctaw County caused her constitutional deprivations. Both parties eventually moved for summary judgment. The district court observed that Jauch asserted violations of the Sixth, Eighth, and Fourteenth Amendments but treated the Fourteenth Amendment claims (procedural and substantive due process) as an attack on the original probable cause determination underlying her arrest. It ruled against her on the basis of procedural due process because state law renders the probable cause determination of a grand jury conclusive, meaning Jauch was not entitled to a hearing (like an initial appearance or preliminary hearing) where she could challenge that determination. With respect to substantive due process, the district court found the Fourth

Amendment applied more squarely to such a claim, and then found the Fourth Amendment was not violated *because* the undisputedly valid probable cause determination supported the arrest. We note that Jauch never alleged a Fourth Amendment violation nor sought to challenge the probable cause determination made by the grand jury.

The district court also ruled against Jauch with respect to her Sixth and Eighth Amendment claims. It further ruled that Choctaw County was not subject to municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), and that Sheriff Halford was entitled to qualified immunity. Based on these rulings, the district court denied Jauch's motion for summary judgment and ordered judgment in favor of the defendants. Jauch timely appealed.

II. OUR REVIEW

"We review a district court judgment on cross-motions for summary judgment de novo." *Cedyco Corp. v. PetroQuest Energy, LLC*, 497 F.3d 485, 488 (5th Cir. 2007). Each party's motion is considered "independently, viewing the evidence and inferences in the light most favorable to the nonmoving party." *Green v. Life Ins. Co. of N. Am.*, 754 F.3d 324, 329 (5th Cir. 2014). "Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

III. DISCUSSION

We address only the Fourteenth Amendment and hold that this excessive detention, depriving Jauch of liberty without legal or due process, violated that Amendment; for that reason, her motion for summary judgment should have been granted as to the Fourteenth Amendment Due Process claim.

A. Moving Beyond the Fourth Amendment

The district court treated Jauch's due process claim as a Fourth Amendment claim, reasoning that "[b]ecause an arrest is a seizure, . . . the more particularized Fourth Amendment analysis [is] appropriate" and concluding that because probable cause supported Jauch's arrest, there was no constitutional violation. This analysis dooms Jauch's claim and seemingly means the Constitution is not violated by prolonged pretrial detention so long as the arrest is supported by probable cause.

While this appeal was pending, the Supreme Court issued *Manuel v. City of Joliet*, which held that a defendant seized without probable cause could challenge his pretrial detention under the Fourth Amendment. 137 S.Ct. 911, 917 (2017). *Manuel* does not address the availability of due process challenges after a legal seizure, and it cannot be read to mean, as Defendants contend, that *only* the Fourth Amendment is available to pre-trial detainees. For example, even when the detention is legal, a pre-trial detainee subjected to excessive force properly invokes the

Fourteenth Amendment. *See, e.g.*, *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994). So, too, may a legally seized pre-trial detainee held for an extended period without further process. This Court has already addressed the interplay between the Fourth and Fourteenth Amendment [sic], and *Manuel* fits with these prior cases.

In 1996, we held the Fourth Amendment inapplicable to the usual pretrial detainee who was *properly arrested* and awaiting trial. *Brooks v. George Cnty., Miss.*, 84 F.3d 157, 167 (5th Cir. 1996). When confronted with a defendant held upon probable cause who spent nine months in pretrial detention, we found the Fourth Amendment inapplicable and the due process clause of the Fourteenth Amendment implicated. *See Jones v. City of Jackson*, 203 F.3d 875, 880 (5th Cir. 2000). The Fourth Amendment could not have been violated, we explained, because the plaintiff was originally arrested "pursuant to a valid court order," but the "alleged nine month detention without proper due process protections" would amount to a due process violation if proven. *Id.* By contrast to these cases, where a claim of unlawful detention was accompanied by allegations that the initial arrest was not supported by valid probable case, we held that analysis was proper "under the Fourth Amendment and not under the Fourteenth Amendment's Due Process Clause." *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 441 (5th Cir. 2015); *see also Castellano v. Fragozo*, 352 F.3d 939, 953 (5th Cir. 2003) (en banc). Just like *Manuel*.

B. Due Process

This case is about due process, and the question raised here was answered in *Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000).[1] Joseph Jones was held on a bench warrant for nine months "without hearing or court appearance." *Id.* at 878. Upon release, he sued. When the case reached us, we held that his right to due process was violated because "[p]rohibition against improper use of the 'formal restraints imposed by the criminal process' lies at the heart of the liberty interests protected by the Fourteenth Amendment due process clause." *Id.* at 880 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972)).

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[1] In *Harris v. Payne*, an unpublished case, we find a potential suggestion that *Jones* is inconsistent with prior cases. *See* 254 F.App'x 410, 420 n.2 (5th Cir. 2007) (per curiam). Having surveyed the area, we are confident that it is not. *Harris* is easily distinguishable; that case involved official negligence and applied the rule that negligent deprivations of life, liberty, or property do not implicate Due Process. *See id.* at 419–21. Given Jauch's 96-day detention without a hearing of any sort, this is also not a case "where only 'immediacy' or lack of it was the issue presented to the court." *Rheaume v. Texas Dep't of Pub. Safety*, 666 F.2d 925, 929 (5th Cir. 1982) (citing *Perry v. Jones*, 506 F.2d 778, 780–81 (5th Cir. 1979); *Anderson v. Nosser*, 438 F.2d 183 (5th Cir. 1971)); *see also Kulyk v. United States*, 414 F.2d 139, 141–42 (5th Cir. 1969). Finally, having been arrested upon valid probable case, Jauch properly does not assert a right to a preliminary hearing, *see Stephenson v. Gaskins*, 539 F.2d 1066, 1067–68 & n.* (5th Cir. 1976) (per curiam), and this case does not involve the rule that "a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 866 (1975) (citing *Scarbrough v. Dutton*, 393 F.2d 6 (5th Cir. 1968) (per curiam)).

Jones is binding, but it did not state whether the due process violation was of the procedural or substantive variety. Other circuits appear split on the question. *Compare Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985) (substantive due process); *Hayes v. Faulkner Cnty., Ark.*, 388 F.3d 669 (8th Cir. 2004) (substantive due process), *with Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470 (9th Cir. 1992) (procedural due process); *see also Armstrong v. Squadrito*, 152 F.3d 564, 575 & n.4 (7th Cir. 1998) (specifically rejecting *Oviatt* and its procedural due process approach).

We find the answer from Supreme Court cases. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976 (1974). This is true with respect to both procedural and substantive due process. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S.Ct. 1708, 1716 (1998). When "the fault lies in a denial of fundamental procedural fairness," the question is one of procedural due process. *Id.* at 845–46, 118 S.Ct. at 1716 (citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 1995 (1972)). The procedural due process analysis starts with one inquiry: whether the state has "deprived the individual of a protected interest—life, liberty, or property." *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984).

Here, we deal with a deprivation of a protected liberty interest due to an allegedly unfair procedural scheme. The Constitution itself protects physical liberty. *Jones*, 203 F.3d at 880–81; *see also Turner v. Rogers*, 564 U.S. 431, 445 131 S.Ct. 2507, 2518 (2011)

(describing "loss of personal liberty through imprisonment" as sufficient to trigger Due Process protections). As a matter of procedure, defendants held in Choctaw County on capias warrants are held without an arraignment or other court proceeding until the circuit court that issued the capias next convenes. Our task is to determine the constitutionality of this procedure, and we are satisfied that Jauch's right to procedural due process is most squarely implicated. Without deciding whether substantive fundamental unfairness may support a due process holding with little procedural deficiency, we hold that prolonged-detention cases do raise the immediate question of whether the pre-trial detainee's procedural due process rights have been violated.

Upon identifying a protected liberty interest, courts ask what process is due. *See Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908 (1989). In asking that question, which test applies? Ordinarily, "[t]he starting point for any inquiry into how much 'process' is 'due' must be the Supreme Court's opinion in *Mathews v. Eldridge*," and we would consider the private interest at stake, the risk of erroneous deprivations under existing procedures in light of available alternative or additional procedures, and the government's interest. *Buttrey v. United States*, 690 F.2d 1170, 1177 (5th Cir. 1982) (citing 424 U.S. 319, 96 S.Ct. 893 (1976)). *Oviatt* applied this test.

The Supreme Court subsequently clarified the law, holding "that 'the *Mathews* balancing test does not provide the appropriate framework for assessing the

validity of state procedural rules which . . . are part of the criminal process,' reasoning that because the 'Bill of Rights speaks in explicit terms to many aspects of criminal procedure,' the Due Process Clause 'has limited operation' in the field." *Kaley v. United States*, 134 S.Ct. 1090, 1101 (2014) (quoting *Medina v. California*, 505 U.S. 437, 443, 112 S.Ct. 2572, 2576 (1992)) (alterations in original)). The Fifth Circuit has had little occasion to apply *Medina*, and the parties neglect it entirely. The Supreme Court, however, has turned to *Medina* repeatedly,[2] and we follow that Court's example when determining which procedural due process test applies. *See Weiss v. United States*, 510 U.S. 163, 177, 114 S.Ct. 752, 760 (1994) (a case arising "in the military context," where one party urged application of *Mathews*, the other advocated for *Medina*, and the Supreme Court held both inapplicable and applied a standard found in *Middendorf v. Henry*, 425 U.S. 25, 96 S.Ct. 1281 (1976)).

