CASE NUMBER 21-2640

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DWAYNE FURLOW, et al., Appellants

vs.

JON BELMAR, et al., Appellees

Appeal from the United States District Court
for the Eastern District of Missouri, Eastern Division
Case Number 4:16-cv-00254
The Honorable Henry E. Autrey

BRIEF OF APPELLEES

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Pursuant to 42 U.S.C. §1983, Plaintiffs Dwayne Furlow and Ralph Torres filed a three-count complaint against Defendants Christopher Partin, Kevin Walsh and Laura Clements in their personal capacities for actual damages and punitive damages, as well as former St. Louis County Police Chief Jon Belmar in his official capacity and St. Louis County. At the core of their complaint, Plaintiffs alleged that the issuance of Wanteds for their arrest, without a magistrate's judicial determination, violated their constitutional rights. Defendants filed a motion for summary judgment seeking dismissal of the entire lawsuit.

The district court granted the Defendants' motion for summary judgment, finding that: a) the practice of issuing Wanteds employed by St. Louis County police officers adheres to the constitutional safeguards articulated by the U.S. Supreme Court; b) there was probable cause for Officers Partin, Walsh, and Detective Clements to issue Wanteds for Plaintiffs; c) Officers Partin, Walsh, and Detective Clements are entitled to qualified immunity; and d) the granting of qualified immunity to Officers Partin, Walsh, and Detective Clements precludes the attachment of municipal liability to Chief Belmar and St. Louis County.

Plaintiffs appeal asserting that the district court committed an error of the law in granting summary judgment in favor of the Defendants.

JURISDICTIONAL STATEMENT

Appellants filed this case in the United States District Court, Eastern District of Missouri, Eastern Division, on February 24, 2016. The District Court had jurisdiction pursuant to 28 U.S.C. §1331, because Appellants' action arose under the Fourth, Fifth, and Fourteenth Amendments of the Constitution of the United States, as well as 42 U.S.C. §1983.

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. Appellants have appealed from the final Order and Judgment issued by the District Court and entered of record on October 5, 2018.

STATEMENT OF ISSUES

I. Whether the district court erred in holding that St. Louis County's issuance of Wanteds is constitutional as a matter of law, if supported by probable cause, pursuant to the Fourth, Fifth, and Fourteenth Amendments – despite the absence of a magistrate's judicial determination?

a. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

b. *Monell v. N.Y. Dep't of Soc. Svs*, 436 U.S. 658 (1978).

c. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

II. Whether the district court erred in holding that probable cause supported Wanteds being issued for Messrs. Furlow and Torres?

a. *Linn v. Garcia*, 531 F. 2d 855, 861 (8th Cir. 1976).

b. *Kuehl v. Burtis*, 173 F.3d 646 (8th Cir. 1999).

c. *Borgman v. Kedley*, 646 F.3d 518 (8th Cir. 2011).

III. Whether the district court erred in holding that Officers Partin and Walsh, as well as Detective Clements, are entitled to qualified immunity?

a. *Messerschmidt v. Millender*, 565 U.S. 535 (2012).

b. *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015).

c. *Winters v. Adams*, 254 F.3d 758 (8th Cir. 2001).

IV. Whether the district court erred in concluding that qualified immunity for Officers Partin and Walsh, as well as Detective Clements, precluded municipal liability as a matter of law?

a. *Brockinton v. City of Sherwood, Ark*, 503 F.3d 667, 674 (8th Cir. 2007).

b. *Cooper v. Martin*, 634 F.3d 477 (8th Cir. 2011).

c. *White v. Jackson*, 865 F.3d 1064 (8th Cir. 2017).

V. Whether the district court erred in granting summary judgment in favor of Appellees as to Count III of Appellants' First-Amended Complaint?

a. *Barkley, Inc. v. Gabriel Brothers, Inc.*, 829 F.3d 1030 (8th Cir. 2016).

b. *Rains v. Jones*, 905 F.3d 545 (8th Cir. 2018).

STATEMENT OF THE CASE[1]

A. St. Louis County's Use of "Wanteds"

The Commission on Accreditation of Law Enforcement Agencies (CALEA) is the premier accrediting association within the United States. (Appellees App. at 501). St. Louis County has been accredited by CALEA since 1998. (Id.). The accrediting process includes a review of St. Louis County's policies, practices, and procedures. (Appellees App. at 502). St. Louis County met all 484 standards in the Law Enforcement area which entitled the police department to Accreditation with Excellence over the last two accreditation cycles. A large portion of this is a review of policies. (Id.).

CALEA has over 25 standards that apply to internal affairs/disciplinary policies and procedures; St. Louis County met all during the 2012 and 2015 reaccreditation process. (Appellees App. at 503). All St. Louis County police officers are certified by the Missouri Department of Public Safety and must comply with Peace Officer Standards and Training (POST). (Appellees App. at 504). The POST program licenses and approves training centers, basic training instructors, training, and curricula. (Id.). The St. Louis County and Municipal Police Academy ("Academy") and its instructors are licensed by the POST Commission. (Id.).

[1] This section is based upon the statement of facts that Appellees submitted in support of their Motion for Summary Judgment. (Appellees App. at 537-586).

POST certification requires graduation from a Police Academy, the passing of the license examination and continuing education. (Id.). The training at the Academy emphasizes that there must be probable cause to effectuate a warrantless arrest. (Id.). Probable cause is based upon the surrounding circumstances; the totality of the circumstances is that a reasonable person would think that the suspect committed the crime. (Appellees App. at 505).

