No. _____

In The
Supreme Court of the United States

DENNIS LEMMA, IN HIS OFFICIAL CAPACITY
AS SHERIFF OF SEMINOLE COUNTY, FLA.,

Petitioner,

v.

SEANA BARNETT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it constitutionally unreasonable for a jail to detain for eight hours any driver arrested with probable cause for driving under the influence of alcohol or drugs (DUI), especially where the detention is expressly authorized by state statute?

2. When a person is arrested based on probable cause for DUI and the arresting officer initially suspects alcohol as the cause of impairment, does the Fourth Amendment require immediate release of the arrestee upon .000 breathalyzer results for alcohol when results of urinalysis for drugs is not known for weeks?

3. When a person is arrested by a law enforcement officer based on probable cause and the arrestee is taken to jail, does the Fourth Amendment place on jail officials an independent and continuing obligation to reevaluate the arresting officer's finding of probable cause prior to judicial review of probable cause for continued detention?

4. Must jail officials release an arrestee prior to magistrate review of probable cause when post-arrest evidence shows "beyond a reasonable doubt" that probable cause for continued detention is lacking, as held by the Eleventh and Fifth Circuits, or may the jailer continue to lawfully hold the suspect based on probable cause for the underlying arrest, as held by the Sixth Circuit?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 12.6 and 14.1(b), the parties to the action below are Seana Barnett, Plaintiff; and Dennis Lemma in his official capacity as Sheriff of Seminole County, Florida, and Sara MacArthur in her individual capacity, Defendants. MacArthur prevailed on all of Barnett's claims against her in the trial court and that result has been affirmed. Thus, she is no longer a party in the case.

RELATED CASES

Seana Barnett v. Sara MacArthur and Donald Eslinger, No. 6:15-cv-469-Orl-18DCI, U.S. District Court for the Middle District of Florida. Judgment entered November 17, 2016.

Seana Barnett v. Sara MacArthur, No. 16-17179, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered October 30, 2017.

Seana Barnett v. Sara MacArthur and Dennis M. Lemma, No. 6:15-cv-469-Orl-18DCI, U.S. District Court for the Middle District of Florida. Judgment entered March 16, 2018.

Seana Barnett v. Sara MacArthur, No. 18-12238, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered April 15, 2020; rehearing denied June 15, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dennis Lemma, in his official capacity as Sheriff of Seminole County, Fla., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix at 1. It is reported at *Barnett v. MacArthur*, 956 F.3d 1291 (11th Cir. 2020). The decision of the district court underlying that opinion is reproduced in the Appendix at 26. It is unreported but may be found at *Barnett v. MacArthur*, Case No. 6:15-cv-469, 2016 WL 10654460 (M.D.Fla. Nov. 16, 2016).

JURISDICTION

On April 15, 2020, the Eleventh Circuit entered judgment. Appendix at 1. Sheriff Lemma filed a petition for rehearing or rehearing *en banc* on May 6, 2020. The Eleventh Circuit entered an order denying the petition for rehearing or rehearing en banc on June 15, 2020. Appendix at 64-65. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent Seana Barnett seeks damages for an alleged violation of her Fourth Amendment rights pursuant to 42 U.S.C. §1983. The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Section 1983, Title 42, United States Code, provides in relevant part that "[e]very 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. . . ."

Florida Statute §316.193(1) provides that "[A] person is guilty of the offense of driving under the influence . . . if the person is driving or in actual physical control of a vehicle within this state and: (a) The person is under the influence of alcoholic beverages, any chemical substance set forth in §877.111, or any substance controlled under chapter 893, when affected to the extent that the person's normal faculties are impaired; (b) The person has a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood; or

(c) The person has a breath-alcohol level of 0.08 or more grams of alcohol per 210 liters of breath."

Florida Statute §316.193(9) provides that "A person who is arrested for a violation of this section may not be released from custody: (a) Until the person is no longer under the influence of alcoholic beverages, any chemical substance set forth in §877.111, or any substance controlled under chapter 893 and affected to the extent that his or her normal faculties are impaired; (b) Until the person's blood-alcohol level or breath-alcohol level is less than 0.05; or (c) Until 8 hours have elapsed from the time the person was arrested."

STATEMENT OF THE CASE

1. The DUI arrest and detention of Barnett.

At approximately 3:25 a.m. on March 15, 2014, Seminole County Sheriff's Deputy Sara MacArthur was on routine patrol when she noticed a car stopped at a green light. The car remained stopped at the green light for eight to ten seconds. After the car proceeded through the intersection, MacArthur followed for a short distance, initiated a traffic stop, and briefly questioned the driver, Seana Barnett. Barnett told MacArthur that she had been out all night in downtown Orlando and that during the evening she had one alcoholic drink. (App., pp. 3-5).