As used in *Medina*, the phrase "part of the criminal process" has been described as "rules concern[ing], for example, the allocation of burdens of proof and the type of evidence qualifying as admissible." *Nelson v. Colorado*, 137 S.Ct. 1249, 1255 (2017). This is not a case about presumptions, evidence, or any workaday aspect of the process-in-action. This is a case about

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[2] *See, e.g.*, *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69, 129 S.Ct. 2308, 2320 (2009); *Cooper v. Oklahoma*, 517 U.S. 348, 364, 116 S.Ct. 1373, 1381 (1996); *Montana v. Egelhoff*, 518 U.S. 37, 43, 116 S.Ct. 2013, 2017 (1996); *Herrera v. Collins*, 506 U.S. 390, 407–08, 113 S.Ct. 853, 864 (1993).

confinement with process deferred. Moreover, while *Medina* was premised on the "considerable expertise" of the states "in matters of criminal procedure and the criminal process" and represents "substantial deference to legislative judgments in this area," 505 U.S. at 445–46, 112 S.Ct. at 2577, the procedure challenged here does not represent the legislative judgment of the state and indeed conflicts with the Mississippi legislature's decree that all defendants be arraigned within 30 days. URCCC 8.01.[3] There is thus room to argue that the *Mathews* test is more appropriate under the circumstances. Ultimately, we again follow the Supreme Court's example, choosing not to decide which test applies "because we need not do so." *Kaley*, 134 S.Ct. at 1101.

The *Medina* test represents the "narrower inquiry" and is "far less intrusive than that approved in *Mathews*." 505 U.S. at 445–46, 112 S.Ct. at 2577. "A rule of criminal procedure usually does not violate the Due Process Clause unless it (i) 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or (ii) 'transgresses any recognized principle of 'fundamental fairness' in operation.'" *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 726 (D.C. Cir. 2017) (quoting *Medina*, 505 U.S. at 446, 448, 112 S.Ct. at 2577–78); *see also Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69, 129 S.Ct. 2308, 2320 (2009). Even

[3] Mississippi's Uniform Circuit and County Rules have recently been replaced by the Mississippi Rules of Criminal Procedure and were deleted effective July 1, 2017.

under the deferential *Medina* test, the indefinite-detention procedure violated Jauch's right to procedural due process.

"Historical practice and, to a lesser extent, contemporary practice" guide our first inquiry. *Kincaid*, 854 F.3d at 726. For the following reasons, we conclude that indefinite pre-trial detention without an arraignment or other court appearance offends fundamental principles of justice deeply rooted in the traditions and conscience of our people. The same traditions that birthed our Sixth Amendment right to a speedy trial and Eighth Amendment prohibition of excessive bail condemn the procedure at issue.

Sir Edward Coke addressed pre-trial detention in 1681, explaining that judges of the period "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, by due trial, without detaining him long in prison." COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681). "Coke's Institutes were read in the American Colonies by virtually every student of the law." *Klopfer v. State of N.C.*, 386 U.S. 213, 225, 87 S.Ct. 988, 994 (1967). And the Supreme Court quoted this very passage in holding "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Id.* at, [sic] 223 87 S.Ct. at 993. What if judges were unavailable? Promulgated in 1166, the Assize of Clarendon provided an answer, decreeing that in cases where the usual judge was unavailable, another judge would be

located that justice be not delayed.[4] Assize of Clarendon ¶ 4 (1166); *see also Klopfer*, 386 U.S. at 223 n.9, 87 S.Ct. at 993 n.9.

The speedy trial clause has three distinct purposes, only one of which is protection against "undue and oppressive incarceration prior to trial." *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776 (1966). Thus, rather than embodying and defining a right against extended pre-trial detention, the clause is "an important safeguard" against it. *Id.* This is, therefore, not a case where the inapplicability of a specific constitutional provision means arguments under the due process clause are not well taken. *Compare Sattazahn v. Pennsylvania*, 537 U.S. 101, 116, 123 S.Ct. 732, 742 (2003) (refusing "to hold that the Due Process Clause provides greater double-jeopardy protection than does the Double Jeopardy Clause"). Rather, the right to a speedy trial "has its roots at the very foundation of our English law heritage" and *grows out of* the fundamental propositions set forth by Coke. *See Klopfer*, 386 U.S. at 223, 87 S.Ct. at 993. The Sixth Amendment's inapplicability here does not delimit "the traditions and conscience of our people." *Medina*, 505 U.S. at 459, 112 S.Ct. at 2585 (quoting *Patterson v. New York*, 432 U.S. 197, 202, 97 S.Ct. 2319, 2322

[4] The Assize of Clarendon set forth basic rules of criminal and civil procedure and has thrice been cited by the Supreme Court as instructive with respect to American practices and traditions. *See Klopfer*, 386 U.S. at 223, 87 S.Ct. at 993; *Russell v. United States*, 369 U.S. 749, 761, 82 S.Ct. 1038, 1045 (1962); *Hurtado v. California*, 110 U.S. 516, 529, 4 S.Ct. 111, 117 (1884).

(1977)); *see also* U.S. Const. amend. IX. And so we reject any suggestion that the Sixth Amendment's speedy-trial clause serves as the only limit on prolonged pre-trial detention.[5]

Even in distant times, a trial could not always be held promptly. The expectation was not that the accused would wait in jail, but that (if eligible) he would be swiftly released on bail. *See* 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 580–88 (2d ed. 1905). Ancient writs used to procure conditional release gradually gave way to the common law writ of habeas corpus. *See id.* at 582–86; 1 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 95–97 (1903). In both eras, just as judicial absenteeism would not justify stalling prosecution, nor would it excuse the withholding of bail. POLLOCK & MAITLAND, *supra*, at 583; 3 W. Blackstone, Commentaries *131. There was a period, however, when the availability of bail in "vacation-time" came into doubt.[6]

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[5] *See Baker*, 443 U.S. at 144, 99 S.Ct. at 2694 (noting pre-trial detention "in the face of repeated protests of innocence" would eventually violate the right to a speedy trial "even though the warrant under which [the detainee] was arrested and detained met the standards of the Fourth Amendment," and suggesting that "depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law' " as well).

[6] The causes and extent of this problem are matters of debate, but not the problem itself. For a sampling, compare *Parker v. Ellis*, 362 U.S. 574, 584, 80 S.Ct. 909, 915 & nn.12–13 (1960) (Warren, J., dissenting) (discussing the writ's nature as a "prerogative" writ, and asserting non-use during vacation-time was a pretextual means of keeping enemies of the king incarcerated), with

See Opinion on the Writ of Habeas Corpus, 97 Eng. Rep. 29, 31–51 (H.L. 1758) (Wilmot, J.), *in* 3 THE FOUNDERS' CONSTITUTION 313–24 (1987). The threat that bail might be unavailable out of term served as a catalyst for the Habeas Corpus Act of 1679. *See* W. CHURCH, WRIT OF HABEAS CORPUS §§ 16–17, p. 18–20 (2d ed. 1893).

"[C]oncerned exclusively with providing an efficacious remedy for pretrial imprisonment,"[7] *Peyton v. Rowe*, 391 U.S. 54, 60 n.12, 88 S.Ct. 1549, 1552 n.12 (1968), the Act condemned a system under which defendants had been "long detained in prison, in such cases where by law they are bailable." 31 Car. 2, ch. 2, § 1. It conclusively imbued judges with the authority to grant habeas writs during vacation-time, and it provided that other officers could grant the writ if no justice of the King's Bench was available. § 3.

Together, the right to a speedy trial and the privilege to petition for habeas relief (and thus bail) protected unconvicted criminal defendants from lengthy pre-trial detention, even while the court was out of

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PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 55–58, 236–40 (2010) (minimizing concerns about the writ's use in vacation-time, and attributing diminished use to genuine confusion in the law).

[7] The Act is most properly understood to create an effective remedy, and the substantive rights it vindicates are those found in the Magna Carta. *Boumediene v. Bush*, 553 U.S. 723, 740, 128 S.Ct. 2229, 2244 (2008). It would later "be described by Blackstone as the 'stable bulwark of our liberties,' " an observation not lost on the Founders. *Id.* at 742, 128 S.Ct. at 2246 (quoting 1 W. Blackstone, Commentaries *137).

term. A.V. Dicey explained how they worked in tandem: "while the Habeas Corpus Act is in force no person committed to prison on a charge of crime can be kept long in confinement, for he has the legal means of insisting upon either being let out upon bail or else of being brought to a speedy trial."[8] THE LAW OF THE CONSTITUTION 214 (8th ed. 1915).

This is our adoptive tradition. At the embryonic stage, we claimed all the rights of Englishmen. *See Hurtado*, 110 U.S. at 540, 4 S.Ct. at 293. And while the impact in England of 1679's Habeas Corpus Act is subject to debate, this country embraced it enthusiastically. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1335; Amanda L. Tyler, *A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1986–89 (2016). The speedy trial right and habeas remedy are written into our Constitution, as is the prohibition of excessive bail. So, too, the requirement that persons be not deprived of liberty without due process. Never have criminal defendants arrested between court terms lawfully been committed to a purgatory where these rights and

[8] To address a potential loophole of excessive bail, *see* HOLDSWORTH, *supra*, at 100, the English Bill of Rights sought to end any such practice with its decree "[t]hat excessive bail ought not be required." 1 W. & M., Sess. 2, c. 2; *see also* 4 W. Blackstone, Commentaries *294. This protection was incorporated into our Bill of Rights nearly verbatim, *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 1409 (1977), further evidence that early Americans shared the English abhorrence of unrestrained pre-trial detention.

protections are out of reach, the Constitution made to wait.

While lessons drawn from modern practice are of "limited relevance to the due process inquiry," the Supreme Court nonetheless surveys the field. *See Medina*, 505 U.S. at 447, 112 S.Ct. at 2578. We are aware of no statutory schemes that permit jailers to hold criminal defendants indefinitely or until the next term of court without bringing them before a judge. Rather, "ubiquitous" state rules require "the prompt taking of persons arrested before a judicial officer," and "[t]he most prevalent American provision is that requiring judicial examination 'without unnecessary delay.'" *Culombe v. Connecticut*, 367 U.S. 568, 587, 81 S.Ct. 1860, 1870 & n.26 (1961); *see also McNabb v. United States*, 318 U.S. 332, 342, 63 S.Ct. 608, 614 (1943). While this commonplace prompt-appearance requirement is not of Constitutional dimension, it shows that a procedure calling for extended pre-trial detention without any sort of hearing is alien to our law. There is no sanction, historical or modern, for the defendants' indefinite detention procedure, and we find that it fails *Medina*'s historical test.