A Wanted is issued when a police officer has probable cause to think that a suspect has committed a crime, but the officer cannot find this person or talk to him; thus, a Wanted is issued. (Appellees App. at 327). If there is probable cause, it is lawful for a police officer to arrest a person – in order to have the in-person conversation necessary to complete the investigation. (Appellees App. at 329). St. Louis County is not the only jurisdiction that employs the issuance of Wanteds. (Appellees App. at 302).

In Missouri, a person arrested can be detained for up to 24 hours. (Appellees App. at 323). However, the 24 hours may not be utilized to obtain the original probable cause, but it can be used to build additional facts for obtaining a warrant. Individuals are not arrested on a wanted merely for questioning without probable cause. (Appellees App. at 447). Officers are trained to apply for a warrant before the expiration of 24 hours. If they have information to apply in 5 hours or 10 hours or 16 hours they do so; they don't wait until 23 ½ hours go by. (Appellees App. at

303). For domestic violence cases, holding a person for 24 hours allows: the victim time to obtain an order of protection; time to get medical help, time to move to a safe house; gives the victim physical and emotional protection during the 24-hour period. The intent is to protect the victim. (Appellees App. at 308).

St. Louis County mandates in-service training and continuing education for its law enforcement officers. (Appellees App. at 303). In-service training involves academics, legal updates, firearm training, etcs. (Appellees App. at 279). The issuance of Wanteds is discussed during field training, including the correct steps needed to be taken, such as the determination of probable cause, notifying a supervisor, and notifying a CARE operator. (Appellees App. at 278-79).

If an officer encounters individual who has had a Wanted issued for them, the next step, when the officer is not familiar with the individual, is to verify that there is in fact a Wanted out for the arrest of the individual. (Appellees App. at 287). If there is an active Wanted, the officer contacts the watch commander. (Appellees App. at 289). Then the CARE operator is notified to cancel the Wanted, resulting in its immediate cancelation. (Id.). The officer who initiated the Wanted is notified that the suspect is in custody. The officer is informed of the location and advised of what time the suspect was picked up. (Id.).

A person would have to be taken into custody for other type cases such as domestic, anything violent, gun cases, and felonies. (Exh. E, p. 6). A Wanted is used as a last

resort to make contact with a person with probable cause, which is a reasonable belief that someone has committed a crime. (Appellees App. at 577).

B. Dwayne Furlow

On November 11, 2015, an incident occurred between Dwayne Furlow and his next-door neighbor, Janet Virgin, which precipitated Ms. Virgin to call 911. (Appellees App. at. 122-23). When police arrived, Ms. Virgin alleged that Mr. Furlow had stolen her cell phone. (Amended Complaint, Par. 34). Officer Christopher Partin, a sworn police officer employed by the St. Louis County police department, along with his field training officer, Officer Slusser, arrived on the scene at approximately 9:00 a.m. (Appellees App. at 3 and 241). After his arrival, Officer Partin spoke to various individuals as part of his investigation, including Ms. Virgin. (Appellees App. at 242-43).

Ms. Virgin told Officer Partin that there had been a history of ongoing issues between her family and the Furlow family, as Mr. Furlow's son had been harassing and fighting her sons. (Id.). Ms. Virgin stated that when she started recording the interactions between the boys on her phone, so she would have evidence of the harassment and fighting, Mr. Furlow approached her, took her phone, hit her in the head, and broke her glasses. (Appellees App. at 243).

The officers also canvassed the neighborhood for additional witnesses. A witness told Officer Partin that he did not see who among the kids started the fight, but that he did see Mr. Furlow assault Ms. Virgin and take her phone. (Id.). If Mr. Furlow was on the scene at the time that the incident happened (i.e. that Janet Virgin was assaulted and her phone was taken from her) and if he was gone when the police arrived just minutes later, then, Officer Partin agrees, a reasonable officer could conclude that Mr. Furlow had fled the scene. (Appellees App. at 253). While Officer Partin was walking back to his car, Mr. Furlow's daughter approached him with a telephone and stated "My dad wants to talk to you." (Appellees App. at 243). While speaking with him, Officer Partin asked Mr. Furlow to return home so that he could answer questions regarding the neighbor's allegation of phone theft. (Appellees App. at 9). Officer Partin did not threaten to arrest Mr. Furlow or issue him a summons; Officer Partin simply stated that he wanted to talk to Mr. Furlow. (Appellees App. at 131).

Mr. Furlow told Officer Partin that he would try and touch base with him when he got finished doing what he was doing, despite Officer Partin's objection. (Appellees App. at 129). Thus, in an attempt to get Mr. Furlow to return to the scene to speak with him, Officer Partin told Mr. Furlow that he would issue a "Wanted". (Appellees App. at 9 and 133).

Subsequently, on the same day, Officer Partin and his training officer drove past Mr. Furlow's house a couple of times and knocked on the door. (Appellants App. at 245-46). Mr. Furlow was aware that officers went to his house on multiple occasions that day to try to speak with him in person, as indicated in a letter written by his attorneys. (Appellees App. at 258-59). After failing to speak with Mr. Furlow, Officer Partin issued a "Wanted" for his arrest later that day. (Appellees App. at 9 and 245-46). The basis for the probable cause included the statements of Ms. Virgin and the independent witness. (Appellees App. at 247).