Based on Barnett's admission to having had alcohol, as well as her behavior, appearance, driving

pattern, and being stopped at a green light, MacArthur asked Barnett to perform field sobriety exercises. Barnett agreed and MacArthur administered the field sobriety exercises. Based on the totality of the circumstances, MacArthur concluded that there was probable cause to believe that Barnett was impaired and so she arrested Barnett for DUI.

MacArthur did not find drugs on Barnett's person, observe drug paraphernalia in the car, or observe outward signs conclusively associated with drug use. MacArthur *suspected* alcohol was the source of Barnett's intoxication but indicated in her arrest paperwork and testimony in this case that it was unknown whether the cause of impairment was drug related. The paperwork submitted for the arrest stated: "Alcohol Related: Y; Drug Related: U." (App., pp. 3-6; 27).

Barnett was transported to the Seminole County Jail and booked into the facility. A technician administered two breathalyzer tests for alcohol, both of which showed a .000 result. Faced with evidence that Barnett's impairment could not be explained by alcohol, MacArthur asked that Barnett provide a urine sample to test for controlled substances, i.e. drugs, and Barnett agreed to do so. Barnett was told that the results of the urine testing might not be back for months. (App., pp. 6-7; 29).

Florida law provides that a person commits the offense of DUI if the person is driving or is in control of a motor vehicle and is under the influence of alcohol or chemical or controlled substances, as set forth by

statute, and is affected to the extent that her normal faculties are impaired; has a blood alcohol level of 0.08 or more grams per milliliter of blood; or has a breath alcohol level of 0.08 or more grams of alcohol per 210 liters of breath. Fla. Stat. §316.193(1).

The Seminole County Jail, which is operated by the Sheriff, follows Florida's DUI hold statute, Fla. Stat. §316.193(9). That statute allows for a waiting period of up to eight hours for release of a DUI suspect who has been arrested based on probable cause:

> (9) A person who is arrested for a violation of this section may not be released from custody:
>
> (a) Until the person is no longer under the influence of alcoholic beverages, any chemical substance set forth in §877.111, or any substance controlled under chapter 893 and affected to the extent that his or her normal faculties are impaired;
>
> (b) Until the person's blood-alcohol level or breath-alcohol level is less than 0.05; *or*
>
> (c) Until 8 hours have elapsed from the time the person was arrested.
>
> (App., pp. 11-13; 48-49) (emphasis added).

The statute is phrased in the alternative and pursuant to the statute, specifically subsection (c), it was the Sheriff's practice to hold persons arrested based on probable cause for DUI and who post bond for eight hours, regardless of the underlying cause of

impairment.[1] Barnett was released just over eight hours after she was arrested: her bond was posted at 10:58 a.m. and she was released at 1:13 p.m. (App., pp. 7-8).

The urine sample from Barnett was sent to the State's crime laboratory for testing for controlled substances. The sample was tested for controlled substances specifically listed in the referenced statute, which was not universal but included amphetamines, barbiturates, cannabinoids, and opiates. A month after Barnett was released from jail, notice was received that Barnett's urine tested negative for the controlled substances identified by statute. (App., pp. 7, 29-30).

When the negative urinalysis result was received, the State Attorney dropped the DUI charge. Barnett then filed suit against MacArthur, in her individual capacity. Barnett criticized the manner of MacArthur's application of the field sobriety exercises. She brought claims under 42 U.S.C. §1983 and state law contending that there was a lack of probable cause for her DUI arrest. (App., pp. 28-31).

Barnett also sued then-Seminole County Sheriff Donald Eslinger, in his official capacity, for false arrest.[2] In addition to the false arrest claims, Barnett

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[1] DUI arrestees who do not post, bond typically remain in jail at least until a First Appearance hearing.

[2] During the litigation, Sheriff Eslinger announced his retirement. Dennis Lemma was subsequently elected Seminole County Sheriff and, pursuant to Federal Rule of Civil Procedure 25(d), Sheriff Lemma is the correct official capacity Defendant at this time.

brought a claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), urging that, regardless of the propriety of the arrest, her Fourth Amendment rights were separately violated when she was not released by MacArthur or by Sheriff's personnel at the jail when the .000 breathalyzer results were obtained.

2. The district court grants summary judgment to the Sheriff on the *Monell* claim related to the eight hour DUI hold.

On motion for summary judgment, United States District Court Judge G. Kendall Sharp entered an Order denying summary judgment to MacArthur based on qualified immunity as to the §1983 individual capacity claims against her. Judge Sharp however granted summary judgment to the Sheriff on Barnett's *Monell* claim that the Sheriff violated her constitutional rights when she was held for eight hours after the arrest pursuant to the DUI hold practice. (App., pp. 46-51).

