No. 20-595

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

OBJECTION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment requires release when law enforcement learns of new information demonstrating that its purported probable cause has dissipated?

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In addition to the opinions identified by Petitioner, the following opinions, which are identified in Petitioner's Related Cases section, are directly related: Barnett v. MacArthur, 715 F. App'x 894, 907 (11th Cir. 2017) and Barnett v. MacArthur, Case No: 6:15–cv–469–Orl–18DCI, 2016 WL 10654460 (Nov. 16, 2016).

JURISDICTION

Petitioner has properly invoked this Court's jurisdiction.

STATEMENT OF THE CASE

Seana Barnett ("Barnett") brought this action against Sara MacArthur, individually ("MacArthur"), and Dennis M. Lemma (formerly Donald Eslinger), in his official capacity as Sheriff of Seminole County, Florida ("Lemma") alleging civil rights violations, false arrest and malicious prosecution brought pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 1988, the Fourth Amendment to the United States Constitution, and Florida common law. Barnett's claims arose out of her arrest and detention for Driving Under the Influence ("DUI") on March 16, 2014.[1]

Defendants moved for summary judgment on all counts,[2] which the district court granted except

1 D.50.
2 D.11,D.13,D.76.

with regard to Barnett's 1983 claim for arrest and continued detention without probable cause against MacArthur (Count I) and the false imprisonment claim against Lemma (Count III). D.111 MacArthur appealed the denial of her qualified immunity defense.[3] The Eleventh Circuit Court of Appeal ("Eleventh Circuit" or "Court") affirmed and declined to exercise jurisdiction over Barnett's cross-appeal issues.[4] On the unlawful arrest claim, the Court stated:

> When we couple these important disputed facts, which we must view in the light most favorable to Barnett, with the undisputed evidence—that MacArthur did not smell or observe any alcohol during the encounter; perceived no indication that Barnett was under the influence of drugs; and admitted that Barnett communicated lucidly and cooperated fully—we do not believe a reasonable officer could have found probable cause to arrest Barnett. *See Kingsland*, 382 F.3d at 1232. Accordingly, we affirm the denial of MacArthur's qualified immunity defense against the § 1983 unlawful arrest claim.

3 D.113.
4 D.126.

Barnett v. MacArthur, 715 F. App'x 894, 907 (11th Cir. 2017). On the unlawful detention claim, the Court similarly found that no reasonable officer could have believed there was probable cause:

> Upon arrival at the station, the DUI technician administered two breathalyzer tests to determine Barnett's blood-alcohol content; both produced results of 0.000. MacArthur was notified of the results, and, *thereafter*, ordered a urine analysis to test for drugs and advanced the DUI citation. But MacArthur admitted that she had no evidence at the time of arrest that Barnett was impaired by drugs. This included her assessment of Barnett's performance on the Vertical Nystagmus Test, the only field sobriety test used to detect drug use. MacArthur did not observe any evidence of drugs in Barnett's vehicle, nor did she find any drugs in Barnett's purse when she searched it to retrieve her phone. It is only after the breathalyzer results came back negative, at 0.000, that MacArthur said she determined that "there was something ... whether it was drugs or—obviously not alcohol ... [b]ut I don't know what drugs that could have been."
>
> Putting aside MacArthur's personal admission, the objective facts of Barnett's detention upon receipt of the

> breathalyzer results are these: (1) Barnett was not under the influence of alcohol; (2) there was no evidence to detain her for driving under the influence of any other controlled substance. Under these circumstances, no reasonable officer could have found that there was probable cause to continue to detain Barnett under Section 316.193 of the Florida Statutes. *See Case*, 555 F.3d at 1327.

Barnett, 715 F. App'x at 907 (emphasis in original).

The case proceeded to trial on March 12–15, 2018, before Senior United States District Judge G. Kendall Sharp on Counts I and III.[5] The evidence at trial did not materially differ from the evidence considered on summary judgment and in the interlocutory appeal.[6] Nonetheless, the jury returned a verdict in favor of both Defendants.[7] Barnett moved for a new trial pursuant to Fed. R. Civ. P. 59(e), arguing, among other things, that the jury verdict was against the great weight of the evidence and resulted in a miscarriage of justice, and that the jury instructions were inadequate.[8] The district court denied the motion.[9] Barnett appealed and the Eleventh Circuit reversed only the entry of summary

5 D.50.
6 D.175,D.179,D.181,D.183.6.
7 D.169.
8 D.174.
9 D.178.

judgment in favor of the Sheriff on the *Monell* claim based on Barnett's detention. Barnett v. MacArthur, 956 F.3d 1291, 1293 (11th Cir. 2020).

As the Court stated, it was "undisputed that the Sheriff's hold policy mandates an eight-hour detention of a person like Ms. Barnett who is charged with a DUI—even if her breathalyzer test results show that her blood alcohol content is .000 and even if she posts bond." Barnett, 956 F.3d at 1297. Nevertheless, the District Court had granted summary judgment, reasoning that the hold policy was consistent with Florida Statute § 316.193(9), which allows the option of holding a person for eight hours after a DUI arrest. The Eleventh Court ruled that "[t]his constituted error for two independent reasons. First, unlike the hold policy, § 316.193(9) does not mandate the blanket eight-hour detention of all DUI arrestees. Second, even if it did, the statute could be unconstitutional as applied to Ms. Barnett through the Sheriff's hold policy." Barnett, 956 F.3d at 1298. The Court agreed with the Fifth Circuit's analysis in McConney v. City of Houston, 863 F.2d 1180, 1185 (5th Cir. 1989), holding:

> Following a warrantless DUI arrest based on probable cause, officers do not have an affirmative Fourth Amendment duty to investigate or continually reassess whether the arrestee is or remains intoxicated while in custody. But where, as here, the officers seek and obtain information which shows beyond a reasonable doubt that the arrestee is

> not intoxicated—in other words, that probable cause to detain no longer exists—the Fourth Amendment requires that the arrestee be released.

Barnett, 956 F.3d at 1299. The court therefore reversed the summary judgment because "as in McConney, a reasonable jury viewing the evidence in the light most favorable to Ms. Barnett could find that her continued detention pursuant to the Sheriff's eight-hour hold policy violated the Fourth Amendment." Id.