The procedure also transgresses recognized principles of "fundamental fairness" in operation. *Medina*, 505 U.S. at 448, 112 S.Ct. at 2578. Prolonged pre-trial detention without the oversight of a judicial officer and the opportunity to assert constitutional rights is facially unfair. The Supreme Court has recognized that "[t]he consequences of prolonged detention may be more serious than the interference occasioned by

arrest" because "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein*, 420 U.S. at 114, 95 S.Ct. at 863. Heaping these consequences on an accused and blithely waiting months before affording the defendant access to the justice system is patently unfair in a society where guilt is not presumed.

Moreover, if *Medina* is the proper test, it is because "[t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." 505 U.S. at 443, 112 S.Ct. at 2576. Here, the challenged procedure denies criminal defendants their *enumerated* constitutional rights relating to criminal procedure by cutting them off from the judicial officers charged with implementing constitutional criminal procedure.[9] *See Osborne*, 557 U.S. at 69, 129 S.Ct. at 2320 (describing *Medina* as satisfied where the challenged procedure is "fundamentally inadequate to vindicate the substantive rights provided"). This is unjust and unfair.

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[9] While we find that Jauch's Sixth and Eighth Amendment challenges are left, the complained-of delays relating to provision of counsel and bail are directly attributable to the indefinite detention procedure we find unconstitutional.

C. *Monell* Liability and Choctaw County

Municipalities cannot be held vicariously liable for the actions of their officials. *See Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 692–93, 98 S.Ct. 2018, 2036–37 (1978). Direct liability is instead required. *Valle v. City of Houston*, 613 F.3d 536, 541 (5th Cir. 2010). "Proof of municipal liability sufficient to satisfy *Monell* requires: (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)." *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001)). The district court found that Choctaw County was not liable under *Monell*. It erred.

Jauch challenges the indefinite detention procedure. Accordingly, the first and second elements of our inquiry reduce to one question: Is the challenged procedure "an official policy" that was "promulgated by the municipal policymaker?" *Hicks-Fields v. Harris Cnty., Texas*, 860 F.3d 803, 808 (5th Cir. 2017) (quoting *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009)). It is. There is no dispute that Sheriff Halford is the relevant policymaker. *See Brooks*, 84 F.3d at 165 ("Sheriffs in Mississippi are final policymakers with respect to all law enforcement decisions made within their counties."). And, both prior to and during this litigation, Sheriff Halford and Choctaw County have cleaved to the indefinite detention procedure. Their position is that indefinite detention is and must be the policy in Choctaw County. Accordingly,

resolution of the first and second elements is as clear as ever it could be. *See Connick v. Thompson*, 563 U.S. 51, 61, 131 S.Ct. 1350, 1359 (2011) ("Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.").

It is also obvious that the indefinite detention procedure caused the due process violation Jauch complains of—indefinite detention. "Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so," the causation determination "is straightforward." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 404, 117 S.Ct. 1382, 1388 (1997). The policy Jauch challenges cannot be separated from the procedure that we have found constitutionally deficient. They are one and the same. In cases like this one, where "fault and causation" are "obvious," "proof that the municipality's decision was unconstitutional" establishes "that the municipality itself was liable for the plaintiff's constitutional injury." *Id.* at 406, 117 S.Ct. at 1389. While courts must be careful not to "blur[] the distinction between § 1983 cases that present no difficult questions of fault and causation and those that do," *id.* at 405, 117 S.Ct. at 1389, we have no trouble concluding that this is an obvious case.

Choctaw County's relevant policymaker instituted a policy whereby certain arrestees were indefinitely detained without access to courts or the benefit of basic constitutional rights. This unconstitutional policy was

"the moving force" behind Jauch's constitutional injury. *See Monell*, 436 U.S. at 694, 98 S.Ct. at 2038. Under *Monell* and its progeny, Choctaw County is liable.

D. Qualified Immunity and Sheriff Halford

Sheriff Halford asserts qualified immunity. Jauch bears the burden of showing that he is not so entitled. *Hanks v. Rogers*, 853 F.3d 738, 744 (5th Cir. 2017). We have held that the indefinite detention procedure violated Jauch's Fourteenth Amendment right to due process. The only question, therefore, is whether Jauch's "right was 'clearly established' at the time of the challenged conduct." *Turner v. Lieutenant Driver*, 848 F.3d 678, 685 (5th Cir. 2017) (quoting *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013)).

We have spilled much ink to thoroughly establish our constitutional footing, an effort we found necessary in light of *Jones*' limited analysis. That explication does not diminish the *Jones* holding, however—prolonged detention without the benefit of a court appearance violates the detainee's Fourteenth Amendment right to due process. 203 F.3d at 880–81. The right at issue here was clearly established and its contours "sufficiently clear" that any reasonable official would understand that the Constitution forbids confining criminal defendants for a prolonged period (months in this case) prior to bringing them before a judge. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

And so we held in *Jones* itself, ruling the individual defendants, a sheriff and his deputy, not entitled to qualified immunity. *Id.* at 881. Sheriff Halford's claim to qualified immunity is less compelling than was the claim of those Mississippi law enforcement officers. Tellingly, Sheriff Halford's arguments relating to qualified immunity do not even mention *Jones.* In fact, at one point in this litigation, he conceded that that "the Choctaw County Sheriff's Office, Choctaw County District Attorney or Circuit Court Judge *clearly* should have provided Plaintiff Jauch with an appearance before the Circuit Court of Choctaw County" within the 30 days provided for by state law. (Emphasis added.) While he attempted to spread the blame to other officials, his actions and decisions are the cause of Jauch's constitutional injury. Either Sheriff Halford is plainly incompetent, or he knowingly violated the law.

Sheriff Halford's lone argument regarding qualified immunity is that "[f]unctions of state officials do not impute legal duties actionable by federal tort to a county official simply because the applicable state official is otherwise immune." Translated from legalese, the assertion is that Jauch sued him only because the truly responsible parties, judges of the circuit court, are immune from suit. This is simply wrong. Sheriff Halford is responsible for those incarcerated in his jail, Miss. Code Ann. § 19-25-69, and the capias did not require him to impose the unconstitutional detention policy. Moreover, in an analogous context, the Supreme Court of Mississippi has made clear the responsibility of county sheriffs to hold detainees in a manner

consistent with their oaths to uphold the federal and state constitutions:

> To hold that the citizen may be arrested and held in jail without the benefit of bail until such time as a court may be held by the mayor or justice of the peace would mean that if [court could not be held for any reason], the sheriff could detain the accused indefinitely, and in violation of his constitutional right to bail. . . . An officer should need no authority other than that implied under the Constitution and the statutes hereinbefore discussed to inform him that he should not hold the citizen in custody for an unreasonable length of time in violation of his constitutional right to bail. It would be better that an offender, who is arrested without a warrant by a sheriff or private person on their own authority, be released without bail, than that he should be detained in jail in violation of the Constitution.

Sheffield v. Reece, 28 So.2d 745, 748 (Miss. 1947).

The present case is different from *Sheffield*, a case of statutory interpretation grounded in the state constitution, but the concerns animating the Supreme Court of Mississippi in 1947 are present here. Sheriff Halford should have known to put his constitutional obligations ahead of his idiosyncratic understanding of state law requirements.[10] He is not entitled to immunity.

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[10] Sheriff Halford has argued that he was not responsible for what happened to Jauch, but we cannot know what he could have

IV. CONCLUSION

The judgment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

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done to allow bail, or legal or judicial action because he did nothing at all. We only know that the sheriff kept her in jail.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60690

D.C. Docket No. 1:15-CV-75

JESSICA JAUCH,

Plaintiff-Appellant

v.

CHOCTAW COUNTY; CLOYD HALFORD,
in his Individual Capacity,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Mississippi

Before REAVLEY, HAYNES, and COSTA, Circuit Judges.

JUDGMENT

(Filed Oct. 24, 2017)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION**

JESSICA JAUCH — PLAINTIFF

V. — CIVIL ACTION NO. 1:15-CV-75-SA-SAA

CHOCTAW COUNTY,
and CLOYD HALFORD — DEFENDANTS

MEMORANDUM OPINION

(Filed Sep. 30, 2016)

The Defendants, Choctaw County and Choctaw County Sheriff Cloyd Halford, sued in his individual capacity, filed a Motion for Summary Judgment [18]. Plaintiff Jauch filed a Cross-Motion for Partial Summary Judgment [20] requesting that the Court make a finding of liability against the Defendants. Pursuant to 42 U.S.C. §1983 Plaintiff alleges various violations of her Constitutional rights during her pre-trial incarceration.

Factual and Procedural Background

On April 26, 2012, Starkville Police Department officers stopped Jessica Jauch for traffic violations and issued several traffic tickets to her. The officers also informed Jauch of an outstanding misdemeanor warrant in Choctaw County. Starkville Police Officers then transferred her to the custody of Choctaw County. The following morning, Choctaw County Sheriff's Deputies

served Jauch with the Choctaw County misdemeanor warrant. In addition to the misdemeanor warrant, a Choctaw County Grand Jury indicted Jauch on felony charges in January 2012. The Choctaw County Deputies served Jauch with the felony indictment and a Capias Warrant, and promptly filed the return in Choctaw County Circuit Court.

Several days later, Jauch cleared the Choctaw County misdemeanor warrant but remained in custody on the felony indictment. While in jail, Jauch asserted her innocence numerous times and asked the jail personnel to take her before a judge so that she could post bail. Jail personnel informed her that she would go before a Circuit Court judge when the next term of court convened in August 2012.

Jauch's case was set and called on July 31, 2012, at which time she was appointed counsel. She formally waived arraignment at this time, and bail was set. Jauch posted bond and was released from custody on August 6, 2012. In total, Jauch spent ninety-six days in jail before she appeared in court. Ultimately, the Assistant District Attorney determined that the evidence against her was deficient and the felony charge was dismissed on January 29, 2013.

The Plaintiff now brings this action under §1983 against Choctaw County and Sheriff Cloyd Halford in his individual capacity. Specifically, the Plaintiff alleges that by detaining her without appointing counsel, allowing her to appear in court, or setting bail, the Defendants violated her Constitutional rights protected

by the Sixth, Eighth, and Fourteenth Amendments. The Defendants filed a motion arguing various bases, including qualified immunity, for summary judgment in their favor [18]. The Plaintiff filed a cross motion for partial summary judgment requesting that the Court make a finding of liability against the Defendants [20]. Finding the consideration of the Plaintiff's motion dispositive in this case, the Court addresses it here.