In concluding that the Sheriff's practice of holding DUI arrestees for eight hours was constitutionally reasonable, the district court noted that the Sheriff's written policies provided that an arrest must be supported by probable cause. As it is reasonable to assume that an arrestee may "look and act better over the course of time in jail, an arrestee's negative breath alcohol test does not rule out impairment by controlled or chemical substances that require further laboratory testing." (App., p. 48).

The district court further held that the Sheriff's practice of detaining DUI arrestees for eight hours is expressly permitted under the Florida DUI hold statute, Fla. Stat. §316.193(9)(c). The court also held that when a driver is arrested for DUI based on probable cause of impairment both the DUI hold statute and the Sheriff's practice of holding DUI arrestees for eight hours promote public safety. (App., pp. 48-49, citing *State v. Atkinson*, 755 So.2d 842, 844 (Fla. 5th DCA 2000)).

3. The qualified immunity appeal, the trial, and this appeal.

MacArthur appealed the district court's denial of qualified immunity, but the Eleventh Circuit affirmed. *Barnett v. MacArthur*, 715 Fed.Appx. 894 (11th Cir. 2017). Trial was held. The jury heard evidence concerning all of Barnett's complaints as to MacArthur's investigation, including Barnett's assertion that neither Barnett's driving nor her performance on field sobriety exercises indicated impairment, that MacArthur improperly administered the field sobriety exercises, and that MacArthur's continued detention of Barnett after the .000 breathalyzer results was unlawful. The jury returned a verdict finding that MacArthur had probable cause for Barnett's arrest and for Barnett's continued detention. The jury also found that the Sheriff did not falsely imprison Barnett under state law based on MacArthur's actions. (App., pp. 2, 66).

It was now Barnett's turn to appeal. She appealed to the Eleventh Circuit both the jury verdict and the earlier grant of summary judgment to the Sheriff on the *Monell* claim premised on the theory that, when the breathalyzer results came back .000 and there was no apparent evidence of drug use, MacArthur and jail staff were obligated to immediately release her. The Eleventh Circuit summarily affirmed the trial result and left undisturbed the jury's finding that there was probable cause for Barnett's arrest despite the later .000 breathalyzer results. (App., pp. 2-3; 41).

However, the Eleventh Circuit reversed the pretrial grant of summary judgment to the Sheriff on Barnett's *Monell* claim for her continued detention at the jail after the .000 breathalyzer results. Both MacArthur and jail officials declined to release Barnett pursuant to the Sheriff's practice of holding all DUI arrestees for eight hours. The Eleventh Circuit acknowledged that the Florida statute on the subject, §316.193(9), explicitly contemplates the Sheriff's policy to detain for eight hours. The court held, however, that even if the statute authorized or mandated the detention policy, the act of holding Barnett could still be unconstitutional. (App., pp. 12-14).

The Eleventh Circuit held that, in light of the .000 breathalyzer results for alcohol and in the absence of objective evidence of drug use, Barnett presented a triable case as to whether the Sheriff's eight hour hold policy unconstitutionally prevented MacArthur or jail officials from releasing Barnett.

> On this record, Ms. Barnett's detention claim against the Sheriff must be tried to a jury. Viewing the evidence in the light most favorable to her, Ms. Barnett was kept in custody pursuant to (and because of) the Sheriff's mandatory eight-hour hold policy after her two breathalyzer test result registered blood-alcohol readings of 0.000 and after she posted bond. The only remaining question then, is whether a reasonable jury could find that the hold policy, as applied to Ms. Barnett, violated her Fourth Amendment rights.
>
> (App., p. 14).

The Eleventh Circuit followed the Fifth Circuit's rule that, even where there is a DUI arrest based on probable cause, if during the subsequent detention evidence comes to light proving "beyond a reasonable doubt" that "probable cause to detain no longer exists" then the arrestee must immediately be released. (App., pp. 14-15, citing *McConney v. Houston*, 863 F.2d 1180 (5th Cir. 1989)).

The court noted that its decision on this point is in tension with the decision of the Sixth Circuit in *Peet v. City of Detroit*, 502 F.3d 557 (6th Cir. 2007), wherein the Sixth Circuit rejected a claim that police or detention officials should have reevaluated probable cause as new evidence came to light which over time tended to exonerate the arrestees in that case. (App., pp. 17-19).

REASONS FOR GRANTING THE PETITION

The Court should grant the petition to resolve the following questions:

1. Under what circumstances does the Fourth Amendment require that an arresting officer or jail official release an arrestee prior to a judge's initial review of probable cause;

2. If the test for release is elimination of probable cause beyond a reasonable doubt as held by the Eleventh Circuit here, is that standard met in this DUI arrest case where only alcohol is ruled out but drug use is not; and,

3. If a person is arrested on probable cause for DUI, may the person be held for a brief period for public safety even if doubt is cast on the original finding of probable cause.