On December 12, 2015, Mr. Furlow, accompanied by his counsel, turned himself in. (Appellees App. at 11). At the time, Mr. Furlow did not deny the accusations that had been made against him. (Appellees App. at 135). Mr. Furlow's counsel indicated that Mr. Furlow did not intend to answer any questions. (Appellees App. at 11). Officer Partin did not badger Furlow to make a statement; the officer respected Furlow's right to remain silent. (Appellees App. at 136-37). Officer Partin then issued a summons for Mr. Furlow to appear in Court on charges relating to assault and to larceny. (Appellees App. at 11). The summons was given to his attorney. (Appellees App. at 137). After giving the summons to the attorney, Officer Partin stated that he would cancel the "Wanted". (Appellees App. at 11). In fact, Officer Partin did cancel the wanted as he was leaving the Justice Services Center. (Appellees App. at 259-60).

This summons for the November 11, 2015 incident was issued on December 12, 2015, with a court date of February 17, 2016. (Appellees App. at 153).

On January 25, 2016, a 911 call was made by a neighbor who stated that Mr. Furlow's wife, Latoya Furlow, came running over to their house stating that Mr. Furlow had beat her up. (Appellees App. at 143). Minutes after the 911 call was made, Mr. Furlow drove away from the scene in a vehicle with tinted windows. (Id.). While Ms. Furlow spoke with the 911 operator, she was distraught and crying. (Id.).

Kevin Walsh, a sworn police officer employed by the St. Louis County police department, received the dispatch call for the alleged domestic violence. (Appellees App. at 3 and 295-96). According to the computer-aided dispatch record, Officer Walsh arrived at the home of the neighbor at approximately 12:25 a.m. (Appellees App. at 296).

As Officer Walsh arrived at the scene, he found Mrs. Furlow crying profusely. (Appellees App. at 304-05). Mrs. Furlow told Officer Walsh that her husband had come home, accused her of being unfaithful, smacked her, knocked her to the ground, stomped on her legs several times, and tried dragging her out of the house by her hair. However, while at the doorway, Mrs. Furlow was able to reach her feet and flee. (Appellees App. at 296).

Although she said that her husband had fled the scene, she indicated that she was nervous about being in the house alone. Officer Walsh offered to perform a

protective sweep outside and inside to make sure that Mr. Furlow had not doubled back and entered through the back door; Mrs. Furlow gave her consent to the protective sweep. (Id.). While performing the protective sweep, Officer Walsh observed a loaded AR-15 rifle in the basement. (Id.). The AR-15 rifle had had one live round in the chamber and 29 rounds in the magazine. (Appellees App. at 305).

Mrs. Furlow indicated that her husband was on probation for burglary, and that she had purchased the AR-15 for their protection. (Appellees App. at 296-97). Officer Walsh considered this to be a dangerous situation, because it was a domestic violence case, the presence of the loaded AR-15 rifle, and the state of mind of Mrs. Furlow, as she stated that she feared Mr. Furlow was coming back. Officer Walsh thought that Ms. Furlow was truly in distress. (Appellees App. at 305). Mrs. Furlow's statement that they needed an AR-15 rifle in their house for protection also alerted Officer Walsh that this may be a dangerous environment. (Id.).

Mrs. Furlow advised Officer Walsh that she planned to move in with a family member in the city; she also voiced her intent to press charges against Mr. Furlow. (Appellees App. at 297 and 306). Officer Walsh assisted Mrs. Furlow with moving plastic tubs of clothing into the car and also rendered the AR-15 rifle safe, and he also placed that rifle in her vehicle. (Appellees App. at 296-97). Officer Walsh also counseled Mrs. Furlow how to obtain an order of protection for her and her children,

secured several things into her vehicle, stayed with her until she gathered a good portion of her belongings and placed them into her vehicle. (Appellees App. at 305).

On the afternoon of January 25, 2016, Officer Walsh spoke with Mr. Furlow regarding the allegation he assaulted Ms. Mr. Furlow. (Appellees App. at 12). Officer Walsh requested that Mr. Furlow return home to be questioned regarding the allegations. (Id.). Mr. Furlow said he had no interest in answering any questions. (Id.). Officer Walsh informed Mr. Furlow that if he did not answer questions that Officer Walsh would issue a "Wanted". (Id.).

Mr. Furlow reiterated that he would not speak to the police. (Appellees App. at 12). Mr. Furlow told Officer Walsh that he had already contacted his lawyers who told him that the officer would lock him up, and that he is not going to turn himself in. (Appellees App. at 297). Officer Walsh attempted to follow up with Mr. Furlow at his home later that night and the next day, because he believed that Mr. Furlow presented a threat to Mrs. Furlow. (Appellees App. at 299 and 309).

The day after the 911 call, Officer Walsh received a telephone call from a person identifying herself as Mrs. Furlow where she indicated she wished to recant her statement. (Appellees App. at 301 and 306). Officer Walsh asked her if anybody was coercing her into saying this and she said "No." Officer Walsh asked her to report to the First Precinct in person and give a written statement. (Appellees App. at 306-07 and 301). Because of Mrs. Furlow's statement and demeanor the day

before, this recantation seemed odd to the police officer. In addition, while she was talking on the phone her voice pattern was fast paced, and she seemed anxious and agitated. (Appellees App. at 307).

Despite Mrs. Furlow's recantation on the telephone, Officer Walsh was concerned. Pursuant to his experience in handling domestic violence cases, while victims may recant their allegations, the victims' first statements are generally the most truthful. (Id.). Moreover, when Officer Walsh spoke with Mr. Furlow on the telephone, he did not then deny that he had assaulted his wife. (Id.).

On January 28, 2016, Mr. Furlow was driving south on Goodfellow Blvd when he was stopped by police because no license plates were displayed on the rear. (Appellees App. at 13 and 152). During the stop Mr. Furlow indicated to the police that he had a suspended license, and that he believed either a Wanted or a warrant had been issued against him. (Appellees App. at 13).