Summary Judgment Standard

Summary judgment is warranted under Rule 56(a) of the Federal Rules of Civil Procedure when the evidence reveals no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The rule "mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

The party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323, 106 S. Ct. 2548. The nonmoving party must then "go beyond the pleadings" and "set forth 'specific facts showing that there is a genuine issue for trial.'" *Id.* at

324, 106 S. Ct. 2548 (citation omitted). In reviewing the evidence, factual controversies are to be resolved in favor of the nonmovant, "but only when . . . both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Importantly, conclusory allegations, speculation, unsubstantiated assertions, and legalistic arguments have never constituted an adequate substitute for specific facts showing a genuine issue for trial. *TIG Ins. Co. v. Sedgwick James of Wash.*, 276 F.3d 754, 759 (5th Cir. 2002); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1997); *Little*, 37 F.3d at 1075.

Analysis and Discussion

I. Procedural Due Process

Plaintiff argues that she was deprived of "liberty" in contravention of the Due Process Clause of the Fourteenth Amendment when Choctaw County incarcerated her for ninety-six days without a court appearance.

In order to address whether Defendants violated Jauch's procedural due process rights, the Court must first determine whether in these circumstances, the Plaintiff possessed a liberty interest in being free from extended incarceration without arraignment or an initial appearance. *Olim v. Wakinekona*, 461 U.S. 238, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983).

"Liberty interests protected by the Fourteenth Amendment may arise from two sources – the Due

Process Clause itself and the laws of the States." *Hewitt v. Helms*, 459 U.S. 460, 466, 103 S. Ct. 864, 868-69, 74 L. Ed. 2d (1983) (citing *Meachum v. Fano*, 427 U.S. 215, 223-27, 96 S. Ct. 2532, 2537-39, 49 L. Ed. 2d 451 (1976)). The Supreme Court has recognized that an individual does have a liberty interest in being free from incarceration absent a criminal conviction, but that they may be deprived of this interest pretrial if the deprivation comports with the requirements of due process. *Baker v. McCollan*, 443 U.S. 137, 144, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979) (although plaintiff "was indeed deprived of his liberty for a period of days," the deprivation was accomplished by due process).

In the instant case, Plaintiff alleges that a state statute creates a constitutionally protected liberty interest. Mississippi Code Section 99-3-17 requires that "every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case, except as otherwise provided in Section 99-3-18."[1]

Additionally, the Uniform Rules of Circuit & County Court ("URCC") require that arraignment, *unless waived* by the defendant, be held within thirty days after the defendant is served with the indictment." UNIF. R. OF CIR. & CNTY. CT. 8.01 (emphasis added). Plaintiff also references the rule that "every person in custody shall be taken, without unnecessary delay and within

[1] Mississippi Code Section 99-3-18 provides procedures for misdemeanor arrestees who may, instead of being taken before a judge, be released.

48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance." UNIF. R. OF CIR. & CNTY. CT 6.03.

However, the above statute and rules must be read in conjunction with Rule 6.05 which states that a defendant who has been indicted by a grand jury "shall not be entitled to an initial appearance" or to "a preliminary hearing." UNIF. R. OF CIR. & CTY. CT. 6.05. Furthermore, the Mississippi Supreme Court has held that "once a defendant has been indicted by a grand jury, the right to a preliminary hearing is deemed waived." *Mayfield v. State*, 612 So. 2d 1120, 1129 (Miss. 1992).

Reading these authorities together, Plaintiff's right to a preliminary hearing or initial appearance was "waived" when she was indicted. Although Mississippi Code Section 99-3-17 makes no exceptions for cases in which indictments have been returned, the Mississippi Supreme Court has consistently held that where a Mississippi statute regarding preliminary hearings conflicted with the URCC 6.05, the conflict must be resolved in favor of the Rule. *See State v. Delaney*, 52 So. 3d 348, 351 (Miss. 2011) ("It is now well established that 'the constitutional concept of separation of powers dictates that it is within the inherent power of this Court to promulgate procedural rules to govern judicial matters.'") (quoting *State v. Blenden*, 748 So. 2d 77, 88 (Miss. 1999)); (citing *Newell v. State*, 308 So. 2d 71 (Miss. 1975)). *See also* Miss. Const. Art. 1, §§ 1, 2 (providing for separation of governmental powers). Because Rule 6.05 controls, under the circumstances of

this case, the Plaintiff did not possess a state created liberty interest that was infringed upon when she was denied a reexamination of the grand jury's probable cause determination.

The content of these state authorities, when read together, is consistent with United States Supreme Court doctrine. "[A]n indictment 'fair upon its face,' and returned by a 'properly constituted grand jury,' conclusively determines the existence of probable cause" to believe the defendant perpetrated the offense alleged." *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (quoting *Ex parte United States*, 287 U.S. 241, 250, 53 S. Ct. 129, 77 L. Ed. 283 (1932)). If the person charged is not yet in custody, an indictment triggers "issuance of an arrest warrant without further inquiry" into the case's strength. *Gerstein*, 420 U.S. at 117 n. 19, 95 S. Ct. 854; *see Kalina v. Fletcher*, 522 U.S. 118, 129, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997). "The grand jury, all on its own, may effect a pre-trial restraint on a person's liberty by finding probable cause to support a criminal charge." *Kaley v. United States*, 134 S. Ct. 1090, 1098, 188 L. Ed. 2d 46 (2014). "[T]hat inviolable grand jury finding, we have decided, may do more than commence a criminal proceeding (with all the economic, reputational, and personal harm that entails); the determination may also serve the purpose of immediately depriving the accused of her freedom." *Id.*, at 1098, 188 L. Ed. 2d 46. Accordingly, Plaintiff has failed to allege a constitutional violation of her procedural due process rights.

II. Substantive Due Process Claims

Plaintiff claims that her arrest and subsequent detention violates substantive due process. That claim is brought under the "shocks the conscience" test for constitutionally arbitrary executive action. *Rochin v. California*, 342 U.S. 165, 172-73, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). However, "[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright v. Oliver*, 510 U.S. 266, 273, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (quoting *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)).

A. Arrest and Probable Cause

Because an arrest is a seizure, the Court finds the more particularized Fourth Amendment analysis to be appropriate. *See Graham*, 490 U.S. at 395, 109 S. Ct. 1865. By virtue of its "incorporation" into the Fourteenth Amendment, the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty. *Gerstein*, 420 U.S. at 125, 95 S. Ct. 854.

The probable-cause determination "must be made by a judicial officer either before or promptly after

arrest." *Id.* at 125, 95 S. Ct. 854. "Since an adversary hearing is not required, and since the probable cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable-cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." *Baker*, 443 U.S. at 142-43, 99 S. Ct. 2689. A grand jury indictment clearly qualifies as a probable cause determination, and is not subject to further pretrial reassessment. *See Kaley v. United States*, 134 S. Ct. 1098, 188 L. Ed. 2d 46 (2014) (holding that "[a]n indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention"). Under this standard, the Plaintiff's indictment by a grand jury, prior to her arrest, was the requisite probable-cause determination that eliminated any Fourth Amendment right to further judicial assessment. Put simply, the Plaintiff was arrested and held on a valid felony grand jury indictment that established the existence of probable cause. Therefore, the Fourth Amendment is not implicated here.

B. Right to Counsel & Right to Be Informed of the Charges

Turning now to the Plaintiff's Sixth Amendment claims, the Plaintiff contends that her detention at the Choctaw County jail for ninety-six days without being taken before a judge violated her clearly established rights to be informed of the charges against her and

her right to counsel. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. AMEND. VI.

In the instant case, the Plaintiff, does not allege that she requested an attorney and was denied access to one. Further, the record reveals that the Plaintiff was not confronted by interrogation or questioning at any point during her detention without counsel present. At her first adversarial appearance in court, Plaintiff was provided with an attorney. *See Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 198, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008) (holding that the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer). At this initial appearance the Plaintiff formally waived arraignment, including her right to have the charges formally read. Finally, according to the stipulated facts in this case, the Plaintiff was informed of the charges against her when she was served with the warrant and indictment soon after being transported to the Choctaw County Jail. For these reasons, it is clear that the Plaintiff has not established a violation of her rights protected by the Sixth Amendment.

C. Right to Bail

The Plaintiff's final constitutional claim is premised on the Eighth Amendment. The Eighth Amendment prohibits, *inter alia*, the imposition of excessive bail. U.S. CONST. AMEND. VIII. Although the Court

notes that the Eighth Amendment only applies to a convicted prisoner, Plaintiff contends that the Eighth Amendment was implicated in her case when her right to due process was violated because she was not taken before a judge for a bail hearing more promptly.

The Court recognizes that this is, in essence, a procedural due process claim cast in substantive terms. *See Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244, 103 S. Ct. 2979, 77 L. Ed. 2d 605 (1983) (holding that because there had been no formal adjudication of guilt, the Eighth Amendment had no application – rather the relevant constitutional provision is the Due Process Clause of the Fourteenth Amendment). Returning for a moment to the procedural analysis outlined above, the Court notes that under the applicable state authorities, a defendant who has been indicted by a grand jury is not entitled to an initial appearance or a preliminary hearing. UNIF. R. OF CIR. & CTY. CT. 6.05. Furthermore, relying on instruction that an indictment returned by a proper grand jury "conclusively determines the existence of probable cause," the Supreme Court has consistently denied defendants' calls for any judicial reconsideration of that issue. *United States v. Contreras*, 776 F.2d 51, 54 (2d Cir. 1985) (quoting *Gerstein*, 420 U.S. at 117 n. 19, 95 S. Ct. 854); see, *e.g.*, *United States v. Suppa*, 799 F.2d 115, 117-19 (3d Cir. 1986); *United States v. Vargas*, 804 F.2d 157, 162-63 (C.A.1 1986) (*per curiam*); *United States v. Hurtado*, 779 F.2d 1467, 1477-79 (11th Cir. 1985). For these reasons, the Plaintiff has failed to establish a violation of

her rights protected by the Eighth and Fourteenth Amendments.