STATEMENT OF FACTS

At approximately 3:25 a.m. on March 16, 2014, Deputy MacArthur observed Barnett come to a brief stop at a green light. There was no traffic in the vicinity.[10] MacArthur's observations of Barnett at the green light did not support stopping Barnett under Lemma's DUI policy because Barnett did not sit at the green light long enough for the signal to cycle.[11] MacArthur followed Barnett for about three blocks and initiated a traffic stop after only one minute despite that Barnett was driving normally as evidenced by the in-car video.[12] Deputy Joel Saslo ("Saslo"), who assisted MacArthur with the DUI investigation, reviewed the video and saw nothing

10 D.64:45:11-46:1;D.179pp.177-81&Exs.6&8;D.181p.213.
11 D.64:75:25-76:16;D.64-2§V.B;D.175-Ex.3;D.179p.232;D181pp.11-12.
12 D.27;D.175pp.73-74-Ex.21.

that would cause him to stop Barnett.[13] At the scene, MacArthur contradicted herself concerning the reason for the stop, and the video did not support her reasons.[14] MacArthur further contradicted herself when she completed her Offense Report.[15]

Barnett explained to MacArthur clearly and lucidly that she had hesitated at the green light because she was unfamiliar with the area and was looking for a shortcut her passenger told her to take, which the video corroborates.[16] Barnett did not slur her words, smell of alcohol, or otherwise appear impaired while explaining herself to MacArthur.[17]

MacArthur claimed she was justified in subjecting Barnett to field sobriety tests because Barnett admitted to having one glass of wine with dinner at 6:00 p.m. the prior evening (i.e., over nine (9) hours earlier), and despite Barnett explaining that she was acting as a designated driver.[18]

MacArthur was inexperienced at conducting field sobriety tests.[19] Barnett was either MacArthur's

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13 D.66:28:14-20.

14 D.64:151:22-152:2;D.27;D.175pp.73-74-Ex.21;D.27;D.35-1¶6;D.175pp.73-74-Ex.21;D181pp.11-12;D.27;D.35-1¶6;D.175pp.73-74-Ex.21.

15 D.64-15;D.179p.190&Ex.14-15;D.27;D.175pp.73-74-Ex.21.

16 D.27;D.35-1¶4;D.35-2¶3;D.175pp.73-74-Ex.21;D.27;D.175pp.73-74-Ex.21.

17 D.64:76:23-77:14;D.27;D.35-1¶¶13&17;D.35-2¶¶7-8;D.35-3¶4;D.175pp.73-74-Ex.21.

18 D.64-14;D.175pp.73-74-Ex.14-15&21.;D.35-1¶7,D.35-2¶7,D.64:154:17-18;160:24-25;D.27;D.175pp.73-74-Ex.21.

19 D.27;D.175pp.73-74-Ex.21;D.64:6:11-12;12:15-17;16:4-

first or second DUI arrest.[20] Despite Lemma's policy requiring that Deputies microphones remain on during a DUI investigation,[21] after informing another Deputy that the stop was a possible Signal 1 (intoxicated driver), McArthur turned off her microphone for over five (5) minutes, apparently discussing her inexperience with the other Deputy.[22]

MacArthur then proceeded to fumble through administering the field sobriety tests, ignoring Barnett telling her that she was suffering from injuries due to a recent automobile accident, including muscle tears in her leg.[23] MacArthur administered the tests incorrectly in several respects and scored them incorrectly.[24]

After Barnett completed the tests, MacArthur asked Deputy Saslo: "What did you write down? What do you think? I'm thinking yeah, but…." Saslo interjected, "She's definitely been drinking and stuff like that…how'd her eyes look?" MacArthur responded "fine."[25] Saslo then asked, "Are you 10-12?", which is code for asking if your microphone is on.[26]

18:22;D.64-1;D.175pp.73-74-Ex.21.

20 D.64:15:16-20;D.179pp.152-53.

21 D.79:22:1-24:18;31:12-15;D.79-5.

22 D.27;D.175pp.73-74-Ex.2;D.179pp.222–23;D.64:163:23-164:2;164:13-15;D.27;D.179pp.225–26&Ex.21. D.27;D.175pp.73-74-Ex.21.

23 D.35-1¶11;D.64:6-10;D.27;D.179pp.114-15,128-29,144-46,151;D.175pp.73-74-Ex.21;D.35-1¶11;D.27;D.179pp.131,144-46,151&Ex.21;D.181p.110,116-17.

24 D.35-6;D.27;D.181pp.23-99.

25 D.64:261:21-262:13;D.27;D.175pp.73-74-Ex.21.

26 D.64:64:9-12;65:20-24;D.175pp.179-81&Ex.21;D.179p.154-

MacArthur got the message that Saslo was going to say something that they did not want recorded and **turned off her microphone**.[27] After four (4) minutes, MacArthur turned the microphone back on as she handcuffed Barnett.[28] Both MacArthur and Saslo claim they do not recall their unrecorded conversation.[29] Saslo testified he could not remember if he thought there was probable cause to arrest Barnett or not.[30] However, after reviewing the entire video, Saslo testified that the field sobriety test results did not warrant arrest.[31]

MacArthur did not bother to speak to Barnett's passenger, Alicia Norwood ("Norwood"), to see whether Norwood would verify Barnett's statements about being the designated driver, having only one drink, looking for a shortcut, and so on.[32] MacArthur did not feel she had any responsibility to explore exculpatory evidence.[33]

While being transported to jail, Barnett asked MacArthur why she arrested her and asked, "So you think it's because of drinking, ma'am?" to which

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27 D.64:263:18-22;266:18-267:15;D.27;D.179pp.154-56&Ex.21.

28 D.66:113:1-24;D.27;D.175pp.73-74-Ex.21.

29 D.64:62:23-24;D.66:110:13-20;113:25-114:5;D.175pp.179-81;D.179p.156.

30 D.66:26:10-20;D.175pp.179-81.

31 D.66:61:7-17;91:4;114:110-23;D.181pp.218-19.

32 D.64:64:23-25;D.175pp.73-74-Ex.21;D.179pp.229-30;D.64:65:1-15;D.179pp.229-30.

33 D.64:65:17-66:4;D.179pp.229-30;D.27;D.35-2¶12;D.181p.120.

MacArthur replied, "Yes ma'am."[34] MacArthur had *no* reason to believe that Barnett was impaired by any substance other than alcohol.[35] MacArthur did not detect the odor of Marijuana or any other drug.[36] No drugs were found in the vehicle (the deputies did not even bother asking to search it), on Barnett's person (including during the strip search), or in Barnett's purse (which both deputies searched looking for Barnett's cell phone).[37] MacArthur did not even bother asking Barnett about drugs.[38] MacArthur admitted she got no indication from the Vertical Nystagmus test that Barnett was on drugs.[39] **Indeed, MacArthur admitted under oath she did not have any indication that Barnett was on drugs when she arrested her**, **and that she did not have probable cause to arrest Barnett for driving under the influence of drugs**.[40] Of course, the urine test results ultimately confirmed that Barnett had no drugs in her system.[41]

When Barnett arrived at the jail, Breath Test Operator Keith Betham ("Betham") first observed Barnett for 20 minutes and then conducted Breathalyzer testing.[42] Barnett's breath samples

