App. 1

United States Court of Appeals
for the Fifth Circuit

No. 21-60456

RACHEL HARRIS, *Guardian of Steven Jessie Harris, on behalf of Steven Jessie Harris*,

Plaintiff—Appellee,

versus

CLAY COUNTY, MISSISSIPPI; LADDIE HUFFMAN, *Former Sheriff, in his Individual and Official Capacities*; EDDIE SCOTT, *Sheriff, in his Individual and Official Capacities*,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:18-CV-167

(Filed Aug, 24, 2022)

Before SMITH, COSTA, and WILSON, *Circuit Judges*.

GREGG COSTA, *Circuit Judge*:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is GRANTED. Because no member of the panel or judge in regular active service requested that

the court be polled on rehearing en banc, the petition for rehearing en banc is DENIED. Our prior opinion, *Harris v. Clay Cnty.*, 40 F.4th 266 (5th Cir. 2022), is WITHDRAWN and the following opinion is SUBSTITUTED therefor:

When a defendant is found incompetent to stand trial with no reasonable expectation of restored competency, the state must either civilly commit the defendant or release him. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). That simple commit-or-release rule was not followed in this case. Steven Harris was found incompetent to stand trial, and his civil commitment proceeding was dismissed. Yet Harris stayed in jail for six more years. This suit challenges his years-long detention when there was no basis to hold him. We consider whether his jailers are entitled to qualified immunity.

I

A

This case stems from a horrific crime spree in 2005.[1] Harris was charged with murdering his father, shooting three law enforcement officers, shooting into occupied vehicles, carjacking, and kidnapping. He

[1] Given the summary judgment posture, we recount the facts in the light most favorable to Harris. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (emphasizing that this basic summary judgment principle applies in qualified immunity cases).

pleaded not guilty in a Clay County circuit court,[2] and the court ordered that he be held in custody without bail.

While Harris was in custody, his counsel requested a mental evaluation to determine Harris's competency to face trial. Harris had a long history of suffering from schizophrenia. The circuit court agreed to the evaluation and transferred him to a hospital. There, doctors concluded that there was "no substantial probability that Mr. Harris [could] be restored to competence to proceed legally in the foreseeable future."

Harris returned to jail and awaited competency proceedings. The court held a hearing on October 12, 2010 and agreed with the doctors that Harris was not competent. It therefore ordered Mississippi to pursue civil commitment proceedings in the chancery court. Importantly, the court also ruled on Harris's detention status: He should be held "until the determination of said civil proceedings."

But the civil commitment case did not last long. On the same day the circuit court removed Harris's criminal case from its active docket (October 20, 2010), the chancery court dismissed the just-filed commitment proceeding for lack of jurisdiction. It based that

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[2] Mississippi circuit courts hear felony criminal proceedings and civil lawsuits. *About the Courts*, STATE OF MISSISSIPPI JUDICIARY, https://courts.ms.gov/aboutcourts/aboutthecourts.php (last visited June 26, 2022). Chancery courts have jurisdiction over matters of equity, including, as relevant here, civil commitment proceedings. *Id.*

dismissal on the pending criminal charges—yes, the charges that had just become inactive—in the circuit court. The circuit court apparently never caught wind of the chancery court's dismissal, sending Harris into legal limbo.

No one disputes that Harris remained in Clay County jail from that point forward. It is hard to explain, then, what happened next. On October 25, 2010, Sheriff Laddie Huffman and Deputy Eddie Scott, the ones in charge of the jail, signed a "Diligence Declaration." The declaration purportedly related to a separate indictment against Harris for assaulting a jailer while in custody.[3] In that declaration, they said the following: "After diligent search and inquiry, [we] have been unable to find the within named Steven J. Harris in [our] county." It appears that they submitted the declaration to the circuit court—further misleading the circuit court that the civil commitment proceedings went according to plan.

Fast forward to 2012. The district attorney prosecuting Harris's case, Forrest Allgood, found out about the state court snafu. After putting the pieces together, he went to Sheriff Huffman to inquire about Harris's confinement. This time Huffman acknowledged that Harris was still in jail but indicated that his mental health seemed to be improving. So Allgood submitted a Motion for Reevaluation to the circuit court, asking the court to again determine

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whether Harris was competent to stand trial. The circuit court never ruled on that motion, perhaps because the case was on its inactive docket, and Allgood never followed up. Harris stayed in jail.

Four more years passed with no change. That is, until a Mississippi news outlet started asking questions about the case.[4] At that point, Scott, who had been elected Sheriff, reached out to the newly elected district attorney to "try[] to push and get things moving" in Harris's case. And then—the day before the newspaper published its article—the district attorney filed a motion for the chancery court to reconsider its dismissal of Harris's civil commitment case.

Things moved fast after the reconsideration motion. After holding that its earlier dismissal was inadvertent, the chancery court finally took up the civil case in June 2016. The court determined that Harris was a danger to himself and others, so it committed him to a medical facility. While there, Harris's mental capacity was reevaluated one last time. The result was the same—he was not competent to stand trial and had no hope of regaining competence. The circuit court dismissed his criminal charges in 2017. Harris was released to his family soon after. He continues to receive medical care for his mental disorders.

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B

Harris's mother, on his behalf, sued District Attorney Allgood, Sheriffs Huffman and Scott, and Clay County under Section 1983.[5] The suit alleges that the defendants violated Harris's Fourteenth Amendment due process rights by unlawfully detaining him for years. The complaint also contends that, at one point, Huffman held Harris down and forced him to take unwanted medication. As to Clay County, Harris argued that Sheriffs Huffman and Scott were final policymakers, making the county liable under *Monell*. The defendants sought summary judgment; Harris responded with a motion for partial summary judgment.

The district court first dismissed Allgood from the case, concluding he had absolute prosecutorial immunity and qualified immunity. It came out the other way as to Huffman and Scott. It determined that they were not entitled to qualified immunity on the detention claim because—taking Harris's account as true—their constitutional violations were obvious. It denied summary judgment to Clay County too, finding that there was strong evidence that Huffman and Scott were final policymakers for the county. Next, the court addressed the forced medication claim. It granted Huffman qualified immunity, concluding that Harris did not prove that the sheriff's actions violated clearly established law. The court did, however, let the medication claim proceed against Clay County as municipal liability

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claims do not require plaintiffs to prove a violation of clearly established law.

So after summary judgment, the following claims remain: the detention claim against Huffman, Scott, and Clay County; the forced medication claim against Clay County alone. Huffman, Scott, and Clay County appeal.

II

Before we address the merits, we must clear the jurisdictional thicket. Harris contends we cannot hear any of the defendants' appeals at this interlocutory stage. That is right for some but not all defendants.

For this court to have interlocutory jurisdiction, the district court's decision as to each defendant must qualify as a collateral order. *See Swint v. Chambers Cnty. Comm'n.*, 514 U.S. 35, 42 (1995). A collateral order is one that is "conclusive, that resolve[s] important questions separate from the merits, and that [is] effectively unreviewable on appeal from the final judgment in the underlying action." *Id.*

The answer is straightforward for the decision denying summary judgment to Huffman and Scott in their individual capacities. An officer's qualified immunity is "an *immunity from suit* rather than a mere defense to liability," and "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The district court's denial of summary judgment—based on its determination

that the officers were not entitled to qualified immunity—therefore qualifies as a collateral order. *See id.*

That conclusion is not altered by Harris's argument that we lack jurisdiction because the district court's denial turned on a genuine dispute of material fact. True, this court does not have jurisdiction to decide the genuineness of factual disputes. *Cole v. Carson*, 935 F.3d 444, 452 (5th Cir. 2019) (en banc). But we can determine whether those factual disputes, viewed in the light most favorable to the plaintiff, are "*material* to the application of qualified immunity." *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018). And we limit our jurisdiction to just that—whether, viewing factual disputes in the light most favorable to Harris, Huffman and Scott violated clearly established law.

Harris is correct, however, that we lack jurisdiction over the ruling keeping Clay County in the case. Unlike the sheriffs, municipalities do not enjoy immunity. *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). The argument that a municipality does not have a policy or custom that violates federal law is merely a defense to liability that, like most other defenses, can be reviewed after final judgment. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 476 (5th Cir. 1999). We thus have repeatedly refused to treat summary judgment denials involving municipalities or officers sued in their official capacities as appealable collateral orders. *See Poole v. City of Shreveport*, 13 F.4th 420, 423 n.3 (5th Cir. 2021); *Trent v. Wade*, 776 F.3d 368, 388-89 (5th Cir. 2015); *Kinney v. Weaver*, 367 F.3d 337, 347 n.10 (5th Cir. 2004) (en banc).

Nor do we have pendent party jurisdiction over Clay County. Defendants assume that if Clay County's liability is "inextricably intertwined" with that of the individual officers, that provides "support [for] pendent appellate jurisdiction." But this court has never permitted—and has indeed rejected—pendent party (as opposed to pendent claim) interlocutory jurisdiction. *See Johnson v. Bowe*, 856 F. App'x 487, 491 n.5 (5th Cir. 2021) ("[T]he discretion to exercise pendent interlocutory appellate jurisdiction does not include pendent party interlocutory appellate jurisdiction. . . ."); *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007) (refusing to recognize "so strange an animal as pendent party interlocutory appellate jurisdiction" (citation omitted)); *Burge*, 187 F.3d at 477-78 (no pendent party jurisdiction over municipality's appeal). Other circuits do sometimes exercise pendent party jurisdiction over orders involving municipalities when individuals with qualified immunity also appeal,[6] but we do not. Bryan Lammon, *Municipal Piggybacking in Qualified-Immunity Appeals*, 126 PA. ST. L. REV. 123, 141 (2021) ("[T]he Fifth Circuit [] appears to have rejected [municipal piggybacking]. . . . I could not find any Fifth Circuit decisions to the contrary.").

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Often the practical difference in these approaches will be negligible. If, for example, we rule in an interlocutory appeal of a defendant with qualified immunity that there is no underlying constitutional violation, then it should be perfunctory on remand for the district court to enter an order applying that ruling to the benefit of a municipality. *See McKee v. City of Rockwall*, 877 F.2d 409, 413 (5th Cir. 1989) ("[T]he municipality will usually be able to reap in district court the benefits of a successful appeal by the city's individual co-defendants."). But our rule against pendent party interlocutory jurisdiction has a greater impact in this case: It means we cannot consider the forced medication claim that survived only against Clay County. And, of course, it means that we do not have interlocutory jurisdiction to decide whether any constitutional violation for detaining Harris is attributable to the county.

We thus dismiss Clay County's appeal and proceed to the merits of the individuals' appeal.

III

The remaining merits issue is whether Huffman and Scott are entitled to qualified immunity for jailing Harris for six years after courts had found him incompetent and dismissed the commitment case. We decide that question de novo, accepting Harris's version of the facts and drawing inferences in his favor. *Kinney*, 367 F.3d at 347-49. The first qualified immunity question is whether the evidence allows a jury to find that the defendants violated Harris's due process rights. *See*

Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011). The second is whether that right is "clearly established." *Id.* An official's conduct violates a clearly established right when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That clearly established right, however, cannot be defined "at too high a level of generality." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021). It must be " 'particularized' to the facts of the case" establishing the right. *White v. Pauly*, 580 U.S. 73 (2017) (quoting *Anderson*, 483 U.S. at 640).

A

The Fourteenth Amendment prohibits a state from confining a criminal defendant "solely on account of his incapacity to proceed to trial" for more than "the reasonable period of time necessary to determine whether there is substantial probability that he will attain that capacity in the foreseeable future." *Jackson*, 406 U.S. at 738. If there is no real probability that defendant will become competent, the state must institute civil commitment proceedings—to gauge the dangerousness of the defendant—or release him. *Id.*

Harris's prolonged detention violated *Jackson.* The circuit court held that he was incompetent and would not regain competency. Almost immediately after that, the chancery court dismissed the civil commitment proceeding. Without a chance at his competency being restored or a pending civil proceeding that could

result in his commitment based on dangerousness, Harris was entitled to go free. Yet he remained in jail for six years. This violated the commit-or-release rule that the Supreme Court recognized a half century ago. *See id.*

The sheriffs do not push back much against the notion that the Constitution required Harris's release.[7] They instead mostly argue that they are not responsible for any constitutional violation. Any fault, they contend, lies with the courts or prosecutor.