III. Qualified Immunity

As plaintiff has failed to establish a violation of constitutional rights or that there are genuine issues of material fact, her Motion for Partial Summary Judgment concerning Defendants' liability for violations of constitutional rights is not well taken. However, in the event that any of Plaintiff's claims survive, Sheriff Cloyd Halford asserts that qualified immunity shields him from both liability and suit. *Wallace v. County of Comal*, 400 F.3d 284, 289 (5th Cir. 2005); *see also Saucier v. Katz*, 533 U.S. 194, 200-01, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) ("qualified immunity is an entitlement not to stand trial or face the other burdens of litigation"). Furthermore, Choctaw County asserts that Plaintiff has failed to establish the existence of an official policy in order to substantiate a finding of liability against them.

The Court employs a two-step test analysis for claims of qualified immunity. *Meadours v. Ermel*, 483 F.3d 417, 422 (5th Cir. 2007). The first step asks whether the plaintiff's allegations, if true, demonstrate the violation of a clearly established right. *Wallace*, 400 F.3d at 289; *see also Saucier*, 533 U.S. at 201, 121 S. Ct. 2151 (defining the threshold question as "[t]aken in the light most favorable to the [plaintiff], do the facts alleged show the officer's conduct violated a constitutional right"). A right is "clearly established"

when its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000) (internal quotation marks omitted). If the plaintiff has alleged the violation of a clearly established right, the second step of the analysis determines whether the defendant's conduct was objectively reasonable under the law at the time of the incident. *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005).

In the context of summary judgment, the government official need only assert qualified immunity, which then shifts the burden to the plaintiff. *Id.* at 262. The plaintiff must rebut the defense by establishing that the government official's allegedly wrongful conduct violated clearly established law *and* that genuine issues of material fact exist regarding the reasonableness of the government official's conduct. *Id.*

Reviewing the Plaintiff's failure to establish a constitutional violation in the context of qualified immunity, the Court finds that the plaintiff has failed to carry her burden of establishing that the government official's allegedly wrongful conduct violated a clearly established constitutional right. *Saucier*, 533 U.S. at 201, 121 S. Ct. 2151; *Michalik*, 422 F.3d at 258.

In addition, the Court finds that the Plaintiff has failed to establish the requisite causation between any alleged violation and the individual Defendant. *See Baker v. McCollan*, 443 U.S. at 142, 99 S. Ct. 2689 (a public official is liable under Section 1983 only if he

causes the plaintiff to be subjected to deprivation of his constitutional rights) (emphasis in original). Because the Plaintiff has not shown that Defendants caused the violation of a clearly established right under *Michalik*, it cannot be said that Sheriff Cloyd Halford's conduct was objectively unreasonable under the law at the time of the incident. *Michalik*, 422 F.3d at 258. As there are no genuine issues of material fact, the Plaintiff cannot overcome the burden required by either prong of the qualified immunity analysis, and individual Defendant Halford is entitled to qualified immunity on all of the Plaintiff's claims. *Meadours*, 483 F.3d at 422.

IV. County Liability

Turning now to the Plaintiff's claims against Choctaw County, the Court notes that in order to establish a claim under Section 1983 against a municipality or other local government, the alleged deprivation must be connected to "a governmental custom," "policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers." *Monell v. New York City Dept. Social Servs.*, 436 U.S. 658, 690-91, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

In this case, the Plaintiff seeks to impose liability for the acts, or more precisely failure to act, of its Sheriff. The Fifth Circuit Court of Appeals has explained the requirements for holding a county responsible for the acts of its officials. *Brown v. Bryan County, Okla.*, 219 F.3d 450, 457 (5th Cir. 2000). The requirements are

(1) "existence of a policymaker;" (2) "a decision by a decision maker that amounts to a policy under *Monell* and its progeny;" (3) "a decision so deliberately indifferent to the rights of the citizens that the County fairly can be said to be culpable for the injury;" (4) "sufficient causation between the specific policy decision and the resulting constitutional injury;" and (5) an actual constitutional injury. *Id.* In order to avoid summary judgment, the plaintiff must provide sufficient evidence to create a factual issue as to each of these elements. *Brown*, 219 F.3d at 457.

Because the Court finds above that the Plaintiff has failed to establish the requisite violation of her Constitutional rights, she is likewise unable to establish a claim under Section 1983 against the County.

In addition, the Court notes that the Plaintiff has failed to sufficiently allege a particular custom or policy that resulted in the alleged violation of her Constitutional rights. Choctaw County is not liable under Section 1983 for acts that allegedly violate a plaintiff's constitutional rights unless the wrongful acts resulted from a policy or custom "adopted or maintained with objective deliberate indifference to the detainee's constitutional rights." *Hare v. City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996). The United States Supreme Court has held that " 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cty. Comm'rs of Bryan Cty., Okla. v. Brown*, 520 U.S. 397, 410, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997).

Plaintiff has alleged that despite personal knowledge of her arrest, Defendant Halford did nothing to satisfy the obligation of an arresting officer to take offenders before the proper officer without unnecessary delay for examination of their case. However, as stated above, the grand jury indicted the Plaintiff, and made the requisite probable cause determination prior to her arrest. As such, there was no requirement for an additional hearing, or other review of that determination. *See Baker*, 443 U.S. at 142-43, 99 S. Ct. 2689. Plaintiff has therefore failed to establish that even if Defendant Halford was a policy maker for the County, that he was "so deliberately indifferent to the rights of the citizens that the County fairly can be said to be culpable for the injury." *Brown*, 219 F.3d at 457.

Finally, as to *Brown*'s fourth and fifth prong, "the plaintiff must identify a policymaker and show that an official policy is the 'moving force' behind the municipal employee's allegedly unconstitutional act." *Brumfield v. Hollins*, 551 F.3d 322, 331 (5th Cir. 2008). As the Court has previously determined, Plaintiff has not alleged an actual Constitutional injury, and even if she could, she has not established the required causation between a specific policy decision and a resulting constitutional injury.

Therefore, Plaintiff has failed to establish a claim against the County under Section 1983 and *Monell*.

Conclusion

For all of the reasons stated above, the Court finds that the Plaintiff has failed to establish violations of her Constitutional rights for purposes of her Section 1983 claims against Choctaw County and individual Defendant Halford. The Court finds that Defendant Halford is entitled to qualified immunity on all of the Plaintiff's claims. In addition, the Plaintiff has not sufficiently alleged the existence of an official policy in order to substantiate a finding of liability against Choctaw County. Therefore, the Plaintiff's Partial Motion for Summary Judgment is DENIED. With no basis remaining for liability against any Defendant, and no remaining claims, the Plaintiff's case is hereby DISMISSED with prejudice. CASE CLOSED.

SO ORDERED, on this the 30th day of September, 2016.

/s/ Sharion Aycock
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
ABERDEEN DIVISION

JESSICA JAUCH	PLAINTIFF
V.	CIVIL ACTION NO. 1:15-CV-75-SA-SAA
CHOCTAW COUNTY, and CLOYD HALFORD	DEFENDANTS

ORDER

(Filed Sep. 30, 2016)

Pursuant to a memorandum opinion issued this day, Jessica Jauch's Cross-Motion for Partial Summary Judgment [20] requesting that the Court make a finding of liability against the Defendants is DENIED. With no basis remaining for liability against any Defendant, and no remaining claims, the Plaintiff's case is hereby DISMISSED with prejudice, and this case is CLOSED.

SO ORDERED, on this the 30th day of September, 2016.

/s/ Sharion Aycock
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60690

JESSICA JAUCH,

Plaintiff-Appellant

v.

CHOCTAW COUNTY; CLOYD HALFORD,
in his Individual Capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

ON PETITION FOR REHEARING EN BANC
(Opinion: October 24, 2017, 874 F.3d 425)

(Filed Mar. 29, 2018)

Before REAVLEY, HAYNES, and COSTA, Circuit Judges.

REAVLEY, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5TH Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

In the en banc poll, six judges voted in favor of rehearing (Judges Jones, Smith, Owen, Southwick, Willett, and Ho) and nine judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Clement, Prado, Elrod, Haynes, Graves, Higginson, and Costa).

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

LESLIE H. SOUTHWICK, Circuit Judge, joined by EDITH H. JONES, JERRY E. SMITH, PRISCILLA R. OWEN, DON R. WILLETT, and JAMES C. HO, Circuit Judges, dissenting from denial of rehearing en banc.

I respectfully dissent from our failure to rehear this case en banc. The panel opinion – for the first time in this or any circuit – declared that a sheriff violated the Constitution when an indicted, pretrial detainee was held until the next regular term of the local criminal court before being afforded an opportunity to have bail set. A capias warrant instructed the sheriff to hold her until the term of court, which was when a judge with authority over that prisoner would be in the county. The sheriff did so, following a practice authorized by the state's Supreme Court. There is no law to the contrary that is established with the clarity the United States Supreme Court requires under recent caselaw that was not considered because it postdates the panel opinion.

At its most basic, my concern is that in assessing the liability of the County and the sheriff, the panel opinion used precedents that are inapplicable to the process afforded in this case, a process drawn from statutes, court rules, and perhaps even policies of the local judges. I cannot discern how these defendants had any effect on when this plaintiff was considered for release. Thus, as to these parties, I believe the panel was wrong. More relevant to whether to take a case en banc, what rights prisoners have to be released on bail or otherwise before trial is a profoundly significant question due to its implications for individual liberty. The full court should rework the answer.