Analysis of this petition must begin with recognition that, despite the .000 breathalyzer results at the jail, Deputy MacArthur had probable cause to arrest Barnett for driving while unlawfully impaired by alcohol or drugs. A jury has so found. The Eleventh Circuit did not disturb that finding.

Although the Eleventh Circuit affirmed judgment for MacArthur in her individual capacity on all claims, the Eleventh Circuit observed that either MacArthur or jail officials could have released Barnett when the breathalyzer results were .000. The Eleventh Circuit concluded that because MacArthur believed initially that the cause of Barnett's impairment was alcohol and there was no obvious evidence of drug use then a

jury could find that the continued hold of Barnett after the breathalyzer results was unconstitutional.

It is true that MacArthur did not find drugs on Barnett, did not observe drug paraphernalia in the car, and did not see specific indications of drug use in Barnett, but that hardly seems to rule out drug use "beyond a reasonable doubt." Only the results of the urine screen would do that, and those results were not known for a month.

To the extent that upon a negative breathalyzer result for alcohol the Eleventh Circuit would require evidence of drugs as the cause of the impairment MacArthur witnessed, the Eleventh Circuit improperly equates the substantial proof needed to prove guilt with the relatively minimal proof necessary to show probable cause. "Probable cause does not require the same type of specific evidence of each element of the offense as would be needed to support a conviction." *Adams v. Williams*, 407 U.S. 143, 149 (1972). Instead, it is a nontechnical, pragmatic approach that evaluates the facts of the case in light of the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 370 (2003).

It has been recognized in Florida that probable cause to arrest for DUI is a function of the entirety of the evidence, and sometimes may not include evidence of the specific cause of impairment. *Dep't of Highway Safety and Motor Vehicles v. Rose*, 105 So.3d 22 (Fla. 2d DCA 2012) (probable cause for DUI is based on all of the evidence, including appearance of driver,

performance on field sobriety exercises, and odor of alcohol; but, even if no odor of alcohol, officer may still have probable cause to arrest for DUI in light of the other evidence indicating impairment); *State v. Kliphouse*, 771 So.2d 16, 23 (Fla. 4th DCA 2000) (probable cause to arrest for DUI is a judgment call by the officer based on the totality of a number of factors, including odor of alcohol, manner of operation of vehicle, speech, lack of balance, admissions, and field sobriety exercises).

A jury has found that there was probable cause to believe that Barnett was driving impaired, even if MacArthur was incorrect at the scene of arrest as to the underlying cause of Barnett's impairment. The practical consequence of the Eleventh Circuit's decision is that in the case of a person arrested on probable cause for DUI where there is no apparent evidence of drug use, and with the benefit only of the breathalyzer results for alcohol but no toxicology for drugs, either the arresting officer or jail officials must release the driver despite the probable cause for arrest and without any evidence actually negating impairment by drugs.

Thus, even if the Eleventh Circuit rule is correct and the arresting officer or jail officials must release a DUI arrestee when there is intervening evidence showing a lack of probable cause "beyond a reasonable doubt," the Court should nonetheless grant the Petition and hold that this case does not meet that standard such as to require another trial. As correctly observed by the district court, a breathalyzer result

negative for alcohol does not mean that Barnett was not under the influence of a controlled substance such as to cause the impairment witnessed by MacArthur. (App., pp. 48-49). See also *Mathis v. Coats*, 24 So.3d 1284 (Fla. 2d DCA 2010) (probable cause dissipated where results of *both* breathalyzer and urinalysis were negative); *But cf. City of Boca Raton v. Basso*, 242 So.3d 1141 (Fla. 4th DCA 2018) (city could be liable for false imprisonment of DUI arrestee where breathalyzer result negative and arresting officer had no proof she was under the influence of something other than alcohol).

1. The eight hour detention of Barnett was constitutionally reasonable because there was probable cause to believe she was DUI. The negative breathalyzer results for alcohol did not show "beyond a reasonable doubt" that the underlying probable cause for DUI was disproven.