Courts, including ours, have rejected jailers' just-following-orders defenses in cases with much briefer unlawful detentions. *See Jones v. Jackson*, 203 F.3d 875 (5th Cir. 2000). Even when a detention was "pursuant to a valid court order," we held that detaining a defendant for nine months without bringing him before a judge offended his due process rights. *See id.* at 880-81. A recent case similarly held that "prolonged detention"—96 days—"without the benefit of a court appearance violate[d] the detainee's Fourteenth Amendment right to due process." *Jauch v. Choctaw Cty.*, 874 F.3d 425, 436 (5th Cir. 2017). Other circuits have come to similar conclusions when defendants were detained at length without being brought in front of a judge. *See Hayes v. Faulkner Cty.*, 388 F.3d 669, 675 (8th Cir. 2004) (38-day detention); *Armstrong v. Squadrito*, 152

[7] We reject the sheriffs' argument that the state's commencement of the proceedings in 2010 was enough to satisfy the Supreme Court's command. *Jackson* would have no meaning if states could start commitment proceedings, terminate them, and then jail defendants indefinitely.

F.3d 564, 567, 573-76 (7th Cir. 1998) (57 days); *Oviatt v. Pearce*, 954 F.2d 1470, 1474-77 (9th Cir. 1992) (114 days).

Harris did not see a judge from October 2010 to June 2016. During those more than 2,000 days, the circuit court never set a hearing. And no case was pending in chancery court. In fact, judges had reason to believe that Harris was no longer detained. A few days after Harris should have been released, Huffman and Scott signed the declaration testifying that Harris was not in the jail (this in a relatively small county with approximately 20,000 citizens and roughly 100 inmates at a given time). That lie allows a factfinder to infer that Huffman and Scott were covering something up—that they knew there was no longer any basis to hold Harris.[8] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (discussing the "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt' " (quoting *Wright v. West*, 505 U.S. 277, 296 (1992))). Thus, the length of time Harris was held without a pending hearing—

[8] Other holes in the sheriffs' story might also lead a jury to conclude that they knew it was unlawful to continue holding Harris on the initial charges. For example, Sheriff Huffman told DA Allgood in 2012 that Harris was still in jail, contradicting his declaration. And while the sheriffs claim the prison assault capias was their basis for holding Harris, that could not be the case because the indictment was never served on Harris (and thus there was never a trial date or any other court hearing relating to that case).

substantial as it was—is not the only basis for tying the sheriffs to the due process violation.

Indeed, this is not a case about jailers' following court orders that turned out to be unconstitutional. These sheriffs held Harris in violation of a court order that followed *Jackson*'s commit-or-release rule. After its competency ruling, the circuit court ordered that Harris "shall remain in custody *until* the determination of said civil proceedings." Until that point, not longer. That meant that once the chancery court ended the civil commitment proceedings—and remember it soon did—Harris should have been released. This case is thus an easier one than the cases cited above in which jailers should have pieced together the need to release the defendant based on the passage of time without court action. Here, the court's order informed the jailers what due process required. Holding Harris for six more years violated the court's instruction.

The sheriffs ignore that commit-or-release order and instead argue that they were detaining Harris "pursuant" to a different to court order. The order they refer to is the initial order to detain Harris issued after his bond hearing in April 2006. It cannot be that the initial detention order in a case overrides subsequent release orders and allows jailers to indefinitely hold defendants without consequence. As we said long ago of another sheriff's defense to a prolonged detention claim—he argued that his ignorance of a court's ordering the defendant's release excused him from liability—if that were the law then "nine months could easily be nine years, and those nine years, ninety-nine

years, and still as a matter of law no redress would follow." *Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1968).

Taking the evidence in Harris's favor, Huffman and Scott violated his due process right by detaining him for six years in violation of the commit-or-release rule and the circuit court's order enforcing that rule.

B

The final question is whether this constitutional violation was clearly established. The district court answered "yes," concluding that the sheriffs' actions were an "obvious" constitutional violation. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Taylor v. Riojas*, 141 S. Ct. 52 (2020) (reversing grant of qualified immunity because the violation was obvious). We agree.

The commit-or-release rule is fifty years old. The rule has no wiggle room; its line is as bright as they come: An incompetent defendant who has no reasonable expectation of restored competency must be civilly committed or released. *Jackson*, 406 U.S. at 738. It is also clear as day that Harris's detention after the October 2010 dismissal of his civil proceeding violated *Jackson*'s rule.

And it has long been the law that sheriffs can be held responsible for unlawful detentions, especially when a court order tells them that the detainee should be released. *See*, *e.g.*, *Whirl*, 407 F.2d at 792. That is the case here, as the circuit court's order informed the

jailers that Harris should remain detained only so long as his commitment proceeding was pending.

Detaining Harris for more than six years after he should have been released under Supreme Court precedent and a state court order is a violation of clearly established law. Qualified immunity thus does not protect Huffman and Scott.

* * *

We DISMISS Clay County's appeal for lack of jurisdiction and AFFIRM the district court's denial of summary judgment as to Huffman and Scott.

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715, 738 (1972). That simple commit-or-release rule was not followed in this case. Steven Harris was found incompetent to stand trial, and his civil commitment proceeding was dismissed. Yet Harris stayed in jail for six more years. This suit challenges his years-long detention when there was no basis to hold him. We consider whether his jailers are entitled to qualified immunity.

I

A

This case stems from a horrific crime spree in 2005.[1] Harris was charged with murdering his father, shooting three law enforcement officers, shooting into occupied vehicles, carjacking, and kidnapping. He pleaded not guilty in a Clay County circuit court,[2] and the court ordered that he be held in custody without bail.

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[6] *See*, *e.g.*, *Taffe v. Wengert*, 775 F. App'x 459, 462 n.2 (11th Cir. 2019); *Novoselsky v. Brown*, 822 F.3d 342, 357 (7th Cir. 2016); *Clubside, Inc. v. Valentin*, 468 F.3d 144, 161 (2d Cir. 2006) (Sotomayor, J.); *Huskey v. City of San Jose*, 204 F.3d 893, 905 (9th Cir. 2000).

interlocutory jurisdiction to decide whether any constitutional violation for detaining Harris is attributable to the county.

We thus dismiss Clay County's appeal and proceed to the merits of the individuals' appeal.

III

The remaining merits issue is whether Huffman and Scott are entitled to qualified immunity for jailing Harris for six years after courts had found him incompetent and dismissed the commitment case. We decide that question de novo, accepting Harris's version of the facts and drawing inferences in his favor. *Kinney*, 367 F.3d at 347–49. The first qualified immunity question is whether the evidence allows a jury to find that the defendants violated Harris's due process rights. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). The second is whether that right is "clearly established." *Id.* An official's conduct violates a clearly established right when the "contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). That clearly established right, however, cannot be defined "at too high a level of generality." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021). It must be "'particularized' to the facts of the case" establishing the right. *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 552 (2017) (quoting *Anderson*, 483 U.S. at 640).

A

The Fourteenth Amendment prohibits a state from confining a criminal defendant "solely on account of his incapacity to proceed to trial" for more than "the reasonable period of time necessary to determine whether there is substantial probability that he will attain that capacity in the foreseeable future." *Jackson*, 406 U.S. at 738. If there is no real probability that defendant will become competent, the state must institute civil commitment proceedings—to gauge the dangerousness of the defendant—or release him. *Id.*

Harris's prolonged detention violated *Jackson*. The circuit court held that he was incompetent and would not regain competency. Almost immediately after that, the chancery court dismissed the civil commitment proceeding. Without a chance at his competency being restored or a pending civil proceeding that could result in his commitment based on dangerousness, Harris was entitled to go free. Yet he remained in jail for six years. This violated the commit-or-release rule that the Supreme Court recognized a half century ago. *See id.*

The sheriffs do not push back much against the notion that the Constitution required Harris's release.[7] They instead mostly argue that they are not

[7] We reject the sheriffs' argument that the state's commencement of the proceedings in 2010 was enough to satisfy the Supreme Court's command. *Jackson* would have no meaning if states could start commitment proceedings, terminate them, and then jail defendants indefinitely.

responsible for any constitutional violation. Any fault, they contend, lies with the courts or prosecutor.

Courts, including ours, have rejected jailers' just-following-orders defenses in cases with much briefer unlawful detentions. *See Jones v. Jackson*, 203 F.3d 875 (5th Cir. 2000). Even when a detention was "pursuant to a valid court order," we held that detaining a defendant for nine months without bringing him before a judge offended his due process rights. *See id.* at 880–81. A recent case similarly held that "prolonged detention"—96 days—"without the benefit of a court appearance violate[d] the detainee's Fourteenth Amendment right to due process." *Jauch v. Choctaw Cty.*, 874 F.3d 425, 436 (5th Cir. 2017). Other circuits have come to similar conclusions when defendants were detained at length without being brought in front of a judge. *See Hayes v. Faulkner Cty.*, 388 F.3d 669, 675 (8th Cir. 2004) (38-day detention); *Armstrong v. Squadrito*, 152 F.3d 564, 567, 573–76 (7th Cir. 1998) (57 days); *Oviatt v. Pearce*, 954 F.2d 1470, 1474–77 (9th Cir. 1992) (114 days).

Harris did not see a judge from October 2010 to June 2016. During those more than 2,000 days, the circuit court never set a hearing. And no case was pending in chancery court. In fact, judges had reason to believe that Harris was no longer detained. A few days after Harris should have been released, Huffman and Scott signed the declaration testifying that Harris was not in the jail (this in a relatively small county with approximately 20,000 citizens and roughly 100 inmates at a given time). That lie allows a factfinder to infer

that Huffman and Scott were covering something up—that they knew there was no longer any basis to hold Harris.[8] *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) (discussing the "general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'" (quoting *Wright v. West*, 505 U.S. 277, 296 (1992)). Thus, the length of time Harris was held without a pending hearing—substantial as it was—is not the only basis for tying the sheriffs to the due process violation.

Indeed, this is not a case about jailers' following court orders that turned out to be unconstitutional. These sheriffs held Harris in violation of a court order that followed *Jackson*'s commit-or-release rule. After its competency ruling, the circuit court ordered that Harris "shall remain in custody *until* the determination of said civil proceedings." Until that point, not longer. That meant that once the chancery court ended the civil commitment proceedings—and remember it soon did—Harris should have been released. This case is thus an easier one than the cases cited above in which jailers should have pieced together the need to

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[8] Other holes in the sheriffs' story might also lead a jury to conclude that they knew it was unlawful to continue holding Harris on the initial charges. For example, Sheriff Huffman told DA Allgood in 2012 that Harris was still in jail, contradicting his declaration. And while the sheriffs claim the prison assault capias was their basis for holding Harris, that could not be the case because the indictment was never served on Harris (and thus there was never a trial date or any other court hearing relating to that case).

release the defendant based on the passage of time without court action. Here, the court's order informed the jailers what due process required. Holding Harris for six more years violated the court's instruction.

The sheriffs ignore that commit-or-release order and instead argue that they were detaining Harris "pursuant" to a different to court order. The order they refer to is the initial order to detain Harris issued after his bond hearing in April 2006. It cannot be that the initial detention order in a case overrides subsequent release orders and allows jailers to indefinitely hold defendants without consequence. As we said long ago of another sheriff's defense to a prolonged detention claim—he argued that his ignorance of a court's ordering the defendant's release excused him from liability—if that were the law then "nine months could easily be nine years, and those nine years, ninety-nine years, and still as a matter of law no redress would follow." *Whirl v. Kern*, 407 F.2d 781, 792 (5th Cir. 1968).

Taking the evidence in Harris's favor, Huffman and Scott violated his due process right by detaining him for six years in violation of the commit-or-release rule and the circuit court's order enforcing that rule.