I start with a summary of the Mississippi statutes and court rules that led to an allegedly unconstitutional detention. Each of the state's 82 counties is placed into one of 22 districts for circuit courts, the courts handling felony criminal cases. *See* MISS. CODE ANN. §§ 9-7-1 through 9-7-57. Almost all circuit court districts contain multiple counties. *Id.* In multi-county districts, there is not a continuous functioning of the circuit court. Instead, each county's circuit court is to schedule at least two court terms per year, which are set by the circuit judges themselves with notice published annually by the Mississippi Secretary of State. *See* § 9-7-3. Choctaw County is in the Fifth Circuit Court District, consisting of seven counties. § 9-7-19. As shown in the Secretary of State's publication, Choctaw County's two circuit court terms are for three

weeks each in February and August. MISSISSIPPI JUDICIARY DIRECTORY AND COURT CALENDAR 35 (2017).[1]

When Jauch was arrested, court rules required an initial appearance within 48 hours of arrest for considering probable cause for the arrest and bail, MISS. UNIF. CIR. & CNTY. CT. R. 6.03, and a later preliminary hearing to examine probable cause and reconsider bail, Rule 6.04. These requirements become moot if a grand jury indicted the individual before the arrest:

> In all cases wherein the defendant shall post bond and is released from custody, or is allowed release on his/her own recognizance, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance. A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing.

Rule 6.05.[2] The plaintiff, Jessica Jauch, had been indicted before she was arrested. Thus state law directed

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[1] Though the parties discuss terms of court and their import, any of these details not identified by the parties may be judicially noticed from official state publications. *See R2 Investments LDC v. Phillips*, 401 F.3d 638, 639 n.2 (5th Cir. 2005). A Mississippi court used its equivalent evidentiary rule to the one we used in *R2 Investments* to take judicial notice of the same publication. *Gray v. State*, 819 So. 2d 542, 546 (Miss. Ct. App. 2001).

[2] The sections in the Uniform Rules that dealt with criminal procedure were removed effective July 1, 2017, revised, and placed into a new Mississippi Rules of Criminal Procedure. MISS. R. CRIM. P. 1.1 (scope). The provisions requiring initial appearances and preliminary hearings continue to exempt prisoners who have been indicted. *See* Rule 5.2(a) (initial appearance) and 6.1(a)(1) (preliminary hearing). Also, a new rule was added which

that neither an initial appearance nor a preliminary hearing needed to be held. There is Mississippi caselaw that the sheriff's office has the responsibility to arrange an initial appearance or preliminary hearing for one of its prisoners. *See Jones v. State*, 841 So. 2d 115, 131-32 (Miss. 2003). Because Jauch had been indicted, though, the sheriff's state-law obligation did not apply to her.

A statute Jauch relies upon, Section 99-3-17, which provides for prompt taking of a prisoner before a magistrate, is the statutory analog to the court rule on initial appearances. The Mississippi Supreme Court has held that the court rules displace any contrary statutes as a matter of separation of powers. *See State v. Delaney*, 52 So. 3d 348, 351 (Miss. 2011). Thus, the statute also is inapplicable because of Jauch's indictment.

The January 24, 2012 capias issued after Jauch's indictment followed those rules. It instructed the sheriff to take into custody and "keep" Jauch so she could be taken to the circuit court of Choctaw County one week later on January 31. It is evident that date was the docket call for the February term of court in the county, at which time she would have been arraigned and bail considered. She was not arrested until April, though. As the County and the sheriff's brief states, because the capias ordering Jauch's arrest was not

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"gives official sanction to common existing practice" of immediate post-arrest release on personal recognizance or on bond. Rule 5.1 & cmt.

executed until April 26, she "effectively miss[ed] the February term of court. The next term of court was August[.]" The County and sheriff cited the following statute as support for waiting until the August court term:

> The process for arrest on an indictment shall be a capias, which shall be issued immediately on the return of the indictment into court, and made returnable instanter, unless otherwise ordered by the court, and if the capias be not returned executed, the clerk shall issue an alias, returnable to the next term, without an order for that purpose.

MISS. CODE ANN. § 99-9-1. Thus insofar as a court order, *i.e.*, the capias issued by the circuit court clerk on behalf of the court, directed the defendant sheriff to do anything, that statutorily-revised obligation after Jauch's April arrest was to hold her until the next term of court. The sheriff did so.

Defendants are correct that overlaying Jauch's legal arguments onto the facts of the case leads to this difficulty:

> Appellant's procedural due process argument is about the impact of state law rules of criminal procedure on her detention between execution of the capias and the first day of the next term of court where she formally waived reading of the indictment before a Circuit Court Judge.

Following through to the finish on the facts, the capias along with the cited Section 99-9-1 led to

Jauch's being held until the August term, approximately 90 days later. According to a notice given to her on July 16, the circuit court would call the docket on July 31. On August 8, a court order recited that on July 31 Jauch was served a copy of the indictment, was officially appointed counsel, entered a not guilty plea, and obtained release on bond and a trial setting. All charges were dropped soon thereafter.

Caselaw has ratified these procedures. The state court concluded that the potential "grievous harm" to a detainee due to "varying and sometimes lengthy intervals between our counties' terms of court demand that a detainee be accorded the right to a preliminary hearing." *Esparaza v. State*, 595 So. 2d 418, 423 (Miss. 1992). Caselaw also approves that no preliminary hearing is necessary once a grand jury has returned an indictment. *Delaney*, 52 So. 3d at 350 (reaffirming *Mayfield v. State*, 612 So. 2d 1120, 1129 (Miss. 1992)).

Already mentioned, but a reminder and elaboration would be useful, is that by the court rules in effect at the time of *Delaney* (and of Jauch's arrest), an initial appearance within 48 hours of arrest was required. UNIF. R. CIR. & CNTY CT. P. [sic] 6.03. "Conditions under which the defendant may obtain release, if any," were also to be addressed. *Id.* There was also a "common existing practice" to allow the person to be released immediately on personal recognizance, on an appearance bond, or on any "provision for bail or personal recognizance . . . made by the judge" in an arrest warrant. MISS. R. CRIM. P. 5.1 & cmt. If none of those common practices applied, the initial appearance within 48

hours would address bail. *Id.* By a different court rule in effect when Jauch was arrested, "[a]t a preliminary hearing the judicial officer shall determine probable cause and the conditions for release, if any." UNIF. R. CIR. & CNTY CT. P. [sic] 6.04.

These rules and common practices must have been known to the *Delaney* court when it discussed the result of an indictment. Still, that court focused only on the purpose of determining probable cause, then held that after "a defendant is indicted by a grand jury, that purpose is fulfilled and the whole issue of a preliminary hearing *and all privileges which attach thereto* become moot." *Delaney*, 52 So. 3d at 350 (quoting *Mayfield*, 612 So. 2d at 1129) (emphasis added). Though *Delaney* did not discuss that a preliminary hearing was also a place for consideration of bail, the decision it principally relied upon, *Mayfield*, had overruled a precedent in which the issue of bail was discussed. *See Avery v. State*, 555 So. 2d 1039, 1041-42 (Miss. 1990) (overruling noted in *Mayfield*, 612 So. 2d at 1128-29). I acknowledge that defendant Delaney, a police officer, though arrested after indictment, seems to have been immediately allowed bail and was never jailed. *Delaney*, 52 So. 3d at 348-49. Though it is unreasonable to posit that the court in *Mayfield* was oblivious to the issue of bail when it discussed *Avery*, and ungenerous to conclude that the *Delaney* court was also oblivious when it analyzed *Mayfield*, it is also true that nothing before the court required it to consider qualifying when these post-arrest procedures become moot. At least the sheriff in our case was not clearly informed of the

opposite, namely, that he must promptly take Jauch to a judicial officer despite what *Delaney* held.

A contextual point for the analysis in the just-cited cases from 1990 and 1992 is that an initial appearance or a preliminary hearing was apparently the only mandated means for bringing a prisoner with some promptness before a judge. Mississippi did not provide for a prompt arraignment either by rule or statute. *See Spencer v. State*, 592 So. 2d 1382, 1389-90 (Miss. 1991). Not long after the 1991 *Spencer* decision, a rule of court was adopted that required an arraignment within 30 days of a defendant's being served with an indictment. UNIF. CIR. & CNTY. CT. R. 8.01 (adopted May 1, 1995). At arraignment, issues of bail may be considered. Rule 8.02.

Though Jauch relies on the current obligation for timely arraignments as another basis for her claim against the sheriff and County, the district court held that the right to an arraignment within 30 days was offset by the court rules I have discussed providing that after indictment, an accused does not have the right to a preliminary hearing or an initial appearance. I do not adopt or reject that reasoning. Regardless of how to read these rules together, nothing in this record supports that the obligation to schedule an arraignment falls on the County or the sheriff. I review what does appear in the record.

In the district court, Jauch cited a Mississippi Attorney General opinion answering the question of "who actually has the responsibility to physically transport

or see to the transportation of the prisoner to a scheduled hearing," the sheriff who ran the jail or a different law enforcement agency who made the arrest? Miss. Op. Att'y Gen. 1992 WL 613847 (April 22, 1992). Rephrased, the basic question was "who drives?" Though the answer was "the sheriff," our question is hardly the same. The circuit court itself decides whether to hear matters in vacation, *i.e.*, that time period between terms of court. MISS. CODE ANN. § 9-7-87. As I will discuss, only a circuit judge could resolve issues regarding Jauch's bail after her indictment, so getting such a judge back to Choctaw County was required. Reasonably, arraignments would be scheduled either by the court and its staff or the prosecutor, perhaps working together. Though I do not see an explicit answer as to whose responsibility it is, nothing supports that it is the sheriff's.

The clear responsibilities relevant to this case are those of the county's circuit court judges. Of course, I have already discussed that in the usual case, someone arrested may be released on personal recognizance, might have bail set in the arrest warrant itself, or at least is entitled to a quick initial appearance. MISS. R. CRIM. P. 5.1, 5.2. If a court is involved, it is likely a justice (of the peace) court, where the accused would respond to charges prepared by an arresting officer; bail is set by that court's judge. *See* MISS. CODE ANN. § 99-5-11. The form of the bond requires the individual to appear at the next term of the circuit court, which is when the next grand jury in the county will meet and decide whether to indict. § 99-5-1. After indictment,

though, exclusive criminal jurisdiction over the accused is acquired by the circuit court. *Lyons v. State*, 196 So. 3d 1131, 1134-35 (Miss. Ct. App. 2016). Accordingly, release post-indictment is no longer within the authority of any local judge except for the county's circuit judges. The availability of one of those judges in the county is subject to the vagaries described in this opinion. Until there was, the sheriff had no judge to drive Jauch to see.