It is important to remember that this case does not involve an extended detention during which Barnett underwent judicial process. Rather, she posted bail during the eight hour DUI detention period. The issue here is therefore whether there is a constitutional obligation to reevaluate probable cause after arrest and booking into the jail, but prior to an initial review of probable cause by a neutral magistrate. In fact, had Barnett not posted bond prior to the expiration of the eight hour hold, the claim would not exist because she could have been held at least through the time of a First Appearance in court.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), this Court held that a person arrested based on probable cause is constitutionally entitled to a judicial determination of probable cause "either before or promptly after arrest." 420 U.S. at 125. Subsequently in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court determined more precisely that within 48 hours of arrest the arrestee must be taken before a neutral magistrate for a judicial review of probable cause to continue to detain. The Court in *McLaughlin* adopted the 48-hour rule as a "'practical compromise' between the rights of individuals and the realities of law enforcement." 500 U.S. at 53 (quoting *Gerstein*, 420 U.S. at 113).

This Court has since held that the Fourth Amendment's reasonableness standard governs detention of a person both before and after the start of legal process in the criminal case as described in *Gerstein* and *McLaughlin*. *Manuel v. City of Joliet, Ill.*, ___ U.S. ___, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017). The Fourth Amendment's probable cause standard thus applies to both arrest and all pretrial detention of an arrestee. 137 S.Ct. at 918 (citing *Albright v. Oliver*, 510 U.S. 266 (1994)).

The Court has never held, however, that between the time of arrest and the judicial review of probable cause called for by *Gerstein* and *McLaughlin* that there must be an independent and continuing reassessment of probable cause either by the arresting officer or by jail officials. Similarly, the Court has not held that if during that period jail officials become aware of evidence or information that casts doubt on the probable

cause possessed by the arresting officer, then the Constitution requires that the probable cause determination must be reexamined by the arresting officer or by jail officials.

The Eleventh Circuit opinion in this case cites a number of its own and other circuit decisions for the general proposition that the Fourth Amendment requires that an arrestee immediately be released when it is demonstrated beyond a reasonable doubt that the initial probable cause determination for the underlying arrest was incorrect. But, close examination of these cases reveals that they are inapposite to the case at hand for a variety of reasons.

Alcocer v. Mills, 906 F.3d 944, 953 (11th Cir. 2018) involved a person arrested for driving without a license. (App. 10 (citing *Alcocer*)). When taken to jail, a notice from Immigration and Customs Enforcement was received and misinterpreted by jail staff as a hold on the arrestee such that she was held even after bail was posted. The issue in that appeal, however, was whether the Fourth or Fourteenth Amendments governed the claim. The opinion in that case did not contain any discussion or conclusion as to the standard of proof necessary to compel release from jail.

Next, the court cited a Seventh Circuit case, *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986) for the proposition that even after a lawful arrest if "the police discover additional facts dissipating their earlier probable cause" then continued detention after the arrest violates the Fourth Amendment. (App., p.

10). *BeVier* involved an arrest of two parents for child neglect when their children were observed outdoors in 100 degree heat, attended only by a babysitter, and with one of the children reported to have been taken to the hospital the day before. *BeVier*, 806 F.2d at 125-127. The *BeVier* court questioned whether the arresting officer fully had probable cause to make the arrest because the state's child neglect statute required a knowing intent on the part of the parents to neglect the child and the arresting officer had no evidence of that. In fact, the testimony showed that he did not even really consider the parents' state of knowledge at all. *Id*. at 126-127.

To whatever extent there was probable cause for the initial arrest, the *BeVier* court held that the probable cause dissipated because a social worker suggested alternatives to arrest. *Id*. at 128. That case is nothing like the instant matter, in which a jury has found probable cause for arrest for DUI and the subsequent evidence in the form of the breathalyzer results rules out only one source of impairment.

The Eleventh Circuit cites *Nicholson v. City of Los Angeles*, 935 F.3d 685 (9th Cir. 2019) for the broad proposition that an arrestee must be released when initial probable cause dissipates. (App., pp. 10-11). That case involved in relevant part a claim for false arrest where a group of teenagers were detained with what appeared to be a gun. Upon detaining the suspects, officers quickly determined at the scene that it was just a toy and that the teens were all friends on their way to school. That might well merit the conclusion, as in

Thompson v. Olson, 798 F.2d 552 (1st Cir. 1986), that probable cause had been eliminated "beyond a reasonable doubt," but that is simply not the case here given that a) a jury has found that Barnett was arrested with probable cause for DUI, and, b) analysis of the urine sample remained pending.

The Eleventh Circuit primarily relies on the Fifth Circuit's decision in *McConney* in support of its holding here that a DUI suspect must be released when it appears beyond a reasonable doubt that the person is not intoxicated. (App., pp. 14-16). *McConney*, like the instant case, was a DUI arrest. The Fifth Circuit held in that case that a jail's four-hour hold of a sober plaintiff was unconstitutional. However, there is a key difference between the two cases.