B

We now turn to whether this constitutional violation was clearly established. The district court determined that there was "at least some question" whether the cited authority was "sufficiently on point" to meet the clearly established prong, mistakenly believing

that a key precedent was not temporally relevant.[9] It therefore relied on *Hope v. Pelzer* to conclude that the sheriffs' actions were an "obvious" constitutional violation. 536 U.S. 730 (2002); *see also Taylor v. Riojas*, 141 S. Ct. 52 (2020) (reversing grant of qualified immunity because the violation was obvious).

Resort to obviousness is unnecessary. Binding precedent at the time of the sheriffs' conduct clearly established their due process violation.

We start with the entrenched commit-or-release rule: An incompetent defendant, who has no reasonable expectation of restored competency, must be civilly committed or released. *Jackson*, 406 U.S. at 738. There is no wiggle room in that principle. Its line is as bright as they come. It is also clear as day that Harris's detention after the October 2010 dismissal of his civil proceeding violated *Jackson*'s rule.

The only question, then, is whether it was clearly established that the sheriffs could be liable for this violation of Harris's clearly established due process right. We recently held that it has been established for

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[9] The district court thought that *Jauch* was not relevant to the clearly established question because it was decided in 2017. But what matters is not when *Jauch* issued but when the events took place that it held violated clearly established law. *See*, *e.g.*, *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 341–42 (5th Cir. 2020). The *Jauch* detention occurred in 2012, by which time the law was already clearly established that a sheriff could be responsible for an unlawful detention. 874 F.3d at 436. The source of that notice is a 2000 decision from this court. *Id.* (citing *Jones*, 203 F.3d at 880–81).

decades that a sheriff can be liable for the unlawful detention of an inmate. *Jauch*, 874 F.3d at 431 (citing *Jones*, 203 F.3d at 880–81). That law recognizes that jailers can be liable when "prolonged detention without the benefit of a court appearance violates the detainee's Fourteenth Amendment right to due process." *Jauch*, 874 F.3d at 436 (citing *Jones*, 203 F.3d at 880–81). That principle later defeated a sheriff's qualified immunity defense in *Jauch*. *Id.*

Given the material similarities between this case and *Jauch*, that principle defeats qualified immunity for these sheriffs too. Both Jauch and Harris were pretrial detainees, yet to plead guilty or have a trial. *Id.* at 428. Both spent an indefinite period of time in jail. *Id.* For Jauch, months; for Harris, years. And during their prolonged detentions, neither Jauch nor Harris had access to the courts. Harris, for his part, did not even have a court date on the calendar. Judged by these metrics, it would seem that the constitutional violation here is even more severe than the one in *Jauch*.

And a sheriff's responsibility for the unlawful detention of an inmate long predates *Jauch* and *Jones*. We held decades earlier that a jailer's authority to detain is "terminated by the actions of a court of competent jurisdiction." *Whirl*, 407 F.2d at 791. *Whirl* thus held that when, as here, a court's decision to end an inmate's detention "has become a matter of public record," the sheriff is at fault for keeping him in custody. *Id.* at 792 (explaining that "[t]he responsibility for a failure of communication between the courts and the jailhouse" falls on the jailer).

The sheriffs, however, contend that our precedent did not put them on notice, pointing to two differences between *Jauch* and this case. First, they argue that unlike. Jauch, Harris was brought before a judge at the beginning of his case. It was at that hearing that the court denied bond for Harris, which they claim was sufficient process under *Jauch*. But the case *Jauch* relied on for the clearly established right against "prolonged detention" without court access shows that it is not limited to defendants who never had an initial appearance. Jones had a hearing during which some charges were dismissed (police had arrested the wrong person) before his nine-month detention that violated due process. *Jones*, 203 F.3d at 878.

The second *Jauch* distinction the sheriffs point to actually shows that notice of unlawfulness is much stronger in this case. Jauch was indefinitely detained pursuant to a court policy, while Harris was not. In other words, the *Jauch* sheriff did have a just-following-orders defense. Yet that excuse did not allow him to defeat qualified immunity. 874 F.3d at 436–37. If a sheriff who complies with a court's policies can be liable for holding an inmate in violation of due process, then it necessarily follows that a sheriff who violates a court order can be liable for a due process violation that results from that defiance. *Cf. Whirl*, 407 F.2d at 791 (recognizing that unlike "errors in a [facially-valid] warrant," which are subject to the control of the courts,

sheriffs are responsible for holding a prisoner "in jail without a court order or written mittimus").[10]

Huffman and Scott thus had greater notice that their conduct violated the prisoner's due process rights than did the *Jauch* sheriff. The unlawful detention here was years longer than the detentions in *Jauch* and *Jones*. It violated a court order.[11] On top of all that is the sheriffs' lie that Harris was no longer in the jail, evidence that they knew Harris was being held unlawfully. Consequently, the sheriffs' liability for violating the commit-or-release rule is clearly established. *See Jauch*, 874 F.3d at 436 (reasoning that the sheriff was not entitled to qualified immunity because his "claim to qualified immunity [was] less compelling" than was the claim of the *Jones* defendants); *see also Dyer v. Houston*, 964 F.3d 374, 384–85 (5th Cir. 2020) (denying qualified immunity because the case arguably presented a "clearer case of deliberate indifference" than an earlier case denying qualified immunity); *Timpa v. Dillard*, 20 F.4th 1020, 1036 (5th Cir. 2021) (denying qualified immunity because the officer's use of excessive force was more severe than in earlier cases denying qualified immunity). As the law has long recognized, "[i]gnorance and alibis by a jailer should not

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[10] Even if there were some logic to the sheriffs' position that compliance with a court policy in *Jauch* made that a stronger rather than weaker case for liability, it again bears noting that there was no such policy in *Jones*. *See* 203 F.3d at 878.

[11] Under Mississippi state law, it "shall be the duty of every sheriff to keep a record, to be called the 'Jail docket,' in which he shall note . . . on what authority [and] how long the prisoner was so imprisoned." MISS CODE ANN. § 19-25-63.

vitiate the rights of a man entitled to his freedom." *Whirl*, 407 F.2d at 792.

* * *

We DISMISS Clay County's appeal for lack of jurisdiction and AFFIRM the district court's denial of summary judgment as to Huffman and Scott.

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

RACHEL HARRIS, GUARDIAN OF STEVEN JESSIE HARRIS ON BEHALF OF STEVEN JESSIE HARRIS **PLAINTIFF**

v. **CASE No. 1:18-cv-167-MPM-RP**

CLAY COUNTY, MISSISSIPPI et al. **DEFENDANTS**

ORDER

(Filed May 19, 2021)

This cause comes before the court on the motion of defendants Forrest Allgood, Eddie Scott, Laddie Huffman and Clay County, Mississippi for summary judgment, pursuant to Fed. R. Civ. P. 56. Plaintiff Steven Jessie Harris has filed his own motion for partial summary judgment,[1] and the court, having considered the memoranda and submissions of the parties, is prepared to rule.

This is a § 1983 action which presents difficult issues arising from the intersection of concerns regarding public safety and the protection of the constitutional rights of a (former) criminal defendant. The former criminal defendant in question is plaintiff Steven Harris, who, after being indicted for murder

[1] The plaintiff in this case is actually Harris' mother, acting as his representative, but this court will refer to him as the plaintiff for the sake of simplicity.

and other serious offenses in 2005, spent almost eleven years in jail in spite of being found incompetent to stand trial based on a diagnosis of schizophrenia. These rather jarring procedural facts raise serious constitutional concerns in light of U.S. Supreme Court precedent, most notably *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). In *Jackson*, the Supreme Court held that a criminal defendant found incompetent to stand trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the foreseeable future. *Id.* If it is determined that he will not regain competency, then the State must either institute civil proceedings applicable to the commitment of those not charged with a crime or release the defendant. *Id.*

Plaintiff argues, with considerable force, that *Jackson* was violated in this case, and, as part of the federal judiciary, it is this court's responsibility to enforce federal law. At the same time, the crimes for which plaintiff was indicted are so serious that this court cannot help but feel a certain degree of sympathy for the reluctance demonstrated by the defendants in this case to simply release him upon the public. In so stating, this court notes that Harris was indicted on 11 counts including the murder of his father, shooting three law enforcement officers, car-jacking two college students, stabbing another car-jacking victim, shooting into multiple occupied vehicles, and escaping the scene by car-jacking and kidnapping. [Dkt. #39-3 pp 2-8]. In the court's view, the nature of these alleged crimes, and

of plaintiff's mental illness, is such that no responsible law enforcement official could help but feel grave trepidation over the prospect of releasing him to the public. At the same time, the law must, at the end of the day, be followed, and it is this basic dilemma which makes this case so extraordinarily difficult.

As noted above, Harris had a history of suffering from severe mental illness, including schizophrenia, and he was transferred to the Mississippi State Hospital at Whitfield for mental evaluation to determine his competency to stand trial and his mental state at the time of the charged offenses. [Order for Mental Evaluation and Treatment]. After three interim reports that had shown some improvement in his symptoms, plaintiff's treating doctors at Whitfield issued a Final Summary Report on September 8, 2008 in which they expressed their opinion that there was no substantial probability that he could be restored to competency in the foreseeable future. [Ex. H to Allgood's motion for summary judgment]. In their report, the Whitfield doctors found that Harris remained at increased risk for future violence and needed long-term psychiatric treatment. [*Id*]. As a result, they recommended transferring the case to chancery court for civil commitment proceedings if the circuit court found Harris to not be competent to proceed. [*Id.*].

After multiple orders of continuance, the circuit court conducted a competency hearing on October 12, 2010, after which it ordered the State of Mississippi to pursue civil commitment proceedings. On October 12, 2010, the same date as the competency hearing and

order, Assistant District Attorney Lindsay Clemons did, in fact, file a Petition for an Order of Commitment in the Chancery Court of Clay County, Mississippi, as required by the circuit court and as recommended in Whitfield's Final Summary Report. [Doc. 168 at ¶ 33; Ex. C at 45]. On October 20, 2010, the circuit court entered an order removing Harris's criminal case from the active docket to allow the civil commitment proceeding to proceed in chancery court. [Ex. M, Order Removing Case from Active Docket].

It is at this point that this case took an unusual procedural turn. Rather than conducting the civil commitment proceedings that had been ordered by the circuit court, the chancery court dismissed, in an order dated October 20, 2010, Harris's civil commitment proceeding for lack of jurisdiction because there were criminal charges pending. [Docket entry 330-14, Chancery Court Dismissal Order at 1]. In his briefing, defendant Forrest Allgood, who served as District Attorney (DA) during most of the events in this case, offers the opinion that the chancery court should have committed Harris in 2010 based on the doctors' opinions, and "that should have ended the matter right then." [Allgood brief at 7]. In so arguing, Allgood notes that the circuit court's order quoted Rule 9.06 of the Uniform Circuit and County Court Rules, in effect at the time of the proceeding, and ordered that the commitment proceedings "shall proceed not withstanding the fact that the Defendant has criminal proceedings pending against him." [*Id.* at 6].

Regardless of which of the two state court judges correctly interpreted Mississippi law in this regard, it seems clear that their disagreement led to a very significant impasse in state court. In its order of dismissal, the chancery court purported to transfer the case back to circuit court, but it failed to state that copies were to be served on the circuit court. [Docket entry 330-15 at 2]. In a 2017 order, the circuit judge wrote that, as a result of the failure to serve the chancery court transfer order upon him, he was unaware that the chancery court had declined to conduct the commitment proceedings. [*Id.*]

In his brief, Allgood maintains that, like the circuit judge, he too was initially unaware that the chancery court had failed to conduct the commitment proceedings ordered by the circuit court. In so contending, Allgood writes that:

> Clemons handled the civil commitment proceeding and appeared at the hearing because Allgood had to be in another county on another matter. [Ex. C at 55]. As a result of their busy schedules at the time, Clemons did not immediately inform Allgood that the chancery court had dismissed the civil commitment proceeding. [*Id.* at 55, 57-58]. They had multiple trials being held in different counties, and Clemons "was worried about a lot more things other than that particular order." [*Id.* at 57-58]. Also, the chancery court judge had indicated that he was transferring the case back to the circuit court, so Clemons likely assumed the order would show up in the circuit

court docket. [*Id.* at 58]. Allgood assumed that Harris had been committed since there was no evidence to oppose commitment and the chancery court was required by law to commit him. [*Id.* at 54-59, 112].