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34 D.64:284:16-21;D.27;D.175pp.73-74-Ex.21.
35 D.64-14;D.35-4;D.27;D.175pp.73-74-Exs.14,15&21.
36 D.64:64-14;77:3-5;D.35-4;D.27;D.175pp.73-74-Exs.14,15&21.
37 D.64:52:2-19;273:19-24;D.27;D.175-Exs.14,15&21;D.179pp.161-64.
38 D.35-1¶16;D.27;D.175pp.73-74-Ex.21.
39 D.35-6;D.27;D.181pp.23-99;D.64:79:8-23;D.35-6.
40 D.64:81:16-18,104:6-12;D.179pp.159-61,166.
41 D.64-12;D.175-Ex.12.
42 D.65:11:3-12:24;24:1-12;26:5-15;28:25-

showed *no* trace of alcohol.[43] At that point, pursuant to § 316.1934, Fla. Stat. (2013), and the Seminole County Sheriff's Office's policy on DUI Countermeasures, Barnett was presumed *not* to be under the influence of alcohol to the extent her normal faculties were impaired.[44] Additionally, **Betham testified he saw no signs that Barnett was impaired, nor did he observe any indicators that she was on drugs**.[45] Nonetheless, and even though MacArthur admittedly had *no* reason to believe Barnett was under the influence of any drug, MacArthur had Betham request a urine sample. Betham did so, informing Barnett that she would lose her driver's license if she did not consent.[46]

As MacArthur was aware when she arrested Barnett, the Sheriff has an official policy and practice requiring that DUI arrestees be detained in jail for a minimum of eight (8) hours *regardless* of whether it becomes clear after the arrest that the individual is not, in fact, impaired.[47] **MacArthur also testified that she could not and would not release an arrestee if she knew she no longer had probable cause "because we don't do that" and "probable**

29:31;D.179pp.11,14.

43 D.64-10;D.175-Ex.10;D.179pp.24-27&Ex.11.

44 D.64:41:17-20;D.64-6;D.65:40:16-21;D-175pp.128-29&Exs.3&7.

45 D.65:11:3-12:24;24:1-12;26:5-15;28:25-29:3;D.179pp.22,34.

46 D.65:30:2-17;32:15-17;61:11-14;D.179pp.27-28,31.

47 D.79:20:16-18;21:2-12;D.35-1§14;D.64:40:3-41:8;281:6-10;D.64-17;D.64-18;D.27;D.175-Ex.21;D.27;D.175-Ex.21.

cause doesn't go away."[48] **Under Lemma's policy, a deputy does not have the discretion to release an individual if the deputy learns that probable cause no longer exits.**[49] In fact, Betham informed Barnett that she would have to stay in jail the full eight (8) hours even though she blew a .000 and should not have been there in the first place.[50]

Shane Love ("Love") testified as Lemma's representative.[51] Love said that, if the Breathalyzer results in a .000, the practice "most of the time" is to request a urine analysis "to see if there's anything else" even though the individual was suspected only of driving under the influence of alcohol.[52] Betham likewise testified that Lemma files every DUI with the prosecutor even if someone blows a .000 and there is no indication that drugs are involved, and that they are still required to stay in jail for eight (8) hours and pay a $500 bond.[53]

As a result of MacArthur's actions and Lemma's official policies, practices and customs, Barnett was processed as an inmate and held for more than eight (8) hours.[54] The following day, March 17,

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48 D.64:37:9-18.

49 D.79:20:11-15;21:2-12;58:10-16;D.64:40:3-41:8;D.65:23:16-21;31:9-12;D.175pp.69,155-56;D.181pp.229,252.

50 D.35-1¶15;D.65:30:2-17;D.179p.38&Ex.18;D.181p.123.

51 D.79:4:13-5:20.

52 D.79:21:6-20;D.64:41:17-42:5;43:5-15;D.66:132:5-11;D.179p.37;D.79:17:6-20;D.175pp.69,155-56;D.181pp.229,252.

53 D.65:18:24-19-17;D.93:11-15;276:7-12.

54 D.64-16;D.64-17;D.64-18;D.77:96:7-101:23;D.181pp.125-27;D.64-17;D.64-18;D.142p.8;D.175p.69-Ex.17-

2014, criminal charges were filed based upon MacArthur's arrest report.[55] On April 15, 2014, the Florida Department of Law Enforcement ("FDLE") issued its Laboratory Report showing that Barnett had no drugs in her system.[56] On May 2, 2014, the state entered a Nolle Prosequi.[57]

ARGUMENT

As Lemma acknowledges in his Petition for Writ of Certiorari ("Petition"), to warrant review, this Court would first have to accept the premise that MacArthur had probable cause to arrest Barnett for DUI based upon the jury verdict on the Section 1983 claim against MacArthur. That premise is false, however. As the Eleventh Circuit determined, one cannot infer from the jury's verdict in this case that it found there was probable cause for the arrest or continued detention, as further explained below. Nonetheless, throughout his Petition, Lemma represents that the jury found that there was probable cause to support the arrest and the continued detention Barnett despite that her breathalyzer results showed she had zero alcohol in her system. E.g., Pet. pp. 8–9, 11, 13. Lemma states repeatedly that there was still probable cause because Barnett could have been under the influence of drugs. E.g., Pet. pp. 12–13, 19, 24, 29. However, as the Eleventh Circuit recognized, MacArthur admitted she had no

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20;D.179pp.37-38;D.181pp.123,229,252.

55 D.82-1;D.175-Ex.14-15&23;D.142p.8.

56 D.64-12;D.142p.8;D-175-Ex.12;D.179pp.32-33&Ex.13.

57 D.82-1;D.142p.9.

probable cause to arrest Barnett for drugs and there was no evidence to support any belief that Barnett was impaired by drugs. Thus, review should be denied because the premise on which the Petition is based is false.

Nor did the Eleventh Circuit rule that law enforcement is required to continually reassess probable cause as Lemma claims. Pet. pp. 15–16, 22. Additionally, contrary to Lemma's representation, Barnett never argued, and the Eleventh Circuit did not rule, that the Sheriff was "obligated to immediately release her." Pet. pp. 9, 16. Rather, Barnett argued that the Constitution requires release after a "brief period of detention to take the administrative steps incident to arrest." Gerstein v. Pugh, 420 U.S. 103, 113–14, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Thus, review is not warranted based upon these false assertions either.