A (computer) search indicated that a Wanted had been issued by Officer Walsh. (Id.). Mr. Furlow was then taken into custody. (Id.). Mr. Furlow called his attorneys while at the police station and spoke to his attorney. (Appellees App. at 153). Counsel for Mr. Furlow notified "multiple" officers indicating to them that there was a lack of probable cause, but (the unnamed police officers) refused to release Mr. Furlow, (as requested by counsel for Mr. Furlow). (Appellees App. at 14). A police sergeant of the First Precinct stated to Mr. Furlow's counsel that

Officer Walsh followed department procedures in issuing the wanted. (Id.). Pursuant to department policy concerning incidents of domestic violence, Mr. Furlow was held 24 hours and released. (Id. and at 301).

C. Ralph Torres

Detective Laura Clements is a sworn police officer employed by the St. Louis County police department. (Appellees App. at 4). Melissa Snyder is Mr. Torres's second ex-wife and the mother of his daughter. (Appellees App. at 172). In or around 2011, Ms. Snyder obtained a protective order against Mr. Torres. (Appellees App. at 173 and 180). When Mr. Torres lived with Ms. Snyder, there were "several times" that the police responded to calls to the house to check on the well-being of his daughter. (Appellees App. at 193). Mr. Torres is aware that Ms. Snyder made statements regarding sexual behavior with Mr. Torres' daughter. (Appellees App. at 178).

In late 2014 or early 2015, Mr. Torres faced an investigation by the Division of Child Protective Services for alleged sexual misconduct involving minor children (Appellees App. at 14). Mr. Torres was aware that allegations had been made against him, but did not know the specifics. (Appellees App. at 182). Andrea Kroninger of the St. Charles County Department of Social Services told Mr. Torres that she needed to speak to him; she left a voice mail that she wanted to speak with him, and in addition Ms. Kroninger sent a letter to him at his home. (Appellees App. at 175).

Mr. Torres was aware that in November 2014 an interview was conducted in St. Charles County, with his daughter at a place called the child center in Wentzville, Missouri. (Appellees App. at 184). Mr. Torres did not speak with any person from St. Charles Department of Social Services, who wished to speak with him about the alleged sexual misconduct. (Appellees App. at 175, 181, and 184). Mr. Torres saw some reports from St. Charles County Division of Children's Services through his attorney. (Appellees App. at 184-85). When Mr. Torres received a voicemail and letter from St. Charles County Division of Children's Services asking him to speak to them, Mr. Torres did not do so, in order to deny the allegations made against him, as well as explain what was going on. (Appellees App. at 187).

On December 16th 2014, Sgt. Redmond gave Detective Laura Clements the assignment regarding the allegations made against Mr. Torres. (Appellees App. at 558). The nature of the assignment was that a five-year old girl disclosed that Mr. Torres had made her touch his genitals. (Id.). Brittney O'Donnell from the Missouri Department of Social Services Children's Division had advised Sgt. Redmond that a forensic interview of the alleged victim had been conducted in November 2014. (Id.). Amy Robins of the Child Center was the forensic interviewer who conducted the 40-45 minute interview with the child. (Appellees App. at 559).

Detective Clements was provided with a copy of the video of the forensic interview and then she watched the interview. (Id.). Prior to watching the video,

Detective Clements spoke with the victim's mother. (Id.). After speaking with the victim's mother and watching the video of the forensic interview, Detective Clements believed that she had probable cause to believe that Mr. Torres had committed the crime of statutory sodomy. (Appellees App. at 560). However, she chose not to arrest Mr. Torres at that point, but to make contact with him in January 2015. (Id.). After leaving a second voicemail message for Mr. Torres, he returned the call. (Id.).

Officer Clements asked Mr. Torres to come to the St. Louis County police department to answer questions about the allegations involving Mr. Torres's minor daughter. (Appellees App. at 15). Mr. Torres told Detective Clements that she would have to speak with his attorney. (Appellees App. at 188). However, Mr. Torres did not give Detective Clements the telephone number of his attorney. (Appellees App. at 187-88).

Detective Clements made several attempts to speak with Mr. Torres's attorney, calling her several times. (Appellees App. at 561). The attorney for Mr. Torres later mentioned to him that she has been playing phone tag with Detective Clements. (Appellees App. at 188). The preference of Detective Clements was that Mr. Torres come in with an attorney and then make a statement or not, and conclude the investigation that way. (Appellees App. at 561). Although it was the hope and preference of Detective Clements that Mr. Torres would come into her office with

his attorney, they never did come in to speak to her. (Id.). Thus, on February 23, 2015, Detective Clements issued a Wanted for Mr. Torres. (Id.).

On or around April 2, 2015, a St. Louis County police officer arrested Mr. Torres at his house. (Appellees App. at 188-89). At the time of the arrest, Mr. Torres was allowed to make telephone calls to his attorney. (Appellees App. at 190). The officer told Mr. Torres that Detective Clements was not on duty, but would be coming on duty at 4:30 p.m. (Appellees App. at 189).

When Detective Clements saw Mr. Torres at the County Justice Center, she asked, "Would you like to make a statement?" The response of Mr. Torres, according to Mr. Torres' testimony in his deposition was "Call my attorney; I don't have anything to tell you." (Appellees App. at 191). When Detective Clements came on duty at 4:30 p.m. there would not have been time to apply for a warrant with the Prosecuting Attorney's office that day. (Appellees App. at 562).

The next day, Detective Clements went to the Prosecuting Attorney's office at 10 a.m., which was before her shift started (at 4:30 p.m.). (Appellees App. at 563). By the time that Detective Clements presented the case and the prosecutor asked questions, it was at or about 11:00 a.m. (Id.). Per the 24-hour rule, Detective Clements knew that Mr. Torres would be released. (Id.). Mr. Torres was released that day. (Appellees App. at 195).