Each county in the Sixteenth Circuit Court District had a "progress docket" which dictated what the district attorney and his assistants did day to day. [*Id.* at 60]. The progress docket listed every active case in that county for each term of court, including both cases set for trial and cases not set for trial as a result of, for example, the defendant's ongoing mental evaluation or the defendant absconding. [*Id.* at 60]. When Harris's case was removed from the circuit court's active docket, it was also taken off the progress docket. [*Id.* at 63, 154]. Because the chancery court's order dismissing the civil commitment proceeding was not sent to Circuit Clerk Harrell, Harris's case didn't appear on the progress docket "so there was nothing there to remind anybody that Steven Jessie Harris was anywhere." [*Id.* at 60-63, 154]. "The chancery court dismissed their particular case. That means he goes back to circuit court and he should have been put on the docket in circuit court. Sadly he wasn't." [*Id.* at 86]. Harris's case is the only one Allgood ever had with these circumstances. [*Id.* at 153-54].

After Harris's case was removed from the circuit court's active docket, Allgood did not talk to anyone about Harris until October of 2012. [Ex. C at 109, 125-26]. Defendant Pearson

> Liddell, Harris's former public defender, testified that Allgood was "notoriously focused" on the active cases they were handling at the time and did not "go back and visit old cases." [Ex. K at 105]. There was enough to talk about with their active cases. [*Id.*]. Allgood similarly testified that his office handled thousands of cases, and there were only three or four attorneys in the District Attorney's Office. [Ex. C at 29, 53]. Because Allgood and Liddell both had heavy case loads they tended to "take care of the hottest fires, the ones that burn your feet." [*Id.* at 53, 126]. "We·were literally running from the time you got out of the bed until the time you left the office and that included Pierson." [*Id.* at 126]. Harris's case was not a topic of conversation because it was not on the progress docket. [*Id.*].

[Allgood brief at 7-9].

In his brief, Allgood describes the circumstances of how, in 2012, he first learned of the impasse in state court as follows:

> Allgood first learned about the chancery court's dismissal of the civil commitment proceeding on or about October 2, 2012, when he had a conversation with Liddell. [Ex. C at 51-52, 79-80, 88-89, 109; Ex. P, Motion for Mental Re-Evaluation and Treatment]. While they were talking, Liddell said something that made Allgood realize that Harris was still in jail and had not been committed. [Ex. C at 55-56, 79-80, 88-89, 91]. Allgood does not specifically recall the conversation but it is described

> in his Motion for Mental Re-Evaluation and Treatment ("Motion for Re-Evaluation") filed six days later. [Id. at 79; Ex. P]. Liddell has no recollection of the conversation but has no reason to think Allgood lied about it. [Ex. K at 101]. Allgood does remember that he panicked because he thought the District Attorney's Office had "dropped the ball" and not pursued the civil commitment. [Ex. C at 55-57, 82, 92, 94, 98-99, 111-12]. Clemons later advised him that she had initiated the chancery court commitment proceeding but that it was dismissed. [*Id.* at 90, 92].

[Allgood brief at 9].

For his part, plaintiff contends that Allgood's denial of knowledge of the chancery court's order lacks credibility, and his briefing emphasizes different procedural facts than defendant's. Specifically, plaintiff describes the events surrounding the 2010 failed commitment proceedings as follows:

> Following the unsuccessful last-ditch efforts and desperate efforts of Allgood and Liddell to obtain a new opinion from the examining psychiatrists that Harris had regained his competency over the past two years in which his hearing on his competency was delayed, Allgood had sought another indictment against Harris for "simple assault" stemming from an altercation between Harris and a jailer at the Clay County jail in July of 2010.
>
> On October 11, 2010, despite knowing that just a few days prior on September 29th, that

Harris had not gained his competency, as explained by Dr. McMichael, and also knowing that the hearing on Harris' competency would be held the following day, Allgood still pursued and obtained a grand jury indictment against Harris, who he knew would be deemed incompetent to stand trial. The October 11th indictment was filed under seal, and such a seal would not be lifted until Harris was served with a "capias" informing him of the indictment ("Capias"). To date that seal has never been lifted, and Harris has never been served [with the indictment].

On or about October 12, 2010, following the presentation of evidence by Drs. McMichael and McVaugh, as well as argument by Allgood and Liddell, Judge Howard entered an order determining that Harris was incompetent to stand trial, and that there was not a probability that he would regain his competence in the foreseeable future, that Defendant Allgood immediately pursue Civil Commitment proceedings, and ordering Harris to remain in custody until determination of civil commitment proceedings were determined (the "Competency Order").

On or about October 12, 2010, a civil commitment action was initiated by Assistant District Attorney Lindsay Clemons ("Clemons") in the Clay County Chancery Court as required by the Competency Order (the "Civil Commitment Action"). Clemons' highest-ranking supervisor was none other than Defendant Allgood. Further, on or about October 12, 2010, the

> same day of the Competency Hearing, a "capias" was issued for the October 11th indictment, and delivered to the Clay County Sheriff to be served on Harris.
>
> On or about October 14, 2010, the Chancery Court issued a confinement order to the Clay County Sheriff's Department, headed by Sheriff Huffman, along with Deputy Sheriff, and current Clay County Sheriff Eddie Scott ("Scott"), ordering that Harris be detained pending the outcome of the civil commitment hearing (the "Civil Confinement Order"). On or about October 20, 2010, Special Master Thomas Storey assigned to oversee the Civil Commitment Action, signed an order finding that the Chancery Court lacked jurisdiction to hear this case ("Civil Action Dismissal Order"). Further, the Civil Action Dismissal Order transferred jurisdiction of any proceedings related to Plaintiff, back to the Circuit Court of Clay County for further disposition.
>
> On the same day the Civil Action Dismissal Order was issued, Circuit Judge Howard entered an order to removing Plaintiff's criminal case from the active docket, as the Court had deemed Harris was "not competent to stand trial and ordered civil commitment proceedings to comply with Mississippi Code Annotated § 41-21-63 (1972)" (the "Inactive Case Order").

[Plaintiff's brief at 5-7].

In his brief, plaintiff contends that the interaction between the chancery court's order finding lack of jurisdiction, and the circuit judge's order removing the criminal case from his active docket, required Allgood to immediately terminate the prosecution in this case. [*Id.* at 7]. Plaintiff further notes that, even after Allgood had undisputedly learned of the chancery court order by 2012 at the latest, he took no actions to either dismiss the charges or to institute new civil commitment proceedings. [*Id.* at 8-9]. For his part, Allgood seeks to justify his inaction, even after learning of the state court impasse, by arguing that it would have been futile to do so until the dispute between the chancery and circuit court judges was resolved. Specifically, Allgood writes in this brief that:

> After talking to Liddell [in 2012], Allgood called the Clay County Jail to find out what was going on and apparently talked to the sheriff, most likely former Sheriff Laddie Huffman, who confirmed that Harris was still in jail but was doing better and might be competent to stand trial. [Ex. C at 79-801, 89, 91, 93-94, 107, 109; Ex. P]. Allgood felt he would be remiss if he failed to bring to the court's attention the new information regarding Harris's competency. [Ex. C at 97]. Therefore, he prepared and filed the Motion for Re-Evaluation and attached to it a letter drafted by the Clay County Jail nurse, Defendant Tanya West.2 [Ex. P]. West's letter indicated that she had observed significant improvement in Harris's behavior since beginning a new regimen of injections pursuant to order by a doctor.

[*Id.*]. Specifically, she observed that Harris was laughing, joking, and conversing with staff, lacked his previous behavioral problems, volunteered for extra duties, and enjoyed his work at the jail. [*Id.*]. Based on this information, on October 8, 2012, Allgood filed the Motion for Re-Evaluation requesting that the circuit court place Harris's criminal case back on the active docket and order that Harris undergo a re-evaluation to determine his present competency to stand trial and his sanity at the time of the offense. [*Id.*]. Allgood never talked to Liddell about the Motion for Re-Evaluation, and Liddell never saw the motion until this lawsuit was filed. [Ex. C at 111; Ex. K at 99-103, 111-13, 148]. Neither Huffman nor Scott recalls seeing the Motion for Re-Evaluation. [Ex. Q at 81; Ex. R at 83, 85-86, 90-91].

Allgood thinks Clemons told him that the civil commitment proceeding had been dismissed after he filed the Motion for Re-Evaluation. [Ex. C at 92, 104]. As a result, Allgood did not pursue the Motion for Re-Evaluation and did not ask the circuit court to set it for hearing. [*Id.* at 92]. Pursuing a civil commitment in chancery court at that point would not have resulted in a different outcome because Harris's criminal charges were still pending. [*Id.* at 90, 92-93]. Also, it would have been inconsistent to seek relief in the chancery court commitment proceeding when Allgood now believed Harris might be competent to stand trial and he instead chose to file the Motion

> for Re-Evaluation in circuit court. [*Id.* at 94-95, 147].
>
> At the time, there was an ongoing dispute between the chancellors and the circuit court judges about their respective jurisdiction and authority regarding civil commitment of individuals with pending criminal charges. [Ex. C at 50-51]. The chancellors refused to civilly commit such persons because they said that East Mississippi State Hospital would not accept patients with pending criminal charges. [*Id.*]. Allgood recalls, "The hang-up was between two judges . . . I thought they were in a Mexican stand-off and they were waiting for the other one to blink." [*Id.* at 106]. When Allgood found out the chancery court dismissed Harris's civil commitment proceeding, he "washed [his] hands of it." [*Id.* at 104, 130]. "I thought it was a dispute between the circuit judge and the chancellor and I was not going to get in the middle of a circuit judge and a chancellor. [*Id.*]. "You argue before judges, not with them." [*Id.* at 132].

[Allgood brief at 11-12].

Plaintiff notes that he did not receive the release he sought until two events occurred: 1) his lengthy incarceration without trial began to receive media attention and 2) Allgood was replaced as district attorney by Scott Colom in 2016. In his brief, plaintiff describes these events as follows:

> On information and belief, in or around February or March 2016, Jerry Mitchell ("Mitchell"),

a Clarion Ledger writer and reporter, began taking interest in Plaintiff's case. In an article dated March 21, 2016, Mitchell brought to life the fact that Harris, a person suffering from mental illness, remained in "legal limbo" as a detainee at the Clay County jail despite having never been tried, and deemed mentally incompetent by the Court.

In an interview with then newly elected District Attorney Scott Colom ("Colom"), who replaced Defendant Allgood in 2016 as the 16th Circuit Court District, District Attorney, Colom stated that Plaintiff's case had long ago "fallen through the cracks." However, it would seem unbeknownst to Colom, Plaintiff's case did not in fact fall through the cracks, but instead Plaintiff was the recipient of gross Constitutional violations perpetrated by Defendant Allgood and other Defendants.

On or about May 20, 2016, the day before the Clarion Ledger article was released Marc Amos ("Amos"), assistant district attorney for the 16th Judicial Circuit, and under the direction of Colom, filed a Motion for Relief From Judgment or Order and to Renew Petition for an Order of Commitment (the "Relief From Order and Renewal Motion") as required by State law. On or about June 7, 2016, the Chancery Court finally issued an Order of Confinement Pending Hearing, the first judicial order permitting Harris to be detained pending the outcome of the new civil commitment proceeding that was commenced by the District Attorney (the "Confinement Order"). . . .

On June 15, 2016, the Chancery Court entered a commitment order finally removing him from his jail cell he had spent so many years unlawfully detained in, and transferred to a medical care facility to treat him for his severe mental illnesses ("2016 Commitment Order"). From the period of October 20, 2010 through June 7, 2016, a period of nearly 6 years, it is irrefutable that Plaintiff was unjustifiably and unlawfully imprisoned at the Clay County jail, as Plaintiff was neither a pretrial detainee nor a convicted prisoner, and no such confinement order existed during this period of time.