1. There Has Been No Finding of Probable Cause.

As Barnett argued below, the jury was not properly instructed on the 1983 claim against MacArthur and the overwhelming weight of the evidence, as well as the Eleventh Circuit's opinion in Lemma's first appeal, demonstrated that MacArthur did *not* have probable cause for the arrest, let alone the continued detention. The Eleventh Circuit therefore rejected Lemma's argument that the jury verdict in favor of Deputy MacArthur constituted a finding that Ms. Barnett suffered no Fourth Amendment violation as a result of the detention. Barnett, 956 F.3d at 1291, 1301 (explaining that

"municipal liability can exist if a jury finds that a constitutional injury is due to a municipal policy, custom, or practice, but also finds that no officer is individually liable for the violation"). As the Eleventh Circuit recognized, defense counsel's closing argument told the jury that "Deputy MacArthur could not be held liable on the Fourth Amendment detention claim because the undisputed evidence showed that Ms. Barnett was kept in custody pursuant to the Sheriff's mandatory hold policy, a policy that Deputy MacArthur had no discretion to deviate from." Id. at 1303. Thus, the Eleventh Circuit found that:

> Because the jury found only that Deputy MacArthur had not 'intentionally committed acts that violated [Ms.] Barnett's Fourth Amendment right ... not to be arrested or detained without probable cause,' DE. 169 at 1 (verdict form), its verdict says nothing about whether the continued detention of Ms. Barnett—after her breathalyzer tests and after posting bond—due to the Sheriff's hold policy violated the Fourth Amendment.

Id. In short, there has been no finding of probable cause in this case.

2. The Jury Was Not Properly Instructed To Make a Determination on Probable Cause.

Even had the jury made a finding on probable cause, which it did not, such a finding could not be relied upon because the jury instructions were

inadequate to explain the law concerning probable cause for both the arrest and the continued detention. In fact, the instructions were misleading in several respects. First, although the District Court utilized the Eleventh Circuit's standard instruction which states that the violation of the plaintiff's Constitutional rights must be "intentional," the instruction was incorrect regarding the Fourth Amendment violations at issue. MacArthur's violation of Barnett's constitutional right to not be arrested or detained did not have to be "intentional." E.g., Hudson v. N.Y.C., 271 F.3d 62, 68 (2d Cir. 2001) ("These instructions were incorrect. Section 1983 does not require any intent to violate constitutional rights.") (citing Caballero v. City of Concord, 956 F.2d 204, 206 (9th Cir. 1992) (stating that "[i]t is well established that specific intent is not a prerequisite to liability under § 1983") (citing Monroe v. Pape, 365 U.S. 167, 187 (1961), overruled on other grounds, Monell v. N.Y.C. Dep't of Soc. Servs., 436 U.S. 658 (1978))). The question is not whether the Fourth Amendment violation was intentional. Id. "Rather, 'the question is whether the officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [her], without regard to [her] underlying intent or motivation." Caballero, 956 F.2d at 206 (quoting Graham v. Connor, 490 U.S. 386, 397–98 (1989)). "To paraphrase Graham: 'An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable [arrest]; nor will an officer's good intentions make an objectively unreasonable [arrest] constitutional.'" Id. As such, the instruction was incorrect. Id. This was particularly

prejudicial given Defendants' position in trial that MacArthur subjectively "believed" there was probable cause based upon her inadequate training and experience. The jury likely concluded that MacArthur was not liable because she did not "intentionally" violate Barnett's Fourth Amendment rights. Rather, the jury may have concluded that MacArthur was not aware that she lacked probable cause due to her inexperience, or that MacArthur had no choice but to detain Barnett for the eight-hours because Lemma's policy required the hold, or both. The jury should have been instructed that the arrest had to be objectively reasonable regardless of any supposed good intent on MacArthur's part. Id.; Hudson, 271 F.3d at 71 ("It is, therefore, quite possible that the jury's finding that no Fourth Amendment violation occurred resulted from its mistaken belief that every rights violation under § 1983, including those involving the Fourth Amendment, must be intentional.").

Second, the jury instructions lacked an explanation of the law holding that probable cause for an arrest only permits detaining a person for the time necessary to complete the administrative steps for the arrest, and that probable cause may dissipate after arrest requiring that the arrestee be released. Gerstein, 420 U.S. at 113–14 (holding that an officer's on-the-scene assessment of probable cause can justify only the initial arrest and a "brief period of detention to take the administrative steps incident to arrest"); see also McConney, 863 F.2d at 1180, 1185 ("A policy requiring continued detention … after determination beyond reasonable doubt that one held on a proper warrantless arrest for public intoxication is in fact not

intoxicated and that probable cause no longer exists raises obvious constitutional concerns."). Once it becomes clear that the on-the-scene assessment was wrong, continuing the detention is unconstitutional. Id. As a result, requiring that an arrestee remain in custody for four (4) hours after a zero Breathalyzer result violates the Fourth Amendment. Strickland v. City of Dothan, Ala., 399 F. Supp. 2d 1275, 1291–93 (M.D. Ala. 2005), aff'd sub nom. Strickland v. Summers, 210 F. App'x. 983 (11th Cir. 2006); Babers v. City of Tallassee, Ala., 152 F. Supp. 2d 1298, 1312–13 (M.D. Ala. 2001) ("The court, therefore, finds that Babers has produced sufficient evidence to allow a reasonable jury to conclude that the City had a policy that required an individual once arrested to remain incarcerated until the arrival of a magistrate, even if an officer ascertains beyond a reasonable doubt that the probable cause which formed the basis for the arrest was unfounded."); Mathis v. Coats, 24 So.3d 1284, 1290–91 (Fla. 2d DCA 2010) (stating plaintiff may be able to establish false arrest claim where, "[a]lthough probable cause existed at the time Mathis was arrested at the scene, she may be able to demonstrate that probable cause evaporated … Ms. Mathis's breathalyzer test showed a .000 reading.") (citations omitted). "[F]ollowing a lawful warrantless arrest, a police officer has an affirmative duty to release an arrestee if he ascertains beyond a reasonable doubt that the probable cause which formed the basis of the arrest was unfounded." Strickland, 399 F. Supp. 2d at 1291. This instruction was necessary based upon issues presented at trial, particularly Defendants' testimony and argument

that the Sheriff's official policy does not permit release of any DUI arrestee even where, as here, the evidence was undisputed that the only probable cause for arrest was that Barnett was impaired by alcohol – not drugs – and Barnett's Breathalyzer results were 0.000. The jury needed clarification that the constitution *requires* release when there is no probable cause, contrary to the Sheriff's policy.

Indeed, the jury asked during deliberations whether Barnett could be released after the 0.000 Breathalyzer results.[58] In response, Barnett requested that the District Court provide an additional instruction to the jury which the Court denied because the case law which the instruction was based upon was not "in evidence." D.92pp.20–21;D.183p.22. Barnett then asked that the Court instruct the jury from Florida Statute Section 316.193(9), which was "in evidence,"[59] and which authorizes the release of a DUI arrestee when there is no longer probable cause to believe the person is impaired. §316.193(9), Fla. Stat. (2013). The Court declined.[60] Particularly considering the Eleventh Circuit's prior ruling that Florida Statute Section 316.193(9) *did* authorize releasing Barnett once she blew a 0.000, the jury should have been so instructed.[61] Barnett, 715 F. App'x at 894, 907.