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Coker v. Arkansas State Police*, 734 F.3d 838, 841 (8th Cir. 2013). Federal Rule of Civil Procedure 56 (a) provides that the court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut but rather as an integral part of the federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U. S. 317, 323 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.* 477 U. S. 242, 247-48 (1986).

SUMMARY OF ARGUMENT

A police officer has probable cause to make a warrantless arrest when the totality of the circumstances at the time of the arrest "are sufficient to lead to a reasonable person to believe that the defendant has committed or is committing an offense.'" *White v. Jackson*, 865 F.3d 1064, 1075 (8th Cir. 2017) (quoting *Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011). A warrantless arrest does not violate "the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause'." *Id.*

In granting the Appellees' motion for summary judgment, the district court correctly concluded in general that St. Louis County's use of Wanteds does not conflict with the Fourth Amendment of the U.S. Constitution, and in particular, the existence of probable cause when Officers Partin, Walsh, and Detective Clements, issued Wanteds for Messrs. Furlow and Torres. The district court also did not commit reversible error in holding that Officers Partin and Walsh, as well as Detective Clements, are entitled to qualified immunity.

Further, "[t]his circuit has consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." *Brockinton v. City of Sherwood, Ark*, 503 F.3d 667, 674 (8th Cir. 2007) (quoting *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir.2005)). Thus, the district court's determination that its grant of qualified

immunity to Officers Partin, Walsh, and Detective Clements precludes municipal liability against St. Louis County, as well as former Chief Jon Belmar, who was sued in his official capacity[2], is consistent with legal principles articulated by U.S. Supreme Court and this Court. In addition, per its aforementioned decisions, the district court's holding that Officers Partin, Walsh, and Detective Clements are entitled to summary judgment, as to Count III of the Appellants' First-Amended Complaint is not an error of law.

This Court should affirm the district court's grant of Appellees' motion for summary judgment.

ARGUMENT

I. The District Court did not err in holding that St. Louis County's issuance of Wanteds is constitutional as a matter of law, if supported by probable cause, pursuant to the Fourth, Fifth, and Fourteenth Amendments – despite the absence of a magistrate's judicial determination.

Missouri law allows police officers to arrest without a warrant when an officer has reasonable grounds to believe someone has violated any ordinance, or any law of this state over which such officer has jurisdiction. *See* §544.216 RSMo. Thus, arresting officers are not required to witness actual criminal activity or have collected enough evidence so as to obtain a conviction for there to be a legitimate

[2] "A suit against a governmental actor in his official capacity is treated as a suit against the governmental entity itself." *Brockinton v. City of Sherwood, Ark*, 503 F.3d 667, 674 (8th Cir. 2007) (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).

finding of probable cause to justify a warrantless arrest. *United States v. Webster*, 625 F. 3d 439, 442 (8th Cir. 2010). Instead, the mere "probability or substantial chance of criminal activity, rather than an actual showing of criminal activity," is all that is required. *United States v. Mendoza*, 421 F. 3d 663, 667 (8th Cir. 2005). In making a probable cause determination, law enforcement officers have substantial latitude in interpreting and drawing inferences from factual circumstances. *United States v. Henderson*, 613 F. 3d 1117, 111 (8th Cir. 2010). Missouri law also requires that all persons arrested and confined in any jail by any peace officer without a warrant for any alleged breach of the peace or other criminal offense or suspicion thereof, shall be discharged from said custody within twenty four hours from the time of such arrest, unless they shall be charged with a criminal offense. *See* § 544.170.1 RSMo.

The state of Florida once allowed persons to be arrested and remain in police custody for 30 days or more without a judicial determination of probable cause. This practice was challenged in the U.S. Supreme Court. In *Gerstein v. Pugh*, 420 U.S. 103, 104-10 (1975), the Court established that the Fourth Amendment requires a neutral judicial determination of probable cause as a prerequisite to extended restraint of liberty. *See id.* at 114. Under *Gerstein*, warrantless arrests are permitted, but persons arrested without a warrant must "promptly" be brought before a neutral magistrate for a judicial determination of probable cause. *See id.* at 114. "A

policeman's on the scene assessment of probable cause provides legal justification for arresting person suspected of crime, and for a brief period of detention, to take the administrative steps incident to arrest. *See id.*

In *County of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991), the Court addressed what is "prompt" within the meaning of the Fourth Amendment. The court noted the distinction that *Gerstein* provides for, but not immediate probable cause determination. *See id.* at 55. The Court declared "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id.* at 56. Examples of unreasonable delays are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the individual, or a delay for delay's sake. *See id.* at 56. If the hearing is held within 48 hours, the burden is on the arrested individual to show that his or her probable cause determination was delayed unreasonably. *See id.* at 57. After 48 hours, it is the government's burden to show that the probable cause determination was delayed for good reason. *See id.*

Here, St. Louis County police officers issue Wanteds only on probable cause, and then there is no unreasonable delay, and arrested persons are not held 48 hours, as generally approved in *County of Riverside*, but rather no longer than 24 hours, and shorter than that if a warrant is refused or taken under advisement. There is no testimony and no reason to believe that detention without a warrant is unjustifiably

prolonged. The only time someone may be held the full 24 hours without actively seeking a warrant involves domestic violence cases but that is **not** done out of ill, but rather to protect the victim. The Missouri Supreme Court has recognized the validity of this practice. To quote *In re Conard*, 944 S.W.2d 191, 201 (1997), "In many instances there are valid reasons for keeping an individual in jail for (the 20 hours that was then allowed by section 544.170). This is especially in instances of domestic abuse when continued violence is a threat."