In this case, the .000 breathalyzer results ruled out alcohol as the cause of Barnett's impairment but did not prove that Barnett was not intoxicated by a controlled substance. That is why the urine sample was requested, provided, and sent to the State for testing. In contrast, in *McConney* there was testimony that a jail official "indicated in substance that he knew (plaintiff) was sober" but had to follow a regulation to hold him for four hours. *McConney*, 863 F.2d at 1183.[3]

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[3] A literal application of *McConney* so as to place on a jail official a duty to "unarrest" a person based on that jail official's review of probable cause as determined by an officer in the field has significant consequences. Jail officials do not investigate crimes or make arrests, they detain. If a correctional officer "knows" a just-arrested murder suspect is "innocent beyond a

If that were true, i.e. that jail officials admitted that probable cause was now completely lacking, that may well present a triable case, as in *McConney*. In this case, however, it is clear that jail officials did not come to such a conclusion and indeed could not have reached such a conclusion because the result of the urine screen was not known for four weeks. A constitutional duty to immediately release should not arise based on incomplete evidence that does not fully disprove probable cause to arrest for DUI, especially when to do so risks placing an apparently impaired person back on the road.

The fundamental problem with the Eleventh Circuit's reasoning in this case is that it cites lack of obvious evidence of drug use and concludes that this negated all probable cause of impairment simply because the arresting officer initially believed that alcohol was the cause of impairment. The Petitioner in this case has public duties to both Barnett and to the general public. Yet, the Eleventh Circuit demands that the Sheriff release a driver who has been arrested for DUI on incomplete information.

The Sixth Circuit forecast the problems created by reconsidering probable cause based on incomplete information in *Peet v. City of Detroit*, the case dismissed by the Eleventh Circuit in its opinion here.

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reasonable doubt," it is not his prerogative, and certainly is not his constitutional duty, to unilaterally release the murder suspect from custody. At most, his duty should be to contact the arresting officer or a judge. Correctional officers should not be placed in the business of second-guessing arrests. See section 2, infra.

In *Peet*, the Sixth Circuit considered an appeal of summary judgment in two related §1983 cases. The plaintiffs in that case were arrested and charged with a shooting based largely on eyewitness identifications connecting the plaintiffs to armed robberies at the same time and nearby location as the shooting. Arrest warrants for plaintiffs were issued and they were placed in custody. A state judge determined that there was probable cause to hold them. *Id*. at 558-562.

As the criminal case remained pending, a number of facts developed which "on balance, tended to exculpate" the plaintiffs. This consisted of victim and witness statements which did not connect the plaintiffs to the shooting; line-ups in which witnesses did not identify the plaintiffs as the assailants; and, questions as to the accuracy of the original witness accounts which led to the charges. *Id*.

Plaintiffs prevailed in their criminal cases and sued. Among other claims, one of the plaintiffs sought damages on the theory that he should have been released from jail "the moment that new, exculpatory evidence came to light." The Sixth Circuit framed the plaintiff's claim this way: "When subsequent developments disprove the correctness of a previous police determination that probable cause exists, the argument goes, the police no longer have justification under the Fourth Amendment to continue the incarceration, and must release the suspect." *Id*., p. 565.

The Sixth Circuit rejected the argument:

> Spencer cites no authority articulating this principle as a Fourth Amendment obligation. It lacks support in this circuit's case law. Nor does Spencer offer any rationale from cases or other authority that would warrant a court-imposed requirement on police to release suspects the moment sufficiently exculpatory evidence emerges.
>
> We note that policy does not support such a new development in the law. Such a rule would give investigators the responsibility to reevaluate probable cause constantly with every additional witness interview and scrap of evidence collected. Moreover, as investigations progress, the strength of evidence against a suspect may frequently change. Some released suspects would be rearrested when further inculpatory evidence emerged and showed that probable cause existed after all. And in lengthy, close cases these suspects might be re-released, and then re-rearrested, and so on.

Id. (footnote omitted)

The Eleventh Circuit in its opinion in this case offered two reasons not to follow the Sixth Circuit's reasoning in *Peet*. First, at the time of the decision in *Peet*, the Seventh and Fifth Circuits had ruled in *BeVier* and in *McConney* that there is a constitutional obligation to release a suspect when probable cause for the arrest has "dissipated." Second, the Eleventh Circuit dismissed concern about the level of obligation placed on

law enforcement, as articulated by the Sixth Circuit in *Peet*, to reevaluate probable cause.

The Eleventh Circuit held that under its version of this rule, there is no "affirmative and independent duty to further investigate in order to continually reassess the matter of probable cause in warrantless arrest cases. It only requires that the officers release an arrestee if evidence they obtain demonstrates beyond a reasonable doubt that there is no longer probable cause for the detention." App., p. 18.