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58 D.183pp.21-23.

59 D.174-Ex.7.

60 D.182pp.22-23.

61 Subsequently, the jury asked another question requesting copies of Florida Statutes Chapter 316 (all the traffic statutes) and Chapter 322 (the driver's license statutes), highlighting that they did not understand what they were deciding.

Third, over Barnett's objection, the instructions did not explain to the jury that:

> The determination of probable cause is based on the totality of the circumstances, thus, a deputy must consider *all* the evidence available to her. When a deputy fails to investigate or consider exculpatory information available to her, or when a deputy falsifies facts to try to support probable cause, it demonstrates that the deputy does *not* have probable cause. Additionally, it is not reasonable for a deputy to rely upon a suspect's performance on a field-sobriety test for a finding of probable cause for a DUI arrest when the test has been administered incompetently.[62]

Kingsland v. City of Miami, 382 F.3d 1220, 1223, 1230–31 (11th Cir. 2004); Dorman v. Florida, 492 So.2d 1160, 1162 (Fla. 1st DCA 1986). These instructions were necessary based upon the evidence at trial that MacArthur did *not* consider exculpatory evidence of which she was aware, did *not* investigate other exculpatory evidence readily available to her, and falsified her reports by not only misrepresenting evidence, but also by excluding exculpatory evidence.[63]

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62 D.154pp.11-12;D.183p.3 (citations omitted) (emphasis in original).

63 *Barnett's Eleventh Circuit Opening Brief* pp.4-18,33-55.

In summary, the jury's verdict cannot be relied upon because the instructions gave the jury "'a misleading impression or inadequate understanding of the law and the issues to be resolved.'" Steger v. Gen. Elec. Co., 318 F.3d 1066, 1081 (11th Cir. 2003) (quoting Stuckey v. N. Propane Gas Co., 874 F.2d 1563, 1571 (11th Cir. 1989) (quoting Bass v. Int'l Bhd. of Boilermakers, 630 F.2d 1058, 1062 (5th Cir. 1980))). A new trial should have been granted on the Section 1983 claim against MacArthur because the instructions left "the jury to speculate as to an essential point of law," including whether Barnett could have been released after the 0.000 Breathalyzer test results. Cruthirds v. RCI, Inc., 624 F.2d 632, 636 (5th Cir. 1980); Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1080–81 (11th Cir. 1987); Somer v. Johnson, 704 F.2d 1473, 1478 (11th Cir. 1983). The jury's questions made it clear that they did not understand the concept of probable cause, or how to evaluate it, particularly regarding the continued detention.

3. The Evidence Did Not Support a Finding of Probable Cause.

The jury's finding that MacArthur did not intentionally violate Barnett's Fourth Amendment right not to be arrested or detained without probable cause also was against the great weight of the evidence. The evidence at trial did not materially differ from the evidence presented at summary judgment.[64] Based upon virtually identical evidence, albeit viewed in the light most favorable to Barnett, both the District Court and the Eleventh Circuit had

64 D.92;D.175,179,181,183.

previously ruled that the evidence did not support *arguable* probable cause for the arrest or continued detention, let alone *actual* probable cause.[65] Specifically, the Eleventh Circuit had stated, "we do not believe a reasonable officer could have found probable cause to arrest Barnett" and "no reasonable officer could have found there was probable cause to continue to detain Barnett" after the 0.000 Breathalyzer results. Barnett, 715 F. App'x at 907. As the District Court put it: "Especially after the breathalyzer test established that Barnett did not have any alcohol in her system, MacArthur did not have actual or arguable probable cause to detain Barnett."[66] Accordingly, the jury's verdict was contrary to the great weight of the evidence presented at trial. Brown v. Sheriff of Orange Cty., Fla., 604 F. App'x 915 (11th Cir. 2015); Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1312–13 (11th Cir. 2013); St. Luke's Cataract & Laser Inst., P.A. v. Sanderson, 573 F.3d 1186, 1200 n. 16 (11th Cir. 2009); Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001).

That evidence included MacArthur turning off her microphone twice during the investigation, apparently to hide her inexperience and doubt as to whether there was probable cause to arrest Barnett.[67] Additionally, there was undisputed evidence that MacArthur had no reason to believe Barnett was impaired by any type of drugs when she placed

65 D.111;D.126pp.25-27.
66 D.111p.12.
67 D.175-Exs.21&22.

Barnett under arrest, and that she admitted she did not have probable cause to arrest Barnett for drug impairment. Likewise, Deputy Betham, a Drug Recognition Expert, testified that he observed no signs whatsoever that Barnett was impaired by drugs when she arrived at the jail.[68] As the Eleventh Circuit put it, "Deputy MacArthur and Mr. Betham admitted there was no evidence that Ms. Barnett—who did not smell of marijuana or slur her words—was under the influence of drugs." Barnett, 956 F.3d 1291, 1291.

There also was considerable evidence that MacArthur administered and scored the field sobriety tests improperly.[69] Moreover, Love and both expert witnesses agreed that MacArthur should have taken Barnett's injuries into consideration in evaluating Barnett's performance on the tests.[70] Barnett's medical records showed that she was unable to do a similar heel-to-toe walk and one leg stand for her doctor just days before the stop.[71]

Moreover, the jury was prejudiced by the Defendants' evidence and arguments at trial attempting to shift blame away from MacArthur, particularly by taking positions opposite to those previously taken by the Defendants in the litigation. For example, Defendant's closing argument included that MacArthur truly believed that she saw nystagmus despite all the evidence that the tests were "garbage" because she did not perform them correctly.

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68 D.179pp.22,34;D.181p.209.
69 D.181p.33-35,67;D.175Ex.3;D.181pp.434-65;D.181pp.218-19.
70 D.175p.150,D.181pp.24-26,54-55,215-16.
71 D.181pp.158-59.

Defendants also argued that MacArthur should not be held liable for the continued detention because Lemma's Hold Policy did not give her the discretion to release Barnett for at least eight (8) hours.[72] This was contrary to Defendants' prior position that MacArthur was entitled to qualified immunity for the continued detention.[73,74] Barnett, 715 F. App'x at 906 ("there is no dispute over whether MacArthur was acting within the scope of her discretionary authority as a Deputy Sheriff of Seminole County when she arrested and detained Barnett"). Defendant's reliance on its official policy at trial was also contrary to its prior position that Florida Statute Section 316.193(9) *required* the eight (8) hour detention,[75] a position which the District Court had agreed with[76] but the Eleventh Circuit had rejected. Barnett, 715 F. App'x at 908. Indeed, Defendants' position was contrary to the law of the case as stated by the Eleventh Circuit's Order:

> Section 316.193 simply requires one of three conditions to be met to ensure sobriety prior to releasing a DUI arrestee, one of which is an eight hour lapse from the time of arrest and one of

72 D.175p.69;D.181pp.229, 252.

73 See, e.g., D.476pp.13–16. Defendants took the position in their summary judgment pleadings and in the interlocutory appeal that MacArthur had the requisite discretion because, otherwise, MacArthur had no qualified immunity for the continued detention. Id.