On April 28, 2017, after the District Attorney filed another motion for re-evaluation of Plaintiff's competency, upon review of the supporting evidence, the Circuit Court once again ruled that Plaintiff was mentally incompetent, and that it remained the treating physician's opinion "to a reasonable degree of medical and psychological certainty, that there is no substantial probability that Mr. Harris can be restored to competence to proceed legally within the foreseeable future. Mr. Harris remains severely and persistently mentally ill".

On July 25, 2017, District Attorney Colom filed a Motion to Nolle Prosequi, on the grounds that it is unconstitutional to hold indefinitely. On July 25, 2017, the Circuit Court entered an order granting the Motion for Nolle Prosequi, having found the following, the State of Mississippi, through the 16th Judicial Circuit District Attorney followed the

> Mississippi Supreme Court in committing Harris, that it was against both the United States Constitution and the laws of the State of Mississippi to hold a person deemed incompetent indefinitely, and on that basis dismissed the action for lack of prosecution.
>
> On August 15, 2017, Plaintiff was granted his freedom and released to his family where he has remained, and is treated with continuous medical care for his severe mental disabilities.

[Plaintiff's brief at 16-18]. Plaintiff thus presently finds himself a free man, but he has filed this action seeking recovery for what he contends to have been a gross violation of his constitutional rights.

This court notes two events in this case which do not fit neatly within a discussion of its complex procedural history, but which nevertheless figure prominently in this lawsuit. The first event, which concerns this court greatly, is described in plaintiff's brief as follows:

> [K]nowing that Judge Howard had removed Harris' case from the active docket, removing its attention from the Court, on October 25, 2010, Allgood, Scott and Huffman conspired to further hide Harris from the courts, while justifying their unlawful imprisonment, by submitting a declaration to the Court stating that the following as it relates to the Capias, "After diligent search and inquiry, I have been unable to find the within named Stephen Jesse Harris in my county," signed Sheriff Laddie Huffman and Deputy Sheriff Eddie Scott (the

> "Sheriff's Diligence Declaration"). The brazen absurdity of such a diligence declaration was mind boggling given the fact that in fact Defendants Huffman and Scott were both well aware that Harris was in their custody at that very time.

[Plaintiff's brief at 10-11].

While it is unclear how this particular evidence implicates Allgood, it is very disturbing that both then-Sheriff Huffman and Deputy Scott (who later took over from Huffman as Sheriff) would certify in 2010 that they were unable to locate plaintiff even though they were, it seems clear, aware that he presently found himself locked up in their jail. Although it is unclear to this court how much an impact this certification had upon plaintiff's continued incarceration, it certainly raises troubling questions.

A second factually distinct event requiring discussion concerns an alleged incident of forced medication as to which two of the most prominently involved parties, former defendants Edmund Miller, M.D. and Tanya West, RN, have since reached settlements with plaintiff. Plaintiff still maintains claims against Sheriff Huffman in this regard, however, and Huffman has sought summary judgment on these claims.

In his brief, Huffman argues that he was merely acting pursuant to orders from medical professionals and that the medication was reasonable under the circumstances. Specifically, Huffman argues that "Harris' attempt to place responsibility on [Huffman] for a

single forced administration of anti-psychotic medication is unavailing since the order for such administration came from a medical doctor after Harris assaulted jail personnel and thus was medically necessary under the circumstances." [Huffman brief at 1].

This court notes that plaintiff's brief offers substantial support for the notion that Dr. Miller and Nurse West were, in fact, the driving forces behind his forced medication. Specifically, plaintiff argues in his brief as follows:

> Sometime in or around January 2012, Defendant West approached Dr. Miller about Harris, a schizophrenic, whom she believed had not been taking antipsychotic medications for some time prior to her employment, and being aware that Harris had been refusing to take the oral medications provided.
>
> In or around late January 2012, although, Dr. Miller never personally examined Harris, he prescribed to Harris Prolixin, a new antipsychotic medication that Harris had never previously taken, to be administered by injection. On or around January 27, 2012, Defendant Miller instructed West to administer the Prolixin to Harris.
>
> On or around February 6, 2012, Defendants West and Huffman attempted to administer the Prolixin to Harris, and in response Harris refused. Following those threats, West then administered the Prolixin in Harris' arm against his will.

> Following this physical ordeal, and as a result of the threats issued to him by the jailer, Harris consented to the continued administration of the antipsychotic medication under duress. Defendant West was aware that forcibly administering antipsychotics drugs against a patient's will, was improper. However, despite this understanding she participated in the February 6, 2012 act any way.

[Plaintiff's brief at 11-12].

While plaintiff thus appears to allege that Dr. Miller and Nurse West had the most prominent roles in allegedly medicating him against his will, he does allege that Huffman personally held him down to receive the medication. Specifically, plaintiff contends in his brief that "[a]fter Harris refused, Huffman caused Harris to be restrained by handcuffs, and held down by several jailers, including Huffman who had placed his hands around Harris' neck. Harris continued to refuse, and was threatened by a female jailer that if he did not accept the shot, they would put the medicine in his food." *Id.* at 12.

Having discussed what it regards as the most important factual and procedural events of this complex case, this court now turns to a discussion of the pending motions.

DISCUSSION

A. Claims asserted against District Attorney Forrest Allgood.

This court addresses first the motion for summary judgment filed by former DA Forrest Allgood, which relies heavily upon immunity grounds. In considering the immunity issues raised by Allgood, this court first notes that plaintiff's concession that he has no valid Americans With Disability Act (ADA) claim against this defendant clearly resolves the issue of Eleventh Amendment Immunity raised by Allgood as to the claims against him in his official capacity. [Plaintiff's brief at 38]. As discussed in this court's prior order, [slip. op. at 10-12] it is well settled that such official capacity claims against a Mississippi prosecutor are tantamount to an action against the State itself, to which Eleventh Amendment immunity generally applies. *See*, *e.g. Brooks v. George Cty., Miss.*, 84 F.3d 157, 168 (5th Cir. 1996). The fact that plaintiff had initially asserted an ADA claim against Allgood at least raised the possibility that such ADA claims would serve to bypass Eleventh Amendment immunity, but, since those claims are now conceded to lack merit, plaintiff has no argument that Eleventh Amendment immunity does not apply in this case. Allgood's motion to dismiss the claims asserted against him in his official capacity, on the basis of Eleventh Amendment immunity, will therefore be granted.

This court now turns to the claims asserted against Allgood in his individual capacity, and it seems clear

that the law relating to absolute prosecutorial immunity is the legal battleground upon which the question of Allgood's personal liability must initially be fought. As discussed below, however, it is well settled that prosecutors may raise a qualified immunity defense even in cases where absolute prosecutorial immunity is found to be inapplicable, and it can scarcely be doubted that qualified immunity is, in its own right, a quite robust immunity doctrine. Plaintiff must surmount both of these formidable obstacles in order to obtain recovery against Allgood in his individual capacity, and this court will address his absolute prosecutorial immunity defense first.

While, as discussed below, this court finds the immunity arguments raised by Allgood to be meritorious, this conclusion should not, by any means, be understood as an endorsement of the manner in which he prosecuted this case. This court does acknowledge that the impasse between the chancery and circuit court judges in this case presented Allgood with a unique and difficult legal challenge, and it has considerable doubts regarding plaintiff's assertion that, once this impasse arose, the DA's only lawful option was to immediately dismiss the charges against him. This court suspects, for example, that Allgood could have sought emergency appellate relief with the Mississippi Supreme Court in which he explained the issues at stake and sought an immediate order compelling either the circuit or chancery judges to conduct the required civil commitment proceedings.

While this court thus believes that Allgood was entitled to take some time to deal with this unexpected and unique legal situation, his decision to essentially do nothing for years is one which is difficult to reconcile with the U.S. Constitution. While this court thus regards Allgood's decision to do nothing for a period of years in response to the impasse in state court to have very likely been the incorrect one, it has no reason to doubt that this decision was, for better or worse, a **prosecutorial** one. Ultimately, that is the crucial point in this context, since absolute prosecutorial immunity protects even those prosecutors who, in the exercise of their core prosecutorial duties, commit constitutional violations arising out of motivations far more reprehensible than an (apparent) desire to protect the public. Consider, for example, a hypothetical case in which a wrongly-convicted plaintiff presents proof that the prosecutor had expressed to third parties an awareness of his factual innocence but that he nevertheless prosecuted him out of personal animus. It is difficult to imagine a more egregious fact pattern than this one, and yet it seems clear that the prosecutor's decision to prosecute would be protected by absolute immunity.

While this court believes that it can reasonably be questioned whether such blanket immunity for prosecutorial acts *should* in fact be the law, the U.S. Supreme Court has held that it is. In the seminal case of *Imbler v. Pachtman*, 424 U.S. 409 (1976), for example, the Supreme Court afforded absolute immunity to a prosecutor who was sued for damages for knowingly using perjured testimony that resulted in an innocent

person's conviction and incarceration for nine years. In so ruling, the Supreme Court concluded that anything less than absolute immunity risked "harassment by unfounded litigation [that] would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423.

With this law in mind, this court expressed, in a March 2020 order, its inclination to conclude that Allgood's actions in this case, constitutional or not, were prosecutorial in nature and thus subject to absolute immunity. Specifically, this court wrote that:

> While this court is inclined to agree with defendant that he was, in fact, acting as a state prosecutor throughout this case, it concludes that this issue is better addressed after the completion of discovery. In so stating, this court emphasizes that absolute prosecutorial immunity is considerably more limited in scope than, say, absolute judicial immunity. For example, the U.S. Supreme Court has rather strictly limited absolute prosecutorial immunity to core prosecutorial functions which are "intimately associated with the judicial phase of the criminal process," and it has not extended that immunity to "investigative" and other similar functions. *See*, *e.g. Buckley v. Fitzsimmons*, 509 U.S. 259, 262 (1993). Based on the limited facts available to this court at this juncture, this court is not prepared to definitively state whether or not Allgood might have "crossed the line" into

> non-core prosecutorial functions in this case, such as through his role in medicating plaintiff to have him declared competent for trial. Thus, while this court may eventually agree with Allgood that he enjoys absolute immunity as to all claims against him, it concludes that these issues would best be addressed on summary judgment, at which time this court will, presumably, have a much more complete understanding regarding the actions which he took in this case.

[Docket 135-1, slip op at 18].

As quoted above, this court raised the possibility that, if Allgood were found to have ordered or participated in plaintiff's forced medication, then such actions might not represent core prosecutorial functions as to which absolute immunity applies. The reasons for this court's conclusion in this regard should not be difficult to discern: a prosecutor's job is to prosecute cases, not to participate in the medical treatment of criminal defendants. Having said that, this court notes parenthetically that, even if the proof in this case demonstrated that Allgood had, in fact, participated in the decision to medicate plaintiff to make him competent to stand trial, defendant might, at least conceivably, still have a good faith argument that absolute immunity still applied. In so stating, this court notes that, in the *Buckley* decision quoted above, the Supreme Court wrote that "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not

entitled to absolute immunity." *Buckley*, 509 U.S. at 273.

These two categories, relating to "investigatory" (or "investigative") and "administrative" functions have been repeatedly affirmed by the Supreme Court and the Fifth Circuit as serving as the basis for the absolute prosecutorial immunity analysis. *See*, *e.g. Loupe v. O'Bannon*, 824 F.3d 534, 539 (5th Cir. 2016); *Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988); *Brooks v. George Cty., Miss.*, 84 F.3d 157, 168 (5th Cir. 1996). While this court has considerable doubt whether participating in the medical treatment of a prisoner, even with a goal of making him fit for trial, is a core prosecutorial function, it might have had a difficult time fitting such actions in either the category of "investigatory" or "administrative" actions as to which absolute immunity does not apply under Supreme Court and Fifth Circuit precedent. This court therefore anticipated that it might face a very difficult and uncertain legal analysis if the proof during discovery demonstrated that Allgood did, in fact, participate in plaintiff's medical treatment.

As it turns out, however, plaintiff developed no incriminating evidence regarding Allgood's participation in his medical treatment, and he instead relies upon a much more tenuous (and dubious) legal argument that, in allegedly providing certain legal advice long after the prosecution in this case had begun, Allgood crossed the line into non-prosecutorial activities as to which absolute immunity should not apply. In arguing that absolute prosecutorial immunity does not apply in

this case, plaintiff, citing *Burns v. Reed*, 500 U.S. 478 (1991), argues that "providing legal advice to law enforcement was not a function closely associated with the judicial process" and is thus exempt from absolute immunity. [Brief at 31].