In summary, under state law the sheriff had no clear obligation to take Jauch before a judicial officer for an initial appearance or for a preliminary hearing because she had been indicted. There was no obligation on the sheriff to have Jauch arraigned because that is a duty that falls elsewhere. The explicit obligation under the court-issued capias was to hold Jauch until the next circuit court term, which is just what the sheriff did. Those legal points are clear, to my eyes at least. The controlling question, then, is whether there was other law that with better clarity established that every reasonable sheriff would have known Jauch had a federal right that overrode these state procedures. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The only precedent the *Jauch* panel considered to be directly on point involved jail procedures in Jackson, Mississippi. *Jauch v. Choctaw Cnty.*, 874 F.3d 425, 429 (5th Cir. 2017) (citing *Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000)). That is a decision that set no specific time limit for presenting a detainee to a magistrate, did not discuss the practice of waiting until the next term of court, and did not address a sheriff's

responsibility in such matters. Absolutely critical, Jones had not been jailed after indictment. Thus, in light of what I have already discussed about indicted detainees, *Jones* seems all but irrelevant. Silence in these varied respects is itself enough to say *Jones* did not clearly establish the relevant law for the Choctaw County sheriff.

I will look more closely. The plaintiff Jones had been jailed on minor offenses in June 1994 but quickly determined to be innocent. *Jones*, 203 F.3d at 878. Nevertheless, he was detained on a judge's year-old bench warrant that had been issued for his failure to appear for sentencing in another matter. *Id.* He was given no opportunity to appear in court until March 1995, and at that time all charges were dismissed. *Id.* Jones then filed suit under Section 1983 against, among others, the sheriff for the county in which the City of Jackson is located. *Id.* This court denied summary judgment, including on the sheriff's claim of qualified immunity. *Id.* at 881.

In one paragraph, we explained our ruling. First, we held Jones's Fourteenth Amendment due process right had been violated because that amendment protects individuals "from unconstitutional actions by state actors." *Id.* at 880-81. Then this court cited *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 196 (1989), a case dealing with a public agency's responsibility for child abuse by a private actor. Finally, *Jones* cited *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972), which analyzed whether a university had violated an instructor's First Amendment rights. That's it for analysis.

Jones fails to put every, and I would say *any*, reasonable jail official on notice as to the constitutionally permissible limit of detention following a capias warrant. There is no indication that, in keeping Jones detained for months on a bench warrant, jailers were awaiting the next term of court. In Mississippi's capital of Jackson, the circuit court has essentially continuous terms of court. See MISS. JUD. DIR., at 36 (showing existence of 48- or 54-day terms of court beginning every other month). In Choctaw County, in contrast, the circuit judges sit periodically and then move on to intervening terms in the other counties. *Jones* did not place Choctaw County's sheriff on notice of a constitutional duty in these circumstances.

Of course, *Jones* is the law of this circuit. Nonetheless, its analysis was perfunctory, drawn from two very general Supreme Court pronouncements in civil cases. Neither *DeShaney* nor *Roth* could possibly constitute clearly established law about detention of prisoners; they are not criminal-law cases. As I will explain after discussing how the panel here applied *Jones*, qualified immunity law now makes clear that law enforcement officials are not required to discern how civil cases in much different contexts would apply to their activities. Even in *Jones*, a panel dissent contended that the law was not clearly established. *Jones*, 203 F.3d at 881-82 (Garza, J., dissenting).

Besides *Jones*, the *Jauch* panel relied on two other due process holdings. *Jauch*, 874 F.3d at 431-32 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), and *Medina v. California*, 505 U.S. 437, 443 (1992)). They fail to

provide guidance on sufficiently analogous facts to satisfy the qualified immunity standard. Insofar as *Eldridge* establishes a due process balancing test, that should automatically imply a lack of clearly established law until courts have declared on similar facts how to strike the procedural balance. *Medina* may provide even less guidance. The *Jauch* opinion states that it asks if a rule of criminal procedure "(i) 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or (ii) 'transgresses any recognized principle of "fundamental fairness" in operation.'" *Id.* at 432 (citation omitted). Given the dearth of cases saying how long is too long before an indicted individual must obtain a bail-setting hearing, *Medina* cannot have sufficiently informed the Choctaw County sheriff how he could avoid liability to Jauch.

I mentioned that a recent Supreme Court decision, so recent that the panel did not have its benefit, clarifies just what law is sufficiently clear to create a basis for liability. *See District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). In that opinion, the Supreme Court informs us how closely analogous the facts in *Jones* must be to those in the current case in order for *Jones* to have clearly established the relevant law. The *Wesby* Court reversed the denial of qualified immunity to police officers whose assessment of probable cause had been challenged. *Id.* at 593. What is required before a precedent sufficiently establishes the law is a close congruence between the facts confronting a law enforcement officer and the precedent:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority. . . .'" It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.

Id. at 589-90 (citations omitted). Particularly clear in showing *Jones* is not a good fit, the Court said that its "'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct *in the particular circumstances before him*." *Id.* at 590 (emphasis added).

For all these reasons, the governing law was not clearly established to justify denying qualified immunity to the sheriff. Under *Wesby, Jones* is not a closely analogous case. Whether Jauch was detained unconstitutionally while awaiting the return of a circuit court judge is not clearly established by *Jones*, which did not set a specific time limitation and did not involve a circuit-riding judge. *Eldridge* and *Medina* offer general pronouncements about due process without remotely similar facts. Finally, this is not a case about indefinite detention. It is about unfairly delayed consideration for bail, but not a delay yet clearly announced as unconstitutional.

Of some importance as well, Mississippi's highest court, presumably informed of clearly established law, decided in *Delaney* that there was no need to take an indicted prisoner before a judicial official prior to the next term of court. Its decision was handed down a decade after our *Jones* decision and a year before the events in this case. Though the court did not consider that conditions of release could be addressed at a preliminary hearing, it still made its broad pronouncement that after an indictment, no preliminary hearing (and apparently no initial appearance either) was needed. This sheriff, in deciding obligations towards Jauch, had quite clear direction from the state court and this court's opaque *Jones* opinion. I do not see that every reasonable sheriff would have known that because of *Jones*, the state court wrote too broadly.

My able colleagues on the *Jauch* panel held that based on *Jones* and these more general authorities, it was "clearly established" that Mississippi's "policy whereby certain arrestees were indefinitely detained without access to courts" violates an individual's constitutional due process rights. *Jauch*, 874 F.3d at 436. No such clarity was established by *Jones* – it did not even deal with the relevant post-indictment procedures. The panel also concluded it was "clearly established" that "the Constitution forbids confining criminal defendants for a prolonged period" before bringing them before a judge. *Id.* True, but what was not clear at all to someone responsible for detention is how prolonged detention must be to constitute a violation of rights. The caselaw would not have informed

very many officials that the state's post-indictment rules violated the federal Constitution. Thus, qualified immunity applies.

Our function in this appeal is to determine whether clearly established rights of this prisoner were violated. They were not. Also clear, though, is that a county *should* not be allowing a prisoner's pretrial release to be unaddressed for extended periods. Judges and jailers could cooperate to minimize delays in consideration. A more robust public defender system would play a significant part by providing an early advocate to seek relief. Even a sheriff, though not having the power to schedule a hearing, might rattle the cage on behalf of such a prisoner so that those who have the authority to do something will hear.

* * *

Had the court agreed to rehear this case en banc, we could have thoroughly assessed the panel's due process reasoning for the sake of future cases.[3] We should

[3] The scope of any constitutional pretrial right to a bail hearing – as opposed to a preliminary probable cause hearing – is unclear, as the *Jauch* panel acknowledges. Courts have split over the applicable due process theory and reasoning. But there is an antecedent question whether such detention should be evaluated under the Sixth Amendment speedy trial right, a specific constitutional provision, rather than the amorphous standard of Fourteenth Amendment due process. In *Baker v. McCollan*, the Court held that a person cannot be detained indefinitely, in part because "the Constitution likewise guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment[.]" 443 U.S. 137, 144, 145-46 (1979). The Court has also repeatedly held that where a particular amendment textually provides constitutional protection of a right, that

have relieved the sheriff of having to go to trial. Qualified immunity, after all, is immunity from suit, not simply from liability. Importantly, we might also have reconsidered the holding that Choctaw County has any liability for Jauch's detention. I respectfully dissent.

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amendment should be the guide rather than the more generalized notion of due process. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent alleges that her detention violated her procedural due process rights under the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> U.S. Const. amend. 14, § 1.

Respondent brought this action pursuant to 42 U.S.C. § 1983. Section 1983 provides in relevant part:

> 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.
>
> 42 U.S.C. § 1983 (2012).

Article 1, Section 1 of the Mississippi Constitution provides for the division of state government into three separate branches. That section provides:

> The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
>
> Miss. Const. art. 1, § 1.

Article 1, Section 2 of the Mississippi Constitution provides for state separation of powers. That section provides:

> No person or collection of persons, being one or belonging to one of these departments,

> shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.
>
> Miss. Const. art. 1, § 2.

Article 5, Section 135 of the Mississippi Constitution provides that the sheriff of a county is a county executive officer. That section provides:

> Effective January 1, 1964, there shall be a sheriff, coroner, assessor, tax collector and surveyor for each county to be selected as elsewhere provided herein, who shall hold their office for four years and who shall be eligible to immediately succeed themselves in office, provided, however, if the offices of sheriff and tax collector are combined the holder thereof shall not be eligible to immediately succeed himself in office. The Legislature may combine any one or more of said offices in any county or counties and shall fix their compensation. The duties heretofore imposed on the county treasurer shall be discharged by some person or persons selected as required by law.
>
> Miss. Const. art. 5, § 135.

Article 6, Section 156 of the Mississippi Constitution provides for the jurisdiction of Mississippi's circuit courts. That section provides:

> The circuit court shall have original jurisdiction in all matters civil and criminal in this state not vested by this Constitution in some other court, and such appellate jurisdiction as shall be prescribed by law.
>
> Miss. Const. art. 6, § 156.