74 D.111p.12; D.126p.23.

75 D.41pp.4-6.

76 D.111p.12.

> which is a blood-alcohol level below 0.05. Fla. Stat. § 316.193(9)(b)–(c). Florida law grants officers discretion in making a DUI arrest *and* in releasing a DUI arrestee. When an officer exercises this discretion under Florida law, the *Constitution* requires her to exercise her discretion in a way that does not violate a person's Fourth Amendment rights. When an officer exercises her discretion to refrain from releasing a DUI arrestee where there is no longer a basis for the arrest or detention, on the unsupported ex post justification that "there was something," she exercises her discretion in clear violation of the Fourth Amendment.

Id. (emphasis in original); see generally Riley v. Camp, 130 F.3d 958, 962 (11th Cir. 1997) (explaining that the district court and appellate court are bound by law of the case developed on prior interlocutory appeal).

In effect, having been relieved of liability for the Monell claim by the District Court's summary judgment ruling,[77] Lemma all but admitted liability for the claim during trial. In fact, Lemma stipulated in the Pretrial Statement that "Defendant Eslinger [now Lemma] has an official policy, practice or custom of requiring that DUI arrestees be detained in jail for

77 D.111pp.16-19.

a minimum of eight (8) hours."[78] Despite the stipulation, Defendants repeatedly introduced evidence that Lemma's policy requires holding DUI arrestees for at least eight (8) hours regardless of whether probable cause exists to support the continued detention and that MacArthur had no discretion to release Barnett, including testimony by Betham, MacArthur, and Love.[79] Moreover, contrary to the Eleventh Circuit's ruling that MacArthur exercised her discretion in violation of the Fourth Amendment when she did not release Barnett because she felt "there was something," id., Defendants repeatedly suggested to the jury that Barnett "could have been" impaired by drugs despite the complete absence of any evidence that she was.[80] Defendants' position hopelessly confused the jury regarding whether Defendants, particularly MacArthur, could be held liable for the continued detention of Barnett after the 0.000 Breathalyzer results. For all these reasons, this Honorable Court cannot rely upon any alleged finding of probable cause by the jury in this case.

4. Law Enforcement Cannot Continue a Detention for 48 Hours When Probable Cause Does Not Exist.

Lemma first presents a new argument in his Petition that, if Barnett had not posted bond prior to the eight-hour minimum hold required by his Hold Policy, she would have no claim because Lemma could

78 D.142p.8.
79 D.175-Ex.17-20;D.179p.38;D.181p.123;D.179p.37.
80 D.175pp.69-70,190-91;D.179pp.22,35,37;D.181p.70.

have held Barnett even longer, namely, until her first appearance as long as it occurred within 48 hours. To the contrary, regardless of whether Barnett posted bond, the Constitution required that Barnett be released from custody once it was clear that there was no probable cause to support her continued detention. Barnett, 956 F.3d at 1297 (citing, among other authorities, BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986) ("The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause."); McConney, 863 F.2d at 1185 ("[O]nce a responsible officer actually does ascertain beyond a reasonable doubt that one who has been so arrested is not intoxicated, the arrestee should be released."); Nicholson v. City of L.A., 935 F.3d 685, 691 (9th Cir. 2019) ("It is well-established that a person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated.") (citation and internal quotation marks omitted); Thompson v. Olson, 798 F.2d 552, 556 (1st Cir. 1986) (addressing false imprisonment claim under Maine law: "following a legal warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded")))).

Gerstein and require release if a judge does not determine there is probable cause within 48 hours to protect individuals' constitutional right not to be detained without probable cause. They do not say that the Constitution permits a 48-hour detention

regardless of whether it becomes clear during the first hour, as it did in this case, that probable cause is lacking. Id.

5. The Eleventh Circuit Did Not Impose New Duties on Law Enforcement.

Lemma next argues that this Court's decisions in Gerstein and McLaughlin did not say there must be an "independent and continuing reassessment of probable cause either by the arresting officers or by jail officials." Pet. p. 15. But neither did the Eleventh Circuit; the Eleventh Circuit said the opposite:

> The Fourth Amendment standard we announce, borrowed from the *McConney* decision of the Fifth Circuit, does not place on police officers an 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.

Barnett, 956 F.3d at 1301. Rather, when law enforcement learns information that makes it clear that probable cause no longer exists, the constitution forbids continuing the detention.

6. Other Cases Are Not At Odds with the Eleventh Circuit.

Lemma also tries to distinguish the cases the

Eleventh Circuit cited to support its decision, arguing they are "inapposite to the case at hand." Pet. p. 16. The distinctions Lemma attempts to make, however, do not demonstrate any disagreement and, in fact, the overwhelming weight of authority, if not all the authority, supports the Eleventh Circuit's decision.

For example, Lemma attempts to distinguish BeVier, Nicholson, and McConney, in which the Seventh, Ninth, and Fifth Circuits, respectively, found Fourth Amendment violations where officers continued detaining arrestees after learning of information dissipating probable cause. According to Lemma, while subsequent evidence in those cases sufficiently disproved probable cause, such a finding is not warranted here because (1) a jury found probable cause for Barnett's arrest for DUI, and (2) the 0.000 Breathalyzer results did not rule out that Barnett was impaired by controlled substances. Pet. pp. 16–19. First, as stated above, this Court cannot rely upon the jury's verdict as a finding of probable cause in this case. Second, Lemma's contention regarding the Breathalyzer results is immaterial given that, as the Eleventh Circuit stated, "Deputy MacArthur and Mr. Betham admitted there was no evidence that Ms. Barnett … was under the influence of drugs." Barnett, 956 F.3d at 1291.

Next, attempting to distinguish BeVier, Lemma states that the court there held that "probable cause dissipated because a social worker suggested alternatives to arrest." Pet. p. 17 (citing BeVier, 806 F.2d at 128). That is no different than the situation MacArthur faced with Barnett. MacArthur

indisputably had the authority to exercise her discretion not to arrest Barnett. MacArthur could have allowed Barnett to get a ride home along with her passenger, whose brother came to drive her home, if MacArthur had any concern about Barnett's ability to drive.[81] Moreover, Lemma fails to mention that BeVier holding was also based on the court's finding that there was no evidence that the plaintiffs knew of their children's condition, which was required by the child neglect statute for which they were arrested, and that the social worker subsequently informed the arresting officer that the plaintiffs had not violated the child neglect statute. See BeVier, 806 F.2d at 126–28. Similarly, in this case, MacArthur admitted that there was no evidence that Barnett was impaired by any controlled substances and MacArthur was subsequently informed by way of the 0.000 Breathalyzer results that Barnett was not impaired by alcohol. Thus, probable cause for Barnett's detention for DUI, if any, had dissipated.