It may be correct to say that there is no affirmative duty under this ruling for the arresting officer or jail officials to *go out and search for* evidence as to probable cause. But, in practical terms, the effect of the Eleventh Circuit's opinion is that whenever potentially exonerating evidence comes to the attention of the arresting officer or jail officials then they are obligated to reweigh the original finding of probable cause. This is the problem recognized by the Sixth Circuit in *Peet*, and starkly illustrated in this case by the fact that the breathalyzer results for alcohol did not rule out intoxication and impairment due to controlled substances.

2. The Eleventh Circuit's standard is unworkable for jail officials and defeats the constitutionally reasonable policy purpose of DUI holds: to protect both the public and the impaired driver.

The Eleventh Circuit's rule would place on jail officials an unworkable ongoing and independent duty to

reweigh probable cause determined by others. For example, here jail officials would have to reevaluate MacArthur's finding of probable cause to arrest Barnett for DUI. Under the Fourth Amendment a person may be arrested without a warrant only where there is probable cause that the person has committed a criminal offense. The procedural safeguard for arrestees after the moment of arrest with probable cause, as established in the field by the arresting officer, is found in *Gerstein* and *McLaughlin*. Under those decisions, a person arrested based on probable cause is entitled under the Fourth Amendment to a judicial review of that probable cause finding within 48 hours.

"[A] policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime," *Gerstein*, 420 U.S. at 113-114, and "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention," *id*. at 126. "[A] jurisdiction that provides judicial determinations of probable cause within [forty-eight] hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *McLaughlin*, 500 U.S. at 56.

Although the Eleventh Circuit minimizes the burden of its new rule by stating that jail officials are not obligated to affirmatively search for exonerating evidence, it is still the case that the Eleventh Circuit rule forces on them an obligation to reevaluate a probable cause determination which has been made in the field by the arresting officer.

In the face of competing evidence, jail officials will be required by the Eleventh Circuit's rule to reweigh the evidence that led to the finding of probable cause in the field and to compare it to the new evidence. In this case, for example, jail officials had the report of MacArthur indicating that Barnett was intoxicated to the point of impairment. This included Barnett's performance on the field sobriety exercises, her driving pattern, the initial observation that she was stopped at a green light for eight to 10 seconds, etc.

Once booked into the jail Barnett had negative breathalyzer results. Under this new rule, jail officials are independently required to now consider the probable cause described by MacArthur, compare it against the breathalyzer results, and make a decision as to whether probable cause still exists. The fact that the district court judge readily made the determination that the breathalyzer results were not the be all and end all that the Eleventh Circuit attached to them ought to make this Court wince at the prospect of releasing an apparently impaired driver when at least half the equation – a controlled substance as possible cause of impairment – cannot be ruled out for a month.

Jail officials under such circumstances face an impossible choice. In this case for example, side with MacArthur's assessment that Barnett was impaired and face liability if the drug testing result is also negative a month later, or side with the breathalyzer results and let a potentially impaired driver back out onto the road. Had that occurred and Barnett caused

an accident killing herself or another, the Defendant Sheriff would face a liability claim for that result.

3. Florida is not the only jurisdiction with a DUI hold policy. Clarification is needed as to the constitutionality of such policies so that they may be effective in the future.

DUI arrests present a unique problem because, when a person arrested for DUI posts bond, the arrestee might still be intoxicated such that release is impractical and in fact dangerous to herself and to the public. Every day, 30 people are killed in the United States in drunk driving accidents. More than 10,000 a year; more than one an hour.[4] Some states and localities have adopted rules, policies, or statutory frameworks calling for a DUI arrestee or an intoxicated person to be held for a period of hours after arrest so that the driver might "sober up" before being placed back on the road.

The circumstances and conditions justifying detention vary widely across the country. Florida's particular statutory scheme, Fla. Stat. §316.193(9), allows jail officials to hold an arrestee for up to eight hours for the safety of the arrestee and the public. A Florida appellate court has noted that a DUI hold under Florida's statute is not punitive in nature and serves a public purpose. "The practice of detaining an intoxicated driver is to protect that driver and the community from an unreasonable danger imposed by drunken driving.

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[4] https://www.nhtsa.gov/risky-driving/drunk-driving

It is a situation analogous to the detention of persons under quarantine orders wherein a threat is posed to the public health and safety." *Atkinson*, 755 So.2d at 844.

A North Dakota statute, N.D. Cent. Code §5-01-05.1, allows a person who is intoxicated by alcohol or drugs to be held for up to 24 hours in jail to detoxify. However, in *City of Jamestown v. Erdelt*, 513 N.W.2d 82 (N.D. 1994), the North Dakota Supreme Court held that a blanket policy of holding DUI arrestees for eight hours did not meet the terms of the statute because that statute requires that the arresting officer in each case must make the determination that the person is both impaired and intoxicated, and must also conclude that the person thereby is a danger to herself or others. The North Dakota Supreme Court attached particular significance to the statute allowing officials, in lieu of detention at jail, to release the person to the custody of a responsible adult. *Id.*, pp. 84-85. However, a Kansas statute, Kan. Stat. Ann. §12-4213, allows "protective custody" holds for up to six hours of persons thought to be a danger to themselves or others and where release to a responsible person is not possible.