Gerstein only requires a judicial determination of probable cause for ***extended restraint*** (emphasis added) of liberty following arrest. *Gerstein*, 420 U. S. at 114. A delay is unreasonable if it is motivated by a desire to uncover additional evidence to support the initial arrest or to use the suspect's presence solely to investigate the suspect's involvement in other crimes. *See id.; Also see United States v. Davis*, 174 F. 3d 941, 944 (8th Cir. 1999).

Here, Appellants argue that St. Louis County's use of Wanteds contravenes the constitutional protections articulated by *Gerstein* and *Riverside*. Specifically, Appellants contend that the issuance of Wanteds by St. Louis County police officers – even with a determination of probable cause – and without the review of a neutral magistrate violates the Fourth Amendment. Appellants' contention is without merit.

In an attempt to buttress their position that the probable cause determination of a "detached and neutral magistrate" is required to make the issuance of Wanteds constitutional, Appellants cite a number of cases that are factually distinguishable from the case at hand. For example, although the case pre-dates *Gerstein* and *Riverside*, Appellants cite *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) for their argument that a neutral and detached magistrate should be used for an issuance of a warrant, but fail to mention that *Johnson* involved entry into a home. (Appellants Br. at 30-31). The U.S. Supreme Court held that officers should not search a home without a search warrant and should obtain the warrant from a magistrate, unless exceptional circumstances exist for an entry which ignores the right of privacy. *See Johnson*, 333 U.S. at 14.

Appellants also reference *Robinson v. City of Chicago*, 638 F. Supp. 186 (N. D. Ill. 1986). In *Robinson*, the plaintiff was arrested and then transported to the police department holding cell for the extended time of three days, without any charge being filed against him. The Court held that even though the original arrest may have been with probable cause that does not satisfy the constitutional requirement of probable cause for extended detention. These facts are incongruent with the instant case, as charges are filed or the arrested individuals are released from custody within 24 hours, if charges are not filed, per St. Louis County's use of Wanteds.

Further, Appellants cite *Gerstein and Riverside*, for the proposition that a suspect must be brought before a neutral magistrate within 48 hours of being detained on a warrantless arrest. Appellees do not dispute and in fact have asserted that they may arrest a suspect without a warrant where officers have probable cause to believe a crime has been committed and the suspect committed it. And, in each individual case, Officers Partin, Walsh, and Detective Clements issued Wanteds on based upon the subjective belief that they had probable cause, and objectively they did have probable cause, or at the very least had arguable probable cause. The Appellants were also released in less than 48 hours (and Mr. Furlow was immediately released on a summons issued by Officer Partin).

In addition, as discussed *supra*, St. Louis County has been CALEA accredited, since 1998. Accreditation is *prima facie* evidence that standards and practices of an agency meet constitutional due process requirements. *Woe by Woe v. Cuomo*, 729 F.2d 96, 106 (2nd Cir. 1984).

There is really no doubt that it is well recognized that a warrantless arrest is valid where it is supported by probable cause. *U. S. v. Watson*, 423 U. S. 411, 417-421 (1976). The necessary inquiry is not whether there was a warrant or whether there was time to get one, but whether there was probable cause for arrest. *See id.* Thus, contrary to Appellants' position, the Fourth Amendment allows an arrest based on probable cause without judicial determination.

II. The District Court did not err in holding that probable cause supported Wanteds being issued for Messrs. Furlow and Torres.

Appellants next argue in the alternative that even if St. Louis County's use of Wanteds is constitutional, Officers Partin, Walsh, and Detective Clements did not possess probable cause to issue Wanteds for Messrs. Furlow and Torres, rendering the Wanteds unconstitutional. Specifically, Appellants claim that Officer Partin's determination of probable cause, based upon the reliance of Ms. Virgin's statements, as well as the statement of a 16-year old witness, was deficient. (Appellants Br. at 41). Appellants posit that Officer Partin should have interviewed a taxi driver at the scene and conducted further investigation prior to issuing the Wanted. Appellants' position is erroneous.

"[L]aw enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances and so long as 'law enforcement would not be unduly hampered…if the agents…wait to obtain more facts before seeking to arrest.'" *Kuehl v. Burtis*, 173 F.3d 646, 651 (8th Cir. 1999) (quoting *United States v. Woolbright*, 831 F.2d 1390, 1394 (8th Cir. 1987)). However, a police officer "need not conduct a 'mini trial before making an arrest,…." *Id.*

With respect to Officers, Partin, Walsh, and Detective Clements, "[l]iability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed." *Smith v. City of Minneapolis*, 754 F.3d 541, 547

(8th Cir. 2014). For a plaintiff to succeed on a claim of false arrest there must be confinement without legal justification. *Rustici v. Weidemeyer*, 673, S.W.2d 762, 767 (Mo. banc. 1984). Probable cause for arrest exists when the totality of the circumstances at the time of the arrest is sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense. *Borgman*, 646 F. 3d at 522- 523. Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based on probable cause if the mistake is objectively reasonable. *Id*. (quoting *Linn v. Garcia*, 531 F. 2d 855, 861 (8th Cir. 1976)). The law does not require law enforcement officers to conduct a perfect investigation to avoid a suit for false arrest. *See Stepnes v. Ritschel*, 663 F. 3d 952, 961 (8th Cir. 2011).