The notion that a prosecutor's act of "providing legal advice to law enforcement," no matter the time period or context involved, constitutes non-prosecutorial conduct as to which absolute immunity does not apply is not only unsupported by the language of the *Burns* decision upon which plaintiff relies, it is directly contradicted by it. Indeed, even a cursory reading of *Burns* makes it clear that this decision only exempted from the protection of absolute immunity pre-prosecution advice to police officers which was given as part of the investigative process, and not, as plaintiff suggests, all "advice given to law enforcement." This fits, of course, the overall thrust of Supreme Court precedent in this context, which is to only recognize exceptions to absolute immunity for conduct which can be characterized as either "investigative" or "administrative" in nature. In *Burns*, the Supreme Court wrote that "[w]e do not believe . . . that advising the police in the investigative phase of a criminal case is so 'intimately associated with the judicial phase of the criminal process,' that it qualifies for absolute immunity." *Burns*, 500 U.S. at 493. Lest there be any doubt regarding the Supreme Court's intent in this regard, it further explained in *Burns* that:

> [W]e note that one of the most important checks, the judicial process, will not necessarily

> restrain out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police. This is particularly true if a suspect is not eventually prosecuted.

Id. at 496.

The Supreme Court in *Burns* thus made it clear that it regarded the act of "providing legal advice to the police" as something which "occur[s] prior to the initiation of a prosecution," and it can scarcely be doubted that this will ordinarily be the case. It can be argued that this was a somewhat sloppy formulation by the Supreme Court, since it is possible to imagine scenarios in which a prosecutor provides legal advice to a police officer even after the initiation of a prosecution. The Supreme Court made it clear that it was not referring to such scenarios in *Burns*, however, by making explicit reference to acts of "advising the police in the investigative phase of a criminal case." *Id.*

It appears to this court that, in relying upon *Burns*, plaintiff essentially seeks to take one sentence of the opinion out of context, namely the Supreme Court's concluding statement that "[i]n sum, we conclude that respondent has not met his burden of showing that the relevant factors justify an extension of absolute immunity to the prosecutorial function of giving legal advice to the police." *Id.* at 496. As noted previously, however, the Supreme Court had already made clear that it was discussing *pre-prosecution* advice given as part of a criminal investigation, and this one

sentence clearly does not serve to negate those previously-written words.

While this court thus believes that the Supreme Court made its intentions in *Burns* very clear even in that decision, subsequent decisions have removed any doubt which might even arguably exist in this context. In *Van de Kamp v. Goldstein*, 555 U.S. 335, 343, 129 S. Ct. 855, 861 (2009), for example, the Supreme Court cited *Burns* for the proposition that "[w]e have held that absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation." Moreover, the Fifth Circuit reiterated just last year that "absolute immunity does not apply when a prosecutor gives advice to police during a criminal investigation." *Singleton v. Cannizzaro*, 956 F.3d 773, 781 (5th Cir. 2020).

The above precedent is, once again, fully consistent with the overall approach adopted by the Supreme Court and the Fifth Circuit of only recognizing "investigative" and "administrative" actions as being exempt from absolute immunity. Indeed, it should be emphasized that plaintiff does not even attempt to argue that either of the instances of legal advice provided by Allgood in this case fell under either of these categories. Accepting plaintiff's reading of *Burns* would thus require this court to ignore the Supreme Court's own words in that decision, its interpretation by subsequent Supreme Court decisions, as well as the overall thrust of well-settled absolute immunity jurisprudence.

This court has refrained from discussing plaintiff's specific proof regarding the advice allegedly provided by Allgood, since it deemed it important to first correctly establish the governing law in this case. Having done so, this court will now proceed to his evidence on this issue. In his brief, plaintiff writes that:

> Here, there are at least two instances in which Defendant Allgood provides legal advice to law enforcement, which establish a constitutional violation. First, following the issuance of the Commitment Order dismissing the commitment proceeding, Defendant Huffman sought advice from Defendant Allgood as to what steps should be taken to address Harris, given that the Chancery Court declined to commit him, and he was deemed incompetent to stand trial. Although Defendant Allgood testified that it was until October 2, 2012, nearly two years after the Commitment Order was issued, that he was made aware that Chancery Court had dismissed Harris's commitment action, and that Harris had remained confined at the Clay County jail that entire time, Defendant Huffman testified to a radically different story as to what Allgood knew. Defendant Huffman testified as follows:
>
> > Q. Okay. Do you recall speaking to either Forrest Allgood or any of his assistant district attorneys about the decision in the Chancery Court case?
> >
> > A. Yes. Tried to get it resolved.

> Q. Okay. And so you took some steps at some point, you spoke to the District Attorney, Forrest Allgood, and you guys had a conversation about why Mr. Harris was still in your jail?
>
> A. Not why. I knew why he was in jail.
>
> Q. Okay. Well, after the commitment proceeding was dismissed, you knew why he was in jail because it had been transferred back to the Circuit Court, correct?
>
> A. I knew he was in jail because of the charges that he had against him in Circuit Court.
>
> Q. Yes. Correct. Absolutely. And so after that you spoke to, you said you spoke to Forrest Allgood about getting this resolved, right, fixing this situation so either he's back being committed again or something else, right? What did you discuss? You were kind of talking about it but I didn't get the full details, if you recall.
>
> A. We talked about his charges. And I told him I didn't need to be housing him over there in the jail if he's insane or incompetent. I talked with him and I talked with the judge but I couldn't get nothing done. So I just waited on the orders from the court.

[Plaintiff's brief at 31].

This supposedly incriminating testimony from Sheriff Huffman strikes this court as vague at best. Indeed, it seems entirely unsurprising that, in a case of this nature, jail officials would, at some point, go to the prosecutor and ask what his legal strategy was, and it appears that Huffman did just that. In the above-quoted passage, the closest Huffman comes to testifying exactly what Allgood might have said in response to his inquiry is his statement that:

> We talked about his charges. And I told him I didn't need to be housing him over there in the jail if he's insane or incompetent. I talked with him and I talked with the judge but I couldn't get nothing done. So I just waited on the orders from the court.

[*Id.*] As best this court can tell, there is nothing in Huffman's testimony which describes conduct that can be fairly regarded as legal advice of any sort which Allgood provided to him.

In providing his own "spin" on Huffman's rather vague testimony, plaintiff writes that:

> Based upon Huffman's deposition testimony, along with the facts set forth herein, it was clear that Huffman sought Defendant Allgood's advice on how to keep Harris confined until he regained his competency to be tried for the alleged crimes. In following Allgood's legal advice, Defendant Huffman utilized the Capias as his justification for Harris's continued confinement at the Clay County jail, despite the fact that Harris should have been

released. Although Allgood's self-serving testimony that prior to October 2, 2012, he had no knowledge that the Chancery Court dismissed the commitment proceedings to one of his major cases, and that he was completely unaware that Harris had still being detained at the Clay County jail two years following the dismissal of the commitment action, directly contradicts Defendant Huffman's testimony, which states otherwise, once again Allgood's deposition testimony supports Huffman's recollection of the events following October 20, 2010, stating:

> Q. Correct. So therefore we're not going to go off a hypothetical, we're going to go off of reality. Given the fact that there was no other civil commitment proceeding pending, the only alternative between the period of October 20th, 2010 and October 7th, 2010 was that Mr. Harris must have been released pursuant to Jackson v. Indiana; is that correct?
>
> MR. SHANNON: Objection It's been asked and answered several times. You can respond again.
>
> A. And I disagree because just because a civil commitment has not been held the reality is that doesn't mean it can't yet be held. The sheriff's office got the guy and was told to hold him by two sources, first on the capias from the grand jury; second, on an order from the chancery court. The chancery court dismissed their particular

> case. That means he goes back to circuit court and he should have been put on the docket in circuit court. Sadly he wasn't. But nonetheless, in the eyes of the sheriff's office they're still holding a capias on a grand jury indictment and that's their authority to hold him and to hold him until there is a disposition.
>
> Defendant Allgood's deposition testimony set forth above, mirrors the exact action in which Huffman implemented following his conversation with Allgood relating to Harris, his "charges" and what to with him following the dismissal of the commitment action.

[Brief at 32-33].

Plaintiff thus infers, based on the evidence as a whole, that Allgood essentially told Huffman the legal strategy which he had chosen to follow in light of the disagreement between the circuit and chancery judges and recommended that he get in line with that strategy. While this court does not believe that Huffman's testimony, quoted above, indicates this to be the case, it will (rather generously) assume for the purpose of this order that this actually occurred. This court's decision to so interpret the evidence is based partly upon plaintiff's proof regarding the second alleged instance in which Allgood provided legal advice, namely to the

newly appointed jail administrator.[2] As to this instance, plaintiff writes in his brief that:

> Sometime shortly after Huffman resigned as jail administrator at the end of 2012, the new jail administrator approached Allgood to seek legal advice as to what they should do about Harris, whom everyone know should not be held at the Clay County jail. [Allgood] responded as follows:
>
> > Q. Do you recall if Sheriff Scott at any point in time while you remained district attorney for Clay County for the 16th circuit, do you recall him making any more inquiries as to what he should be doing with Mr. Harris?
> >
> > A. I had a conversation and I cannot say it was with Eddie Scott. I'm not sure who I had it with. It was with somebody from the jail. I want to say it was Billy Perkins.
> >
> > Q. I'm sorry. You want to say it was who?
> >
> > A. Billy Perkins. He was the jail administrator at the time.
> >
> > Q. Okay.
> >
> > A. Sometime after that motion was filed I believe Billy Perkins came to my office about this and he wanted to go see the Judge if memory serves me correct and he

[2] The parties appear to harbor some uncertainty regarding this administrator's name, since they repeatedly refer to him by his job title. This court will do likewise.

> wanted me to go with him. **And I don't remember the exact words, I know I told him you can do what you want to, I'm not going, that's between those two judges and I'm not getting in it. I know I told him that. And I know I said something to him that was discouraging, I don't know what it would be, something to the effect that if I was in your place I wouldn't go either or something like that**, once again, based on the fact that I thought that this was a spat between two judges and getting in the middle of those two judges was not a good idea for anybody.
>
> Defendant shamelessly forced everyone to get in line with the Plan originally devised by him, Huffman and Liddell.

[Plaintiff's brief at 14-15 (emphasis in original)].

In light of this proof, this court will assume for the purposes of this motion that, as plaintiff contends, Allgood told both Huffman and the new jail administrator what his legal strategy as a prosecutor was and recommended that they get on board with it. While this may be a generous assumption as to Huffman, this court views it as essentially immaterial, since it can discern no valid argument that the Supreme Court's holding in *Burns* covers this alleged legal advice provided by Allgood to either the Sheriff or to the jail administrator.

As noted previously, plaintiff relies heavily upon the statement by the Supreme Court in *Burns* that "we conclude that respondent has not met his burden of showing that the relevant factors justify an extension of absolute immunity to the prosecutorial function of giving legal advice to the police." [*Id.*] After taking this statement out of context of the full discussion in *Burns*, plaintiff then takes it upon himself to change the word "police" to "law enforcement," presumably to better apply to Sheriff Huffman. It seems clear to this court, however, that plaintiff's own proof and arguments support a conclusion that the alleged advice given to both Huffman and the jail administrator were in their capacities as *jailers* who were responsible for maintaining physical custody over him during his prosecution. This seems obvious enough in the case of the jail administrator, but it is also true in the case of Huffman, who, as a Mississippi sheriff, wears a number of different hats. It is clear that in this case, plaintiff takes issue with Huffman not with regard to the manner in which he carried out police functions such as investigating and arresting him, but, rather, the fact that he continued to keep him in jail even after the impasse in state court. This court thus concludes that the advice in this case does not even fit under plaintiff's highly selective reading of *Burns*, which cannot, under any stretch of the imagination, be understood to include jailers.

