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Wanted!: Fourth Amendment Protection for St. Louis Residents from the Unconstitutional Wanteds System

Brooke Buerck

NOTE

Wanted!: Fourth Amendment Protection for St. Louis Residents from the Unconstitutional Wanteds System

Furlow v. Belmar, 52 F.4th 393 (8th Cir. 2022).

Brooke Buerck [*]

I. INTRODUCTION

Back in the days of Jesse James, Billy the Kid, and Butch Cassidy, wanted posters were plastered all around town: "Wanted! $5,000 Reward!" Law enforcement agencies still utilize wanted posters today, but they appear more commonly on the internet or in the media rather than in classic paper form with bold lettering and a black-and-white portrait of the suspect that is associated with Western films.[1] The purpose of such

[*] B.A., Southern Illinois University, 2021; J.D. Candidate, University of Missouri School of Law, 2024; *Associate Member* (2022–23) and *Assistant Managing Editor* (2023–24), *Missouri Law Review*. I would like to thank Professor Lynn Branham for her assistance with my interpretation of the Fourth Amendment and guidance during the writing process. I also want to thank Nathaniel Carroll for meeting with me to discuss his work on the case and providing additional materials for me related to this issue. Further, I would like to thank my friends and colleagues at University of Missouri School of Law and on the *Missouri Law Review* editorial board for their encouragement and assistance throughout the writing and editing process, as well as my family and friends for their support throughout my law school career.

[1] JOSEPH M. CALVERT, PUBLIC ENEMIES: A DEMOGRAPHIC ANALYSIS OF FEDERAL FUGITIVE WANTED POSTERS 18 (2012), http://etd.auburn.edu/handle/10415/3289 [https://perma.cc/686F-7WAU]. For example, federal law enforcement agencies such as the FBI produce wanted or most wanted lists and publish them online. *See Ten Most Wanted Fugitives*, FBI, https://www.fbi.gov/wanted/topten [https://perma.cc/U7BT-JDDD] (last visited Jan. 9, 2024). Most wanted lists are available for the type of crime as well. *Id.* Additionally, although not explicitly wanted posters, photographs of fugitive or other individuals suspected of crime commonly appear in the news, including internet, television, and print, and even on billboard displays across highways. L. J. Supenski, *Wanted Posters: From Paper to E-Billboards*, GETTYSBURG TIMES (June 26, 2015),

wanted "posters" or other similar investigatory tools is to facilitate capture by involving the public and communicate the agency's priorities by showing the public which individuals and crimes are a top priority.[2]

Law enforcement officers in St. Louis County also use a database called the "Wanteds System" as a tool for identifying suspects they want to bring into custody and question.[3] The Wanteds System allows individual officers to input demographic and investigatory information of a person into the database, and then the database transmits the record to law enforcement officers in St. Louis County and surrounding counties in Missouri and Illinois.[4] The record, known as the "Wanted," prompts any other officer to seize, arrest, and conduct a custodial interrogation of the suspect, all without an official warrant from a judge.[5] Unlike a publicly displayed wanted poster, the Wanteds are accessible only to law enforcement agencies.[6] Furthermore, a suspect can remain in the database for a period of time, such as a few months, or potentially indefinitely, all without the opportunity to challenge the Wanted or to request they be removed from the system.[7]

On their face, the interests in privacy and autonomy protected by the Fourth Amendment of the U.S. Constitution potentially collide with the St. Louis County Police Department's ("SLCPD") desire for efficiency in apprehending individuals who have committed crimes.[8] These competing interests came before the Eighth Circuit Court of Appeals in *Furlow v. Belmar*.[9] Plaintiff Dwayne Furlow was arrested pursuant to a Wanted following a traffic stop on January 28, 2016.[10] Plaintiff Ralph Torres was arrested at his home on April 1, 2015, based on a Wanted issued on February 23, 2015.[11] Both Furlow and Torres brought this putative class action under 42 U.S.C. § 1983 on behalf of themselves and others who have been arrested in connection with a Wanted.[12] Furlow and Torres alleged that, among other things, SLCPD Chief of Police Jon Belmar, in

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https://www.gettysburgtimes.com/life_entertainment/columns/article_58d6fa53-29c3-5ea1-a19d-14c89d25374b.html [https://perma.cc/UW66-P295].

[2] CALVERT, *supra* note 1, at 6–8.

[3] Furlow v. Belmar, 52 F.4th 393, 397 (8th Cir. 2022).

[4] *Id.* at 397–98.

[5] *Id.* at 397.

[6] *Id.* at 398.

[7] *Id.* The information in the Wanted may also be available on a national database if the charge under investigation is a felony offense. *Id.*

[8] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[9] 52 F.4th 393 (8th Cir. 2022).

[10] *Id.* at 399.

[11] *Id.*

[12] *Id.* at 400.

his official capacity, St. Louis County, and the arresting officers in their individual capacities violated plaintiffs' Fourth, Fifth, and Fourteenth Amendment rights.[13]

Faced with the question of the Wanteds System's constitutionality on its face, the Eighth Circuit concluded that the Wanteds System's constitutionality "depends on the circumstances," or, in other words, the Fourth Amendment analysis must be done on a case-by-case basis.[14] Because there were at least some constitutional applications of the system, the court held that the facial challenge failed.[15]

This Note will discuss the *Furlow* court's analysis, including its incorrect application of Supreme Court precedent regarding the standard for a Fourth Amendment facial challenge and its lack of consideration for the practical problems of the continued existence of the Wanteds System. Part II of this Note explains the factual background of both the Wanteds System and of *Furlow*. Part III discusses the Fourth Amendment's requirement for reasonable arrests, either with a warrant when necessary or without a warrant but supported by probable cause. Next, Part IV explores the *Furlow* court's decision and rationale. Lastly, Part V examines the *Furlow* court's incorrect evaluation of the plaintiff's facial challenge, provides a proper evaluation of its unconstitutionality, and warns of the ultimate harms the Wanteds System poses to residents of Missouri and Illinois.