Next, Lemma tries to distinguish Nicholson, which involved the detention of teenagers with a toy gun. See 935 F.3d at 689. Lemma states that the officers' on-the-scene determination that the gun was a toy "might well merit the conclusion … that probable cause had been eliminated 'beyond a reasonable doubt,'" but that such a conclusion is not warranted 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." Pet. pp. 17–

81 D.35-3;64:38:16-39:4;D.66:119:14-120:11;D.179:233:10-234:21.

18. Lemma's reasoning is erroneous. Similar to the officers in Nicholson determining on-the-scene that the plaintiffs were unarmed and not engaged in criminal activity, MacArthur determined before Barnett was booked into jail that Barnett was not under the influence of alcohol. That MacArthur then requested a urine sample knowing there would be no results for weeks cannot justify the continued detention in light of MacArthur and Betham's admissions that there was no evidence that Barnett was under the influence of drugs. There was no probable cause to continue to detain Barnett. The Constitution does not permit detaining people based upon conjecture that "there might be something."

Finally, Lemma attempts to distinguish McConney in which "[t]he Fifth Circuit held that a jail's four-hour hold of a sober plaintiff was unconstitutional." Pet. p. 18. According to Lemma, such a conclusion was warranted in McConney because "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." Id. (quoting McConney, 863 F.3d at 1183 (alteration in original). Lemma further argues that such a conclusion was not warranted in this case because the results of Barnett's urine sample were not yet known. Id. at 19. However, similar to McConney, both MacArthur and Betham admitted that there was no evidence that Barnett was impaired by drugs and they knew she had zero alcohol in her system. Their only justification for continuing to detain Barnett was Lemma's eight-hour hold policy. Therefore, contrary to Lemma's assertions, there was no probable cause to

continue detaining Barnett let alone require a urine sample from her.

In short, all of the cases support the Eleventh Circuit's decision. That leaves Lemma with the one Sixth Circuit split panel decision in Peet in which the majority said there was no precedent to require release when law enforcement learns probable cause no longer exists. Peet cited no authority to support its statement, which was incorrect. The Sixth Circuit had long recognized the constitutional right to be free of continued detention without probable cause. E.g., Gregory v. City of Louisville, 444 F.3d 725, 749–50 (6th Cir. 2006) (discussing whether continued detention claims should be brought as malicious prosecution or 1983 claims and noting that the law had been clearly established well prior to 1993) (citing Spurlock v. Satterfield, 167 F.3d 995, 1006-07 (6th Cir. 1994).[82] A panel decision of the Sixth Circuit cannot overrule the decision of a prior panel, thus, Peet's contrary position is not controlling in the Sixth Circuit. E.g., Salmi v. Sec'y of Health & Human Servs., 774 F.2d 685, 689 (6th Cir. 1985) (explaining that a panel decision cannot overrule a prior panel decision) (citations omitted). Therefore, Sixth Circuit precedent is not in conflict with the Eleventh Circuit's decision.

Additionally, as the Eleventh Circuit pointed out, the Sixth Circuit failed to recognize other courts' prior decisions that were contrary to its statement and

82 The dissenting opinion in cited the Gregory decision for this very proposition. Peet, 502 F.3d 579.

incorrectly assumed that requiring release would necessarily impose an affirmative duty to re-evaluate the matter of probable cause with every new piece of information or evidence. Barnett, 956 F.3d at 1300–01 (declining to follow Peet v. City of Detroit, 502 F.3d 557, 565 (6th Cir. 20 07)). As such, the Peet panel's ill-considered statements in the majority opinion do not warrant this Honorable Court's consideration in light of the Sixth Circuit's contrary cases and the nearly universal decisions from all other courts to the contrary.

7. The Eleventh Circuit's Standard Is Not Unworkable Or Unreasonable.

Lemma next claims the Eleventh Circuit's standard is not workable or reasonable. However, the Eleventh Circuit considered and balanced the concerns of law enforcement and the Constitution. The Court determined that the standard "properly balances the competing liberty interests and law enforcement concerns and remains faithful to the Fourth Amendment's textual command that seizures and detentions be reasonable." Barnett, 956 F.3d at 1301 (citing Riley v. Cal., 573 U.S. 373, 381, 134 S. Ct. 2473, 189 L.Ed.2d 430 (2014) ("As the text makes clear, the ultimate touchstone of the Fourth Amendment is reasonableness.") (citation and internal quotation marks omitted)). This standard has worked in the First, Fifth and Seventh Circuits since the 1980s. E.g., BeVier, 806 F.2d at 128; McConney, 863 F.2d at 1185; Thompson, 798 F.2d at 556. It has since been adopted by the Ninth and Eleventh Circuits. E.g., Nicholson, 935 F.3d at 691; Barnett,

956 F.3d at 1297. The standard adopted by the Eleventh Circuit has not proven unworkable in the nearly 40 years it has been utilized.

Contrary to Lemma's suggestion, Constitutional rights are not disposable simply because it is more expedient for law enforcement to ignore them. Lemma argues that it is too taxing for law enforcement to have to reassess whether probable cause still exists when it learns new information. However, the standard of beyond a reasonable doubt makes release necessary only in cases where it should be obvious to any reasonable officer that probable cause no longer exists. In other words, it is only in cases like Barnett's, where it was abundantly clear that the probable cause has dissipated, that release is required. Any reasonable officer should have known that there was no longer probable cause when Barnett's breathalyzer came back *zero* and the *only* reason she was arrested was the officer's belief that she was impaired by alcohol. If anything, the standard adopted by the Eleventh Circuit is weighted too much in favor of law enforcement by requiring that the evidence demonstrate "beyond reasonable doubt" that there is no longer probable cause for a detention for an arrestee's constitutional rights to prevail, and not imposing any duty at to reassess probable cause unless exculpatory evidence happens to fall in law enforcement's lap. This standard will surely result in many continued detentions unsupported by continuing probable cause when the Constitution requires erring on the side of release rather than detention.

8. No Clarification Is Needed Because Other Jurisdictions Do Not Permit Continuing Detentions Unsupported By Probable Cause.