In the instant case, as noted by the district court, Officer Partin provided deposition testimony that he indeed interviewed the taxi driver, but had difficulty understanding him, as there was a significant language barrier. (Appellees App. at 264). Moreover, the facts reflect that the taxi driver arrived on the scene after Mr. Furlow left home. Thus, there is no basis to believe that a statement from the taxi drive would have exonerated Mr. Furlow. Therefore, Officer Partin had probable cause to believe that Mr. Furlow assaulted Ms. Virgin and took her phone.

Appellants also assert that Officer Walsh issued a Wanted for Mr. Furlow, concerning the alleged domestic violence incident involving his wife, solely for the

purpose of retaliation, after Mr. Furlow refused to return home and exercising his Fifth Amendment rights via a telephone conversation. (Appellants Br. at 42). Appellants' assertion is baseless.

In his deposition, Officer Walsh testified extensively about his reliance upon Ms. Furlow's statements, emotional state, and the presence of a loaded AR-15 rifle in the Furlow home. (Appellees' App. at 296-97; 304-05). While Ms. Furlow did recant her statements that Mr. Furlow assaulted her via the telephone the next day, Officer Walsh testified that he did not cancel the Wanted, because the recantation appeared "odd" – as her voice pattern was fast paced and her demeanor seemed to be anxious and agitated. (Appellees' App. at 307). As a result, Officer Walsh determined that Ms. Furlow's recantation was not sincere. Thus, Officer Walsh continued to believe that there was probable cause that Mr. Furlow assaulted his wife.

Further, Appellants contend that while Detective Clements's relied upon the statements of Mr. Torres's ex-wife/mother of the child, but did not question her to assess her credibility, and did not speak with Missouri Department of Social Services Children's Division investigators, she did not have probable cause to issue a Wanted for Mr. Torres. Appellants' contention is erroneous.

Detective Clements provided deposition testimony that she spoke to Mr. Torres's ex-wife/mother of the child and viewed the video of the forensic interview

of the child. (Appellees App. at 559). Appellants fail to provide allege what, if any, exonerating evidence Detective Clements would have learned or what would have led her to believe that Mr. Torres's ex-wife/mother of the child was not credible from an in-person interview. Moreover, Detective Clements also testified that normally she would have attended the forensic interview, but the interview was conducted on November 26, 2014. (Appellees App. at 559). This was two days after the non-indictment grand jury announcement, which resulted in unrest and required all officers to work mandatory 12-hour shifts. (Id.). Therefore, under the circumstances presented, Detective Clements did conduct a "reasonably thorough investigation" prior to issuing a Wanted for Mr. Torres, which resulted in the presence of probable cause.

In sum, despite Appellants' arguments to the contrary, there was probable cause to issue Wanteds for Messrs. Furlow and Torres.

III. The District Court did not err in holding that the individual Defendant police officers are entitled to qualified immunity.

The determination of whether an officer is entitled to qualified immunity requires consideration of the "objective legal reasonableness" of the officers' conduct in light of the information they possessed at the time of the alleged violation. *See Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)). "[Officers] will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have

concluded" that the Officers should have taken the disputed action. *Id*. (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Courts should be mindful of the Supreme Court's pronouncement that "[q]ualified immunity gives government officials room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law." *Messerschmidt v. Millender*, 565 U.S. 535 (2012) (citations omitted). Thus, "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Luckert v. Dodge County*, 684 F.3d 808, 817 (8th Cir. 2012) (citation omitted).

Qualified Immunity is immunity from suit rather than merely a defense to liability. *Mitchell v. Forsyth*, 472 U. S. 511, 526 (1985). A defendant is entitled to a thorough determination of a claim of qualified immunity if that immunity is to mean anything at all. *O'Neill v. City of Iowa City*, 496 F. 3d 915, 918 (8th Cir. 2007).

Appellants assert that Officers Partin, Walsh, and Detective Clements are not entitled to qualified immunity, because they failed to conduct a "reasonably thorough investigation" prior to issuing the Wanteds and/or failed to "reasonably interview witnesses readily available at the scene [or] investigate basic evidence" to support a determination of probable cause. Appellants' assertion is without merit.

As discussed *supra*, Officers Partin, Walsh, and Detective Clements conducted reasonable investigations prior to issuing Wanteds for Messrs. Furlow

and Torres. As a result, each issued Wanteds based upon the subjective belief that they had probable cause, and objectively they did have probable cause, or at the very least had arguable probable cause.

Nonetheless, assuming *arguendo*, even if this Court finds that Officers Partin, Walsh, and Detective Clements were not correct in their belief that probable cause existed to issue the Wanteds that is not enough to deny them qualified immunity. This Court must find that the actions by Officers Partin, Walsh, and Detective Clements were plainly incompetent or executed with the knowledge that they violate the law. *See Messerschmidt*, 565 U.S. at 535 (citations omitted); *see also Winters*, 254 F.3d at 766 (finding that even if police officers were not permitted to detain the plaintiff, the reasonableness of their beliefs that under the community caretaking functions exception they were permitted to detain the plaintiff entitled them to qualified immunity on the Fourth Amendment illegal detention claim). "In other words, if the officers' mistake as to what conduct the law required is reasonable, [Officers Partin, Walsh, and Detective Clements] are entitled to the immunity defense." *Samuelson v. City of New Ulm*, 455 F.3d 871, 876 (8th Cir. 2006) (quoting *Kuha v. City of Minnetoka*, 365 F.3d 590, 602 (8th Cir. 2003).

IV. The District Court did not err in concluding that the grant of qualified immunity to Officers Partin, Walsh, and Detective Clements precluded municipal liability as a matter of law.