In arguing that absolute immunity does not apply, plaintiff emphasizes not Allgood's own strategy as prosecutor, but rather his alleged advice that county

officials get on board with it. Nevertheless, it seems clear to this court that adopting plaintiff's position would drive a gaping hole in absolute prosecutorial immunity as a defense, and he fails to provide legal authority to support such a holding. In the court's view, the notions that 1) county officials would have sought to learn a prosecutor's legal strategy 2) that he would have told them what that strategy was and 3) recommended that they get on board with it constitute rather unremarkable and predictable events in a case of this nature. This court notes that plaintiff does not even argue that it was improper for Allgood to tell county officials who asked what his *own* legal strategy was, and it would be difficult for him to contend otherwise. Moreover, it strikes this court as rather unrealistic to think that, having told such officials what he thought the correct legal strategy in this case was, that Allgood would have recommended to those officials that they do anything differently than what he had just told them he thought was the proper course of action.

Plaintiff's argument that providing post-prosecution advice regarding a matter of core prosecutorial strategy serves to bypass absolute immunity strikes this court as being an extraordinary one which cries out for supporting authority. Plaintiff offers no authority suggesting that absolute immunity applies to any post-prosecution advice, and it seems particularly unlikely to this court that advice which urged third parties to get on board with a prosecutor's legal strategy would be held to fall outside of the scope of absolute

immunity. In so stating, this court emphasizes that the formulation and execution of such a legal strategy represents the very core of a prosecutor's duties, and the notion that absolute immunity would simply disappear the moment a prosecutor urged others to act consistent with his strategy seems highly suspect.

This court's conclusion that absolute immunity covered the post-prosecution advice given by Allgood is likewise supported by the nature and subject matter of that advice. Indeed, as Allgood points out in his brief, the Supreme Court indicated in *Van de Kamp* that even conduct which might otherwise be considered "administrative" and thus potentially outside the scope of absolute immunity would still be protected by absolute immunity if it "necessarily require[s] legal knowledge and the exercise of related discretion." *Van de Kamp*, 555 U.S. at 344. As discussed previously, the advice allegedly given by Allgood related to a rather difficult legal dilemma arising from the fact that two state court judges were engaged in a disagreement regarding whose responsibility it was to conduct civil commitment proceedings. While this court has, once again, serious doubts regarding whether Allgood adopted the constitutionally *correct* decision as to how to respond to this impasse, it agrees with him that this decision "necessarily require[d] legal knowledge and the exercise of related discretion" within the meaning of *Van de Kamp.*

Thus, even assuming, purely for the sake of argument, that Allgood's alleged advice to Huffman and the jail administrator could somehow be considered either

"investigatory" or "administrative" in nature, that advice would still relate strongly to an attorney's knowledge of the judges involved, the legal obligations relating to the impasse between those judges, and the exercise of discretion regarding the best way to proceed in this situation. Of course, this court sees no valid argument that the advice at issue in this case could possibly be considered "investigatory" or "administrative" in the first place, but it agrees with Allgood that, even if it could be, *Van de Camp* would still render absolute immunity applicable. This court therefore concludes that there are multiple, independently-sufficient reasons why Allgood's alleged legal advice in this case is protected by absolute immunity, and his motion for summary judgment is therefore due to be granted on this issue.

This court now turns to Allgood's alternative argument that he is protected by qualified immunity, which it chooses to address out of an abundance of caution, in the event that it is held to have erred in finding absolute immunity applicable in this case. To defeat a claim of qualified immunity, a plaintiff must show that (1) the plaintiff has alleged that the defendant has violated a clearly established constitutional or statutory right, and (2) a reasonable person would have known of that clearly established right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). When analyzing the second prong, the court must "consider whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question." *Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007). "To

make this determination, the court applies an objective standard based on the viewpoint of a reasonable official in light of the information then available to the defendant and the law that was clearly established at the time of the defendant's actions." *Id.*

While less than absolute, qualified immunity is, of course, a very robust immunity doctrine in its own right which has led to the dismissal of many civil rights lawsuits in federal court. Part of the power of the qualified immunity doctrine arises from the fact that it must simply be raised as a defense by a defendant, and the plaintiff has the burden of establishing the proof and arguments necessary to overcome it. *See Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir.1997) (noting that the plaintiff bears the burden of demonstrating that an individual defendant is not entitled to qualified immunity).

With the foregoing authority in mind, this court turns to the parties' arguments on the qualified immunity issue. Since the qualified immunity standard makes a greater inquiry into the nature of the defendant's alleged conduct, this court wishes to take this opportunity to comment on this issue. It appears to this court that all defendants in this case were subjectively motivated by a desire to protect the public from an individual who was indicted on, and never acquitted of, charges that he murdered his father, shot three law enforcement officers, car-jacked two college students, stabbed another car jacking victim, shot into multiple occupied vehicles, and escaped the scene by car-jacking

and kidnapping. [Dkt. #39-3 pp 2-8.] Indeed, even plaintiff alleges in his brief that:

> Huffman admitted that he reached out to Dr. McMichael and was frustrated by the fact that the Mississippi Department of Health didn't "have a criminally insane program to house the criminally insane until they get them back to their sanity and get their holding over with." Having come to the conclusion that another commitment hearing would not accomplish their goal, which was to try Harris for the crimes alleged against him, Allgood and Huffman were left with few alternatives to keep Harris confined, with the hope that Harris would one day regain his sanity and be tried for the crimes he was charged with.

[Plaintiff's reply brief at 25].

In the court's view, it is typical of plaintiff's (futile) efforts to make the issues in this exceedingly difficult case seem to be clear-cut that he harshly criticizes the defendants for not simply releasing an individual indicted for horrific crimes upon the public. Indeed, plaintiff appears to acknowledge himself that the State of Mississippi has made inadequate expenditures to treat the criminally insane while protecting the public at the same time. If this is true, and it does appear to be the case, then this is a truly regrettable fact which cannot be attributed to any of the defendants in this action.[3] Moreover, this court cannot pretend that it

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[3] In so stating, this court admits to considerable uncertainty regarding the issue of to what extent Mississippi law and its

lacks sympathy, on a human level, for defendants' alleged reluctance to make recourse to civil commitment proceedings which, by plaintiff's seeming admission, would not have actually protected the public.

While this court thus has a certain sympathy for defendants' predicament on a human level, it is, at the end of the day, sitting in its capacity as a federal judge charged with enforcing the U.S. Constitution. In this capacity, this court cannot pretend that it is acceptable for an individual such as plaintiff to be kept incarcerated for many years with no conviction and without being afforded the rights guaranteed to him by U.S. Supreme Court precedent such as *Jackson*. It is, once again, truly regrettable if the State of Mississippi elects to place a higher priority on saving money than on protecting its citizens, but, at the end of the day, the requirements of the U.S. Constitution in this context are non-negotiable. This court is thus committed to enforcing the requirements of the U.S. Constitution in this case, and it now turns to a discussion of some of the facts of this case relating to the allegations against Allgood.

In the court's view, Allgood's key error as a prosecutor in this case was in not filing an emergency appeal with the Mississippi Supreme Court regarding the impasse in state court, once he learned of it. Indeed, filing

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mental health facilities would have allowed the public to be protected in the event that civil commitment proceedings had gone forward in 2010. While it appears that this protection would have been rather limited, this court looks forward to a clarification of this issue at trial.

an appeal is the well-established means for dealing with erroneous decisions by trial courts, and this court can discern no reason why Allgood would not have done so in this case. At the same time, the decision whether or not to file such an appeal is clearly and indisputably a *prosecutorial* decision, as to which absolute immunity applies. Plaintiff offers no authority even suggesting otherwise, and this court will therefore set aside this error for the purposes of its qualified immunity discussion.

In reading plaintiff's arguments on the qualified immunity issue, it appears that they are based upon a fundamental misconception of the nature of the qualified immunity defense as it relates to the claims against Allgood. Specifically, plaintiff's appears to assume that, if he can demonstrate that the one sentence allegedly spoken by Allgood to the jail administrator and Sheriff Huffman, during the course of a prosecution which lasted years, is not subject to absolute immunity, then that removes absolute immunity from the table completely as a defense in this case, and he can seek to meet the stringent requirements of qualified immunity with regard to even core prosecutorial actions by Allgood. That is simply not the law, however.

The Fifth Circuit recently reiterated that "a prosecutor is afforded only qualified immunity for acts performed in the course of 'administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings.'" *Wooten v. Roach*, 964 F.3d 395, 407 (5th Cir. 2020), citing *Loupe*, 824 F.3d at

539. The Fifth Circuit has thus made clear that a prosecutor is merely entitled to qualified immunity for specific acts which fall outside of the scope of absolute immunity but implicit in this statement is that he continues to enjoy complete immunity for core prosecutorial functions. Of course, this court has previously concluded that the advice given by Allgood to the jail administrator cannot fairly be characterized as either "administrative" or "investigatory" in nature, and it has therefore concluded that absolute immunity applies to that advice as well. This court's present analysis of the qualified immunity issue is based on an assumption that it erred in making this finding, but, even in this scenario, this would merely mean that the lesser qualified immunity defense only applies to *that specific action* by Allgood. Plaintiff's arguments in this case do not reflect this fact.

In briefing the qualified immunity issues in this case, plaintiff does not limit himself to the post-prosecution advice allegedly given by Allgood to the jail administrator and Huffman, which represents the only prosecutorial conduct as to which he even has an argument that absolute immunity does not apply. Instead, plaintiff seeks to argue that Allgood's *entire course of action* in continuing to prosecute this case, even after the impasse in state court, violated clearly established law. For example, plaintiff argues that:

> As evidenced above, and set forth in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) and *Brown v. Jacquith*, 318 So. 2d 856 (1975) the law is clearly established that a person

deemed mentally incompetent where there is no probability that they will regain competence in the foreseeable future, they must either be committed or released, as they are a free ordinary citizen. Here, Defendant Allgood engaged in acts or omissions by prosecutors where their activities are no longer advocating on behalf of the state. As set forth above, Defendant Allgood was the ring leader in causing some of the worst Constitutional violations committed to anyone in this. As a prosecutor, an actor on behalf of the State, pursuant to the Supreme Court of Mississippi and the Constitution of the United States, Defendant Allgood was required to commit Mr. Harris or cause his release once he was deemed incompetent to stand trial. As set forth by the evidence throughout this Opposition, Defendant Allgood continuously, in spite of the clearly established law, did everything he could to keep Harris unlawfully confined at the Clay County jail, with the assistance of Defendants Huffman and Scott. . . .

As District Attorney Colom properly did, he first committed Harris through the civil commitment process, and then he dismissed the case when it was clear Harris would not regain his competency in the foreseeable future. Despite Defendant Allgood's argument that there is no clearly established law requiring him, an agent acting on behalf of the state, to either commitment Harris or release him, both *Jackson v. Indiana* and *Brown v. Jacquith* make it clear that Allgood is required to do so. In informing the Judge Howard that Harris

> was being unlawfully detained at the Clay County jail, would not have obligated Allgood to represent Harris at all, but instead, adhere to the oath of protecting the Constitution and ensuring justice be done. Such an act did not require a motion to the Court, or anything more than Allgood advising Judge Howard during any court appearance before his bench. Allgood did not act as a reasonable prosecutor would, and this was reflected by the subsequent actions taken by District Attorney Colom, who did act as any reasonable, minister of justice would do.

[Plaintiff's brief at 36-37].

It is thus apparent that plaintiff has failed to limit his qualified immunity arguments to the one act on the part of Allgood on which he has a good faith argument that absolute immunity does not apply, namely the advice allegedly given to two individuals acting in their capacities as jailers, that they "get on board" with his prosecutorial strategy not to get in the middle of a dispute between two judges. Plaintiff instead seeks to essentially bring Allgood's entire course of handling this case back on the table, and this is improper. Even assuming that plaintiff is correct, as argued above, that "[a]s a prosecutor . . . Defendant Allgood was required to commit Mr. Harris or cause his release once he was deemed incompetent to stand trial" the crucial fact is that these actions listed by plaintiff are, without question, core prosecutorial acts which are protected by absolute immunity. Indeed, plaintiff, does not even make a pretense otherwise, openly framing his qualified

immunity arguments in terms of what Allgood was required to do "as a prosecutor." Such arguments have no place in a qualified immunity argument against a prosecutor clearly protected by absolute immunity with regard to the vast majority of his actions, and this court could therefore reject his arguments on this basis alone.