Lemma also claims that DUI arrests present a unique problem because the person might bond out while still intoxicated and, thus, might pose a threat to themselves or others. This is not a unique problem, however. For example, many arrested for violent crimes or crimes like drug trafficking also may pose a threat to themselves or others when released. That risk does not justify unconstitutional detentions, nor is there anything unique about DUI arrests that warrants exempting them from the Fourth Amendment.

Similarly, the Eleventh Circuit's opinion does not defeat the supposed public safety justification for holding DUI arrestees as Lemma suggests. There is no public safety justification for jailing a person that law enforcement knows, beyond a reasonable doubt, there is no probable cause to believe is under the influence.

Lemma's argument also ignores that Florida's statutory scheme allows for release either after the arrestee is no longer impaired, after the person's blood-alcohol level is less than 0.05; or after eight hours. § 316.193, Fla. Stat. (2019). Lemma simply chose to ignore the first two options for every DUI arrestee, both of which authorized releasing Barnett in this case, insisting instead on holding every arrestee for at least eight hours regardless. In fact, MacArthur could have exercised her discretion to

release Barnett at the scene instead of arresting her. In fact, her passenger's brother arrived at the scene to drive his sister home before Barnett was placed under arrest, and Barnett could have ridden home with them if there were concern over her ability to drive. Moreover, Florida has a separate statutory scheme that allows for the detention of an intoxicated person who is a danger to herself or others; it's commonly known as the Marchman Act. § 397.301 *et seq.*, Fla. Stat. (2019). As such, Lemma's alleged safety concerns do not justify the arrest or the continued detention.

Lemma attempts to portray the issue as though it is a widespread concern throughout the country. However, most of the statutes and cases to which he cites are not DUI laws at all. And, as Lemma points out, various states have differing policies for when intoxicated individuals can be detained. However, that patchwork of different approaches is all the more reason to deny certiorari in this case, particularly since none of the statutes or cases are contrary to the Eleventh Circuit's holding.

The North Dakota statute Lemma points to is not a DUI statute, but a public intoxication statute more akin to Florida's Marchman Act. N.D. Cent. Code Ann. § 5-01-05.1. The statute provides alternatives to jail as long as the person is not a danger to herself or others, including taking the individual home or to a hospital or detoxification center. Id. Nonetheless, the City of Jamestown insisted on holding every DUI arrestee for at least eight hours in violation of the statute, like Lemma, reasoning that all arrestees pose a danger to

themselves and others. This resulted in the dismissal of the DUI charges as a sanction for violating the law. City of Jamestown v. Erdelt, 513 N.W.2d 82, 83 (N.D. 1994). No Constitutional issue was raised or addressed, and the case is not inapposite to the present case. Id.

Lemma also points to the case of City of Fargo v. Stutlien, 505 N.W.2d 738, 741 (N.D. 1993), in which the Supreme Court of North Dakota discussed the interplay between the state's DUI statute and the state's civil commitment statute and said the latter provided the appropriate avenue for addressing safety concerns. Thus, it was improper to create a blanket "minimum period of detention" for DUI arrestees to be held in jail for up to 12 hours or until their BAC was below .05. City of Fargo discussed this Court's decisions in Gerstein and McLaughlin, rejecting the same argument Lemma makes in this case, i.e., that this Court allows up to a 48 hour hold regardless of the circumstances. Id. As City of Fargo put it: "Although those decisions allow detention for completion of the administrative steps incident to a warrantless arrest, they do not involve blanket "minimum periods of detention" and specifically disapprove "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661, 1650, 114 L. Ed. 2d 49, 63 (1991) and citing Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975)). Again, the case is consistent with the Eleventh Circuit's decision.

The Kansas statute Lemma discusses is not a DUI statute either. Again, it is a protective custody statute more akin to Florida's Marchman Act. It allows law enforcement officers to detain a person arrested for violation of a municipal ordinance for a period not to exceed six hours if there is probable cause to believe that the person may cause injury to oneself or others, but only if there is no responsible person or institution to which such person might be released. Kan. Stat. Ann. § 12-4213. The statute has no bearing on Lemma's policy of holding DUI arrestees for a minimum of eight hours regardless of whether the probable cause for arrest has dissipated, or regardless of whether the arrestee poses a threat to herself or others, or regardless of whether there is a responsible person to whom she could be released.

In the Tennessee case Lemma references, local judges created a policy of detaining DUI arrestees who refused to submit to a breath-alcohol tests in custody for twelve hours. State v. Pennington, 952 S.W.2d 420, 421 (Tenn. 1997). The only constitutional issue raised was double jeopardy, which was rejected, although the court recognized the detentions could implicate other constitutional protections. Id. at 423 ("A policy of detaining suspected drunk drivers for refusing to submit to a test to determine blood-alcohol content may, if punitive, implicate certain constitutional protections, but the double jeopardy clause is not one of them…"). Again, the case is not inapposite to the present case.

The Delaware case Lemma cites provides that, under some circumstances, a person suspected of DUI,

but for whom the police officer does not have probable cause, may lawfully be taken to the police station for further investigation. However, the person can be held for only two hours on reasonable suspicion, and the police officer in that case violated the law by holding the plaintiff for four hours. Thus, summary judgment was denied on the unlawful detention claim. Glover v. City of Wilmington, 966 F. Supp. 2d 417 (D. Del. 2013). Once again, the statute that supported the detention was not a DUI statute. 11 Del. C. § 1902. It was a reasonable suspicion statute generally applicable to criminal investigations. Id. And, again, Glover is not inapposite to this case, nor did it address the constitutional issue at hand.

The Colorado statute discussed in Anaya v. Crossroads Managed Care Sys., Inc., 195 F.3d 584, 591 (10th Cir. 1999), was another civil commitment statute; not a DUI statute. Id. (citing Colo. Rev. Stat. Ann. § 25–1–310(1)). The Court held that probable cause justifying an arrest for a crime does not necessarily provide probable cause to justify detaining the arrestee in a detox center. Rather, there must be probable cause to believe an intoxicated person is a danger to himself or others. Id. Accordingly, the Court reversed the summary judgment on the plaintiffs' 1983 claims. Id. Similarly, the other Tenth Circuit case Lemma cites had nothing to do with detaining a DUI arrestee. Panagoulakos v. Yazzie, 741 F.3d 1126, 1131 (10th Cir. 2013). Panagoulakos involved a firearm charge and held that there was no clearly established authority that required release under the unique circumstances of that case. Id. Neither case is contrary to the Eleventh Circuit's opinion in this case.

CONCLUSION

Lemma's Petition fails to demonstrate that review by this Honorable Court is needed or appropriate. The Eleventh Circuit's opinion is consistent with this Court's precedent and all other courts to have considered the same or similar issues, save one decision that failed to cite or consider other case law including its own precedent. The Fourth Amendment does not permit holding a person in jail for eight hours when law enforcement is well aware that probable cause does not exist for the continued detention.

Respectfully submitted,

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