The Florida statute has no corollary for release to another responsible person. To the Petitioner's thinking, while the option might be attractive in general public policy terms, it does not address the problem posed in the instant case because it forces on jail officials yet another discretionary task that leaves them open to criticism and litigation. And, of course that option would not be viable in all cases because not all

drunk drivers will have someone available to come and pick them up from the jail at 4 a.m. and in lieu of the eight hour hold.

It has been held in Tennessee that a county-wide policy of holding DUI arrestees for eight hours – a policy in that case created by local judges – served a remedial purpose, not a punitive one such that it did not represent double jeopardy to the subsequent criminal proceeding. *State v. Pennington*, 952 S.W.2d 420 (Tenn. 1997) ("[T]he policy was intended, at least in part, to protect the public from individuals who had been arrested on suspicion of driving under the influence."). See also *Glover v. City of Wilmington*, 966 F.Supp.2d 417 (D.Del. 2013) (under Delaware law, a person suspected of DUI, but where probable cause is not established, may be held for up to two hours for purposes of investigation) (citing Del. Code tit. 11, §1902).

In *Anaya v. Crossroads Managed Care Systems, Inc.*, 195 F.3d 584, 591 (10th Cir. 1999), the Tenth Circuit held that the state may take an intoxicated person into custody and detain that person where there is probable cause to believe he "is a danger to himself or others." See also *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1131 (10th Cir. 2013) (collecting cases and awarding arresting officer qualified immunity on claim she should have released plaintiff when she realized that probable cause had dissipated because "[t]he majority of courts have never imposed such a duty, much less under circumstances similar enough (to deny the immunity) . . . " (internal quotations and citation omitted)).

But, in *City of Fargo v. Stutlien*, 505 N.W.2d 738, 741 (N.D. 1993), the court held that this Court's decision in *McLaughlin* does not authorize blanket policies for DUI holds where the delay is "for delay's sake." Clarity is needed because the delay at issue here is not for "delay's sake" – it is based on an arrest for probable cause that the arrestee is driving under the influence and is impaired and is therefore a threat to self and others.

In *McConney*, the plaintiff testified that a jail official told him that he knew he was sober but had to hold him for four hours due to the jail's own regulations. There is no similar testimony or evidence here that a jail official determined that Barnett was not impaired, even using the Eleventh Circuit's beyond a reasonable doubt standard. Indeed, all of the evidence is to the contrary. When the .000 breathalyzer results were obtained, a urine sample was requested and sent to the state to test for controlled substances as the possible cause of impairment. Barnett was told that the results would not be back for some time, possibly for months.

MacArthur believed at the scene of arrest that the cause of Barnett's impairment was alcohol but that is in large part because Barnett admitted she had consumed alcohol that evening. It is not surprising that Barnett did not admit to MacArthur that she might also, or in the alternative, be under the influence of controlled substances. In her arrest paperwork, MacArthur's report reflected that there was definite evidence that MacArthur's impairment was alcohol related but it was unknown whether and to what

extent the impairment was drug related, as MacArthur indicated that drug use was "unknown."

The "ultimate touchstone of the Fourth Amendment is reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Petitioner submits that it is sensible to believe that a person who has been arrested on probable cause for DUI is a potential threat to themselves or to public safety such that an eight hour hold is a constitutionally reasonable approach to preventing harm to the arrestee or the public.

This Court should grant the petition and hold that a policy or practice of briefly holding a person arrested on probable cause that she is driving under the influence of alcohol or a controlled substance does not violate the Fourth Amendment. The Court should hold that it is constitutionally reasonable to detain such an arrestee, especially where the period of doing so is significantly less than the 48-hour window for judicial review of probable cause under *McLaughlin*.

CONCLUSION

This case has significance beyond the interests of the parties to this particular lawsuit. In the bigger picture, as to all types of criminal conduct, there is a conflict in the circuit courts as to the constitutional duty of jail officials to reconsider and reweigh evidence of probable cause which has been found by law enforcement officers in the field. The Court should resolve the conflict on this issue.

State and local jurisdictions across the country employ different types and lengths of DUI hold policies, some with conditions, some without. These policies are not enacted punitively but instead to protect the arrestees and the public. Clarity is needed so that DUI hold policies are properly, constitutionally, and safely put in place.

Respectfully submitted,

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