Article 6, Section 158 of the Mississippi Constitution provides for the holding of circuit court terms. That section provides:

> A circuit court shall be held in each county at least twice in each year, and the judges of said courts may interchange circuits with each other in such manner as may be provided by law.
>
> Miss. Const. art. 6, § 158.

Section 9-7-3 of the Mississippi Code, Mississippi's statute providing for scheduling of terms of court, was amended in 2013 and 2015 to provide for circuit court judges to assign criminal matters to county courts and to make stylistic changes. At the time of Respondent's detention, that section provided:

(1) The state is divided into an appropriate number of circuit court districts severally numbered and comprised of the counties as set forth in the sections which follow. A court to be styled "The Circuit Court of the County of " shall be held in each county, and within each judicial district of a county having two (2) judicial districts, at least twice a year. From and after January 1, 1995, the dates upon which court shall be held in circuit court districts consisting of a single county shall be the same dates state agencies and political subdivisions are open for business excluding legal holidays. The dates upon which terms shall commence and the number of days for which such terms shall continue in circuit court districts consisting of more than one (1) county shall be set by order of the circuit court judge in accordance with the provisions of subsection (2) of this section. A matter in court may extend past such times if the interest of justice so requires.

(2) An order establishing the commencement and continuation of terms of court for each of the counties within a circuit court district consisting of more than one (1) county shall be entered annually and not later than October 1 of the year immediately preceding the calendar year for which such terms of court are to become effective. Notice of the dates upon which the terms of court shall commence and the number of days for which such terms shall continue in each of the counties within a circuit court district shall be posted in the office of the circuit clerk of each

county within the district and mailed to the office of the Secretary of State for publication and distribution to all members of the Mississippi Bar. In the event that an order is not timely entered as herein provided, the terms of court for each of the counties within any such circuit court district shall remain unchanged for the next calendar year. A certified copy of any order entered under the provisions of this subsection shall, immediately upon the entry thereof, be delivered to the clerk of the board of supervisors in each of the counties within the circuit court district.

(3) The number of judges in each circuit court district shall be determined by the Legislature based upon the following criteria:

(a) The population of the district;

(b) The number of cases filed in the district;

(c) The case load of each judge in the district;

(d) The geographic area of the district;

(e) An analysis of the needs of the district by the court personnel of the district; and

(f) Any other appropriate criteria.

(4) The Judicial College of the University of Mississippi Law Center and the Administrative Office of Courts shall determine the appropriate:

> (a) Specific data to be collected as a basis for applying the above criteria;
>
> (b) Method of collecting and maintaining the specified data; and
>
> (c) Method of assimilating the specified data.
>
> (5) In a district having more than one (1) office of circuit judge, there shall be no distinction whatsoever in the powers, duties and emoluments of those offices except that the judge who has been for the longest time continuously a judge of that court or, should no judge have served longer in office than the others, the judge who has been for the longest time a member of the Mississippi Bar, shall be the senior judge. The senior judge shall have the right to assign causes and dockets and to set terms in districts consisting of more than one (1) county.
>
> Miss. Code Ann. § 9-7-3 (2012)

Section 9-7-87 of the Mississippi Code, Mississippi's statute providing for special terms of circuit court, has remained unchanged since Respondent's detention and provides as follows:

> At a special term the circuit court may impanel grand and petit juries, and shall have jurisdiction to hear and determine all civil and criminal business, in the same manner as at a regular term.

> Parties and witnesses shall be bound to attend; and witnesses duly subpoenaed or bound by recognizance, shall be subject to the same penalties for failure to attend as if such failure had occurred at a regular term. On receiving the order for a special term, if it be held because of a failure of a regular term, the proper officers shall open the envelopes containing the names of the jurors for such regular term, if it has not been done, and the venire facias shall issue and the jurors be summoned as required by law; but if there be no such envelopes, the jurors shall be drawn as provided in case of a failure of the judge to draw them. The judge may direct whether jurors shall be summoned and how they shall be drawn.
>
> Miss. Code Ann. § 9-7-87 (2012)

Section 19-25-35 of the Mississippi Code, Mississippi's statute providing for certain duties of a county sheriff, has remained unchanged since Respondent's detention and provides as follows:

> The sheriff shall be the executive officer of the circuit and chancery court of his county, and he shall attend all the sessions thereof with a sufficient number of deputies or bailiffs. He shall execute all orders and decrees of said courts directed to him to be executed. He shall take into his custody, and safely keep, in the jail of his county, all persons committed by order of either of said courts, or by any process

> issuing therefrom, or lawfully required to be held for appearance before either of them.
>
> Miss. Code Ann. § 19-25-35 (2012)

Section 19-25-35 of the Mississippi Code, Mississippi's statute requiring the sheriff to execute and return process for the circuit court, has remained unchanged since Respondent's detention and provides as follows:

> Every sheriff, by himself or his deputy, shall from time to time execute all notices, writs, and other process, both from courts of law and chancery, and all orders and decrees to him legally issued and directed within his county, and he shall make due returns thereof to the proper court. If any sheriff fail herein, he shall, for every offense, be fined by the court to which the writ or process, order or decree, is returnable, in any sum not exceeding One Hundred Dollars ($ 100.00), on motion, five days' previous notice thereof being first given to said sheriff. The sheriff may be arrested and committed to jail until payment of the fine and cost. The sheriff and his sureties shall likewise be liable to the action of the party aggrieved by such default, for all damages sustained thereby, and also liable to all other penalties provided by law for such offenses.
>
> Miss. Code Ann. § 19-25-35 (2012)

Section 99-9-1 of the Mississippi Code, Mississippi's statute on issuance of capias process for arrest following grand jury indictment, has remained unchanged since Respondent's arrest and provides as follows:

> The process for arrest on an indictment shall be a capias, which shall be issued immediately on the return of the indictment into court, and made returnable instanter, unless otherwise ordered by the court, and if the capias be not returned executed, the clerk shall issue an alias, returnable to the next term, without an order for that purpose.
>
> Miss. Code Ann. § 99-9-1 (2012)

Section 99-15-53 of the Mississippi Code, Mississippi's statute . . . has remained unchanged since Respondent's detention and provides as follows:

> A district attorney, or other prosecuting attorney, shall not compromise any cause or enter a nolle prosequi either before or after indictment found, without the consent of the court; and, except as provided in the last preceding section, it shall not be lawful for any court to dismiss a criminal prosecution at the cost of the defendant, but every cause must be tried unless dismissed by consent of the court.
>
> Miss. Code Ann. § 99-15-53 (2012)

At the time of Respondent's arrest and detention, Rule 6.03 of Mississippi Uniform Circuit and County Court Rules ("URCCC"), Mississippi's court rule governing the initial appearance of a criminal defendant, provided:

> 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.
>
> Upon the defendant's initial appearance, the judicial officer or other person authorized by statute shall ascertain the defendant's true name and address, and amend the formal charges if necessary to reflect this information. The defendant shall be informed of the charges against him/her and provided with a copy of the complaint. If the arrest has been made without a warrant, the judicial officer shall determine where there was probable cause for the arrest and note the probable cause determination for the record. If there was no probable cause for the warrantless arrest, the defendant shall be released. The judicial officer shall also advise the defendant of the following:
>
> 1. That the defendant is not required to speak and that any statement made may be used against him/her;
>
> 2. If the defendant is unrepresented, that the defendant has the right to assistance of an attorney, and that if the defendant

> is unable to afford an attorney, an attorney will be appointed to represent him/her;
>
> 3. That the defendant has the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so;
>
> 4. Conditions under which the defendant may obtain release, if any;
>
> 5. That the defendant has the right to demand a preliminary hearing while the defendant remains in custody.
>
> URCCC 6.03 (2012)

URCCC Rule 6.04, Mississippi's court rule governing preliminary hearings, was replaced effective July 1, 2017 with the Mississippi Rules of Criminal Procedure. At the time of Respondent's detention Rule 6.04 provided:

> At a preliminary hearing the judicial officer shall determine probable cause and the conditions for release, if any. A finding of probable cause may be based on hearsay evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.
>
> If from the evidence it appears that there is probable cause to believe that the officer

> has been committed, and that the defendant committed it, the judicial officer shall bind the defendant over to await action of the grand jury. If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the defendant shall be discharged from custody. The discharge of the defendant shall not preclude the state from instituting a subsequent prosecution for the same offense.
>
> URCCC 6.04 (2012)

URCCC Rule 6.05, Mississippi's court rule governing waiver of initial appearances and preliminary hearings in criminal matters, was replaced effective July 1, 2017 with the Mississippi Rules of Criminal Procedure. At the time of Respondent's detention Rule 6.05 provided:

> In all cases wherein the defendant shall post bond and is released from custody, or is allowed release on his/her own recognizance, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance. A defendant who has been indicted by a grand jury shall not be entitled to a preliminary hearing.
>
> URCCC 6.05 (2012)

URCCC Rule 8.01, Mississippi's court rule governing arraignments, was replaced effective July 1, 2017 with the Mississippi Rules of Criminal Procedure. At the time of Respondent's detention Rule 8.01 provided:

> Arraignment, unless waived by the defendant, shall be held within thirty (30) days after the defendant is served with the indictment. At or within sixty (60) days of arraignment (or waiver thereof), the court shall enter an order setting a date for trial. Unless good cause be shown, and a continuance granted by written order setting forth the reasons for continuance, an accused shall be brought to trial no later than two hundred seventy (270) days following arraignment (or waiver thereof).
>
> Arraignment shall be held in open court, and shall consist of (i) reading the indictment to the accused; and, (ii) calling upon the defendant to plead to the charge in the indictment. Prior to arraignment a copy of the indictment shall be served on the defendant. Defendants who are jointly charged may be arraigned separately or jointly within the discretion of the court. If codefendants are arraigned at the same time and charged with the same offense, the indictments need be read only once, with stated identification of each defendant.
>
> In all cases waiver of the reading of the indictment may be permitted if the defendant is represented by an attorney. Arraignment is

deemed waived when the defendant proceeds to trial without objection.

URCCC 8.01 (2012).