Appellants next claim that the district court's conclusion that the conferral of qualified immunity to Officers Partin and Walsh, as well as Detective Clements, precludes the "[establishment] of municipal liability or liability of a governmental entity is an error of law." (Appellants' Br. at 46). In all three counts of their First-Amended Complaint, Appellants assert claims against Appellees St. Louis County and former St. Louis County Police Department Chief Jon Belmar, in his official capacity.

"A suit against a governmental actor in his official capacity is treated as a suit against the governmental entity itself." *Brockinton v. City of Sherwood, Ark*, 503 F.3d 667, 674 (8th Cir. 2007) (citing *Hafer v. Melo*, 502 U.S. 21, 25, (1991)). "This circuit has consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." *Id.* (quoting *McCoy v. City of Monticello*, 411 F.3d 920, 922 (8th Cir.2005)).

In *McCoy*, this Court recognized that the Eighth Circuit consistently finds the general rule that in order for municipal liability to attach, there must first be individual liability on an underlying substantive claim, citing *Turpin v. County of Rock*, 262 F. 3d 779, 784 (8th Cir. 2001), which concluded that because district court

properly granted officers summary judgment on qualified immunity grounds, the county likewise was entitled to summary judgment. *See McCoy*, 411 F.3d at 922.

Appellants cite *Monell v Department of Social Services*, 436 U.S. 658, 694 (1978), for the proposition that individual liability does not affect the determination of whether there is municipal liability. *Monell* holds that a municipality may not be vicariously liable for the unconstitutional acts of its employees, but only when the unconstitutional acts implement or execute an unconstitutional municipal policy or custom, and the unconstitutional policy or custom was the moving force behind the constitutional violation. *Monell*, 436 U.S. at 694. Appellees contend that *Monell* does not further the Appellants' position, as the policy and custom at hand clearly is that probable cause to believe someone committed a crime is needed when an officer issues a Wanted for a suspect.

The district court concluded that the Officers Partin, Walsh, and Detective Clements were entitled to summary judgment on Counts I, II, and III of the Appellants' First-Amended Complaint. As a result, the district court found Officers Partin, Walsh, and Detective Clements were not individual liable for the underlying substantive claims asserted by the Appellants. Thus, per this Court's general rule, in concluding that municipal liability does not attach to Appellees St. Louis County or former Chief Belmar, the district court did not commit an error of law.

V. The District Court did not err in granting summary judgment in favor of Appellees as to Count III of Appellants' First-Amended Complaint.

Appellants contend that the district court erred in dismissing Count III of their First-Amended Complaint, which alleged a lack of procedural safeguards in the use of Wanteds, in granting Appellees' motion for summary judgment. Specifically, Appellants argue that the district court committed procedural and substantive error, Appellants allege that they were not provided notice or afforded an opportunity to respond to identify issues of law or genuine issues of material fact that would preclude the grant of summary judgment.

"Federal district courts have power to grant summary judgment *sua sponte* when the losing party is given sufficient advance notice and an adequate opportunity to submit evidence in opposition." *Barkley, Inc. v. Gabriel Brothers, Inc.*, 829 F.3d 1030, 1041 (8th Cir. 2016) (quoting *Chrysler Credit Corp. v. Cathey*, 977 F.2d 447, 449 (8th Cir. 1992)) (*per curiam*); *see also* Fed. R. Civ. P. 56(f).

Federal Rule of Civil Procedure 56(f) provides that the court may grant summary judgment on grounds not raised or on its own "[a]fter giving notice and a reasonable time to respond." *Rains v. Jones*, 905 F.3d 545, 551 (8th Cir. 2018). Even without notice, however, summary judgment may be granted "on an issue not properly raised in the summary judgment motion if the district court's findings on properly addressed issues foreclose the unraised issue." *Rains*, 905 F.3d at 552

(quoting *Heisler v. Metro. Council*, 339 F.3d 622, 632 (8th Cir. 2003)) (citations omitted).

In the case at hand, Counts I and II of the Appellants' First-Amended Complaint alleged that Appellees violated the constitutional rights of Messrs. Furlow and Torres, with the issuance of Wanteds. The district court addressed the alleged constitutional violations, concluding that the Appellees' actions were constitutional and that they were entitled to summary judgment on Counts I and II. As a result of the district court's conclusions concerning Counts I and II, the district court foreclosed on Count III of the Appellants' First-Amended Complaint, which alleged that the issuance of Wanteds deprived the Appellants of liberty interests to live freely without the threat of being arrested. Since the district court upheld the constitutionality of the Wanteds, the Appellants' argument that they were deprived of liberty interests was rendered moot.

Moreover, as the district court noted, Appellants were not deprived of liberty interests, because no liberty existed – as Appellants were not free from arrest because Officers Partin, Walsh, and Detective Clements determined that there was probable cause to arrest them. Thus, the district court did not commit procedural or substantive error in its grant of summary judgment to Appellees on Count III of the Appellants' First-Amended Complaint.

CONCLUSION

Pursuant to the foregoing reasons, Appellees respectfully request that this Court affirm the district court's grant of summary judgment in their favor.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

1. This brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) and because:

this brief contains 9,263 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style of F.R.A.P. 32(a)(6) because:

this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman.

VERIFICATION OF VIRUS-FREE ELECTRONIC FILES

The undersigned hereby certifies that the electronic files presented to the Clerk of this Court containing a copy of the Appellees' brief has been scanned for viruses and is virus free.

Dated: January 18, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that within 6 days of receipt of the notice that the brief has been filed, I will send 10 paper copies of Appellees' brief and 2 paper copies of Appellees' Appendix to the Clerk of Court, as well as 2 paper copies to the counsel of record for the Appellants.

Dated: January 18, 2022.

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