A second weakness in plaintiff's qualified immunity arguments relates to the authority which he cites in order to meet the crucial "clearly established" prong of the qualified immunity standard. While the "clearly established" prong of the qualified immunity standard has been widely criticized by commentators and judges throughout the country and continues to mandate harsh outcomes, it remains binding precedent which this court is bound to follow. In *Plumhoff v. Rickard*, 134 S. Ct. 2012, 188 L.Ed.2d 1056 (2014), the Supreme Court described the "clearly established" prong as follows:

> An official sued under § 1983 is entitled to qualified immunity unless it is shown that the official violated a statutory or constitutional right that was "'clearly established'" at the time of the challenged conduct. Ashcroft v. al-Kidd, 563 U.S. 731, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011). And a defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. *Id.*, at 2083-2084. In other words, "existing precedent must have

> placed the statutory or constitutional question" confronted by the official "beyond debate." *Ibid.* In addition, "[w]e have repeatedly told courts . . . not to define clearly established law at a high level of generality," id., at 2074, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced.

Plumhoff, 134 S.Ct. at 2023.

The U.S. Supreme Court has thus stressed that plaintiffs' burden of demonstrating that defendants violated "clearly established law" requires not a citation to generalized principles of law, but, rather, specific authority on point which "placed the statutory or constitutional question" confronted by the official "beyond debate." *Id.* Plaintiff has failed to heed this admonition in this case. As quoted previously, plaintiff cites *Jackson* and *Brown v. Jacquith* for the proposition that "a person deemed mentally incompetent where there is no probability that they will regain competence in the foreseeable future, they must either be committed or released, as they are a free ordinary citizen." [*Id.*] Clearly, this authority fails to address the specific, and narrow, factual allegation which even arguably gets past absolute immunity in this case, namely the advice allegedly given to two individuals acting in their capacities as jailers, that they "get on board" with Allgood's prosecutorial strategy not to get in the middle of a dispute between two judges.

There is nothing in the precedent cited by plaintiff regarding the constitutionality of providing advice to

jailers regarding a matter of prosecutorial strategy, and there is nothing addressing the unique procedural situation faced by Allgood in this case, namely the state court impasse. While this court has very serious issues with the way in which Allgood prosecuted the case, it strikes it as a legitimate, and significant, mitigating factor in his favor that he attempted to "do the right thing" legally and institute civil commitment proceedings. Once again, this court believes that Allgood committed a serious error as a prosecutor by not appealing that impasse to the Mississippi Supreme Court, but that decision is clearly covered by absolute prosecutorial immunity and therefore has no place in the qualified immunity analysis.

This court is very much aware of the weaknesses of the "clearly established" prong as a legal standard, and it is sympathetic to the notion that a plaintiff should not be expected to offer authority which matches the facts of a particular case in all its details. In this case, however, it seems clear that the state court impasse is the *sine qua non* without which this lawsuit would not even exist. That is, plaintiff admits that Allgood enjoys absolute prosecutorial immunity for his actions prior to the chancellor issuing his September 20, 2010 order of dismissal, and the events relating to the Clay County Jail all occurred after plaintiff was transferred there following that order.

It thus seems highly likely that, if the chancellor had simply carried out the civil contempt proceedings as ordered by the circuit court judge, then this lawsuit would never have been filed. Under these

circumstances, this court does not believe that the state court impasse can reasonably be regarded as a mere detail of this case, but must be considered an essential fact which must be addressed, in some way, by the authority offered to meet the "clearly established" standard. In so concluding, this court is not suggesting that this authority must involve a dispute between two judges, but it does seem fair to require some authority clearly establishing what a prosecutor's duties are if he promptly files a motion for the legally-required civil contempt proceedings, and yet they are not carried out by the responsible state court, for whatever reason. Plaintiff offers no such authority, instead relying upon the case law which he, presumably, would have relied upon if Allgood had never even sought the civil contempt proceedings in the first place.

Once again, this court does not regard Allgood's strategy of doing nothing for years in response to the impasse as having been the constitutionally correct one, and it will therefore assume that plaintiff should prevail on the first prong of the qualified immunity standard. Fair or not, however, U.S. Supreme Court precedent requires that plaintiffs surmount an additional obstacle by presenting authority "clearly establishing," under circumstances reasonably close to the one faced by the defendant, the unlawfulness of his planned course of action. In the court's view, by failing to submit authority dealing with either advice provided to jail officials, or the proper legal response to a state court's refusal to conduct the required civil contempt proceedings, plaintiff has failed to meet this

burden. This court thus concludes that plaintiff has failed to meet the second prong of the qualified immunity standard, and Allgood's motion for summary judgment is therefore due to be granted on the basis of qualified immunity, even in the event that this court erred in finding that he enjoys absolute prosecutorial immunity in this case.

As a final act of judicial housekeeping regarding the claims against Allgood, this court observes that its holding that he enjoys Eleventh Amendment immunity as to all claims against him in his official capacity similarly bars any state law claims asserted under the MTCA. In so stating, this court notes that the Mississippi Tort Claims Act expressly preserves the State's Eleventh Amendment immunity on claims brought in federal court. *See* Miss. Code Ann. § 11-46-5(4). This immunity aside, this court (which would be the trier of fact on any MTCA claims) does not regard any of Allgood's alleged actions in this case as falling within the scope of any state law tort claims, including those which might be asserted against him individually. This court further notes that Allgood has filed a motion to exclude plaintiff's expert witness Willie Abston, who sought to testify regarding the legal standard of care. This court has not considered Abston's opinions in preparing this order, and it finds the motion to strike his testimony to be moot in light of its order today. That motion will therefore be dismissed.

B. Claims asserted against the Clay County defendants

This court now turns to plaintiff's claims asserted against the Clay County defendants, including former Sheriff Huffman and current Sheriff (and former Deputy) Scott, as well as Clay County itself. In considering these claims, this court's analysis begins with a recent Fifth Circuit decision which casts a long shadow over this case. In *Jauch v. Choctaw Cty.*, 874 F.3d 425, 437 (5th Cir. 2017), the Fifth Circuit determined that a county sheriff was not entitled to qualified immunity where a pretrial detainee waited for 96 days to be brought before a judge and was effectively denied bail. In so holding, the Fifth Circuit wrote that the sheriff "should have known to put his constitutional obligations ahead of his idiosyncratic understanding of state law requirements. He is not entitled to immunity." *Id.* *Jauch* was decided after the relevant events in this case, and this court will accordingly not consider it in the context of the "clearly established prong" of the qualified immunity standard. Nevertheless, in considering its basic approach to this case, and the liability of Clay County itself, this court cannot ignore the fact that the Fifth Circuit in *Jauch* expressed grave concerns regarding the actions of a Mississippi sheriff and county which resulted in a pretrial incarceration which was of vastly shorter duration than the one in this case.

In light of *Jauch*, and the length of the pretrial incarceration in this case, Clay County's motion for summary judgment simply cannot withstand substantial

evidence that constitutional violations by itself and/or its employees served to unlawfully extend plaintiff's detention. Unfortunately for the County, not only does such evidence exist, but this court regards it as being of a potentially quite damaging nature. This court previously mentioned this evidence in its discussion of the facts, but given its importance, it will repeat it here. In his brief, plaintiff describes this evidence as follows:

> [K]nowing that Judge Howard had removed Harris' case from the active docket, removing its attention from the Court, on October 25, 2010, Allgood, Scott and Huffman conspired to further hide Harris from the courts, while justifying their unlawful imprisonment, by submitting a declaration to the Court stating that the following as it relates to the Capias, "After diligent search and inquiry, I have been unable to find the within named Stephen Jesse Harris in my county," signed Sheriff Laddie Huffman and Deputy Sheriff Eddie Scott (the "Sheriff's Diligence Declaration"). The brazen absurdity of such a diligence declaration was mind boggling given the fact that in fact Defendants Huffman and Scott were both well aware that Harris was in their custody at that very time.

[Plaintiff's response to Clay County's motion for summary judgment at 10-11].

Thus, the Sheriff's Diligence Declaration consists of a simple assertion that: "[a]fter diligent search and inquiry, I have been unable to find the within named Stephen J. Harris in my county. This, 25th day of

October, 2010" [Plaintiff's exhibit 21]. The signatories are listed as Sheriff Laddie Huffman and Deputy Eddie Scott. The Declaration is thus a straight-forward factual assertion that Huffman and Scott were unable to locate plaintiff during a time when it seems clear that they knew he was located in their jail. Obviously, the fact that Huffman and/or Scott would have attested to such facts raises very serious concerns regarding their good faith, or lack thereof, in this case.

This court was sufficiently concerned by the Sheriff's Diligence Declaration, which was first raised in a response to a summary judgment motion filed by then-defendant Dr. Miller, that it, through its staff, e-mailed counsel for the County about it to ensure that it was addressed in its reply brief. As it turns out, the issue was not, in fact, addressed in defendant's reply brief, and this court spent a considerable amount of time preparing an order based on the assumption that the County had not addressed the issue. This court later discovered that the issue had, in fact, been addressed by the County in its briefing, but in its response to *plaintiff*'s motion for summary judgment. This fact resulted in a substantial delay in the preparation of this order.

This court can, and will, overlook the County's filing its explanation for the Sheriff's Diligence Declaration in the wrong brief, but it cannot overlook what is substantively missing in that explanation: namely, record citations in support of the facts asserted. It is a basic principle of summary judgment motion practice that alleged facts which merely consist of "lawyers

talking" is not competent summary judgment evidence at all and may not be considered in this court's ruling. Broadly stated, the County's explanation for the Sheriff's Diligence Declaration is that it was somehow consistent or required by local circuit court practice, but, even disregarding the lack of record citations, this court remains rather confused by this assertion. Indeed, this court has never encountered a local court practice which requires false assertions of fact by responsible public officials, and that is what plaintiff, not unreasonably, alleges the Sheriff's Diligence Declaration amounts to. Moreover, the County speculates openly in its response on important matters such as its assertion that "[t]he handwriting on the writ is possibly that of then Chief Deputy Eddie Scott or it could also be the writing of another deputy." [Defendant's response to plaintiff's summary judgment motion at 20].

Thus, even aside from its lack of factual support in the record (which cannot be excused), the County's explanation for the Declaration leaves a number of important unanswered questions. It should be emphasized at this juncture that, even in the qualified immunity context, this court is required to view summary judgment evidence in the light most favorable to the plaintiff, as the non-moving party. See *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014). Therefore, to the extent that the County itself admits ambiguities in the evidence, these must clearly be resolved in plaintiff's favor on summary judgment. As quoted above, the County's response concedes that then-Deputy Scott may have signed the Declaration, but it relies upon

numerous bare assertions of fact with no record citations in support of a conclusion that, if he did sign it, it would have been pursuant to circuit court practice. Id. In its submission, the County appears to suggest, without directly saying so or certainly proving it, that circuit court practice in Clay County is to require sheriffs and/or deputies to make factually false declarations that they are unaware of th e location of a particular criminal defendant when they are fully aware of his location. Id. at 19-20. Once again, the notion that this would be circuit court practice strikes this court as quite suspect, and extraordinary claims require extraordinary proof, and certainly more than bare assertions in a brief.

This court adheres to the quaint notion that, when a Sheriff or his deputy attests that •[a]fter diligent search and inquiry, I have been unable to nd the within named Stephen J. Harris in my county,Ž these words should actually mean something in the eyes of the law. Justice may proceed only on truthful assertions, and this court is ce rtainly not prepared to declare these words a nullity on summary judgment, based on unproven and confusing assertions regarding circuit court practice. Indeed, in light of the clarity and evident falsity of the Sherif f•s Diligence Declaration, this court regards it as a literal impossibility for the County to have briefed any iteration of its •it was a matter of circuit court practiceŽ theory which would have removed the Declaration as an issue presenting triable fact issues for a jury to decide.