II. FACTS AND HOLDING

To understand the merits of the plaintiffs' claims in *Furlow*, it is necessary to first explain the details of the Wanteds System, how it works, and its use in Missouri.

A. The Wanteds System

SLCPD in St. Louis, Missouri, uses a system called the "Wanteds System" as a tool for its law enforcement officers.[16] Use of the Wanteds System began over twenty years ago after encouragement from the St. Louis Prosecuting Attorney's Office ("SLPAO").[17] According to the SLPAO, an officer must conduct a complete investigation prior to submitting an application for an arrest warrant to a magistrate judge.[18] SLPAO defines a complete investigation as one which requires an officer

[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 397.
[17] *Id.* at 398.
[18] *Id.*

to interview all suspects in the alleged crime prior to submitting a warrant application.[19] The Wanteds System helps SLCPD identify the individuals it wants to interview prior to obtaining the warrant.[20] From February 2011 to December 2016, SLCPD issued approximately 15,000 Wanteds and made 2,500 arrests pursuant to those Wanteds.[21] While Wanteds themselves prompt any officer to seize, arrest, and conduct a custodial interrogation of a suspect, including officers who did not issue the Wanted, they are not arrest warrants issued by a judge.[22]

The Wanteds System operates in a series of steps. First, a SLCPD officer independently makes a determination that they have probable cause to suspect an individual has committed a felony offense.[23] According to the 2010 written policies of the SLCPD, an officer did not need to make an explicit finding of probable cause to issue a Wanted.[24] In 2016, after the commencement of Furlow's lawsuit, the SLCPD amended its written policy to require a supervising SLCPD officer to approve the Wanted,

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[19] *Id.*

[20] *Id.*

[21] *Id.* at 398. This data indicates that 17% of all Wanteds resulted in arrest being made. *Id.* This information does not provide for how many individuals were "'informally' arrested or detained pursuant to Wanteds," nor does it provide for how many of those Wanteds resulted in a judicially-issued arrest warrant or a criminal conviction. *Id.* St. Louis County has an estimated population of 990,414 people as of July 1, 2022, and another 286,578 people were living in St. Louis City as of July 1, 2022. *QuickFacts – St. Louis County, Missouri*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/stlouiscountymissouri [https://perma.cc/CN3R-4J2M] (last visited Jan. 9, 2024); *QuickFacts – St. Louis City, Missouri*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/stlouiscitymissouri/PST040222#PST040222 [https://perma.cc/4U2C-SCLN] (last visited Jan. 9, 2024). For St. Louis County alone, this indicates that approximately 1.5% of all residents had a Wanted issued for their detention during this period of time, assuming that each Wanted was for one single resident.

[22] *Id.* at 397–98.

[23] *Furlow*, 52 F.4th at 397. SLCPD Policies define a Wanted as the following:

> Also known as an Arrest Order or Person of Interest (POI). It is a record that can be entered into REJIS and/or [Missouri Uniform Law Enforcement System (MULES)], and/or National Crime Information Center (NCIC)]. Documenting a person as wanted shall be based on probable cause that an individual has committed a felony crime."

ST. LOUIS CNTY. POLICE DEP'T, OFFICE OF THE CHIEF OF POLICE, DEPARTMENTAL GEN. OR. 20-026, https://www.stlouiscountypolice.com/who-we-are/policies-and-procedures/ [https://perma.cc/R4W8-JH26] (last visited Jan. 9, 2024) (available under General Orders 026 Teletype and Rejis Terminal Policy, page 2) [hereinafter DEPARTMENTAL GEN. OR. 20-026].

[24] *Furlow*, 52 F.4th at 397 n.1.

prior to entry into the database, by reviewing the facts supporting the initial officer's determination of probable cause.[25] SLCPD's policies state nothing about the issuance of Wanteds for misdemeanor crimes.[26]

Next, the officer provides information related to an individual suspect or a suspected crime to a computer clerk, including the individual's name, physical descriptors, personal data, address, charges under investigation, and the issuing officer's name and contact information.[27] Then, without any judicial oversight, the computer clerk inputs this information into a Regional Justice Information System ("REJIS") database, at which point the Wanted is issued.[28] The Wanted, a digital record on the database, is then transmitted and available to most law enforcement agencies in St. Louis County and surrounding counties in Missouri and Illinois.[29] Wanteds are, in most cases, only available to those with login access to the REJIS database and may remain active indefinitely if it is not removed or cancelled.[30] Individuals suspected of a crime and whose information is put into the Wanteds database have no process to challenge the information contained in the Wanted or request its removal.[31] Officers can use the database to view and search for active Wanteds and, ultimately,

[25] *Id.* at 397. SLCPD Policy specifically states: "Once the case officer has determined probable cause exists that a person has committed a felony crime, they must have a review of the facts supporting the case by their immediate supervisor, or designee, and receive approval before requesting wanted person entries." DEPARTMENTAL GEN. OR. 20-026, *supra* note 23, at 3.

[26] DEPARTMENTAL GEN. OR. 20-026, *supra* note 23. Notably, the *Furlow* court's opinion acknowledges that Wanteds do in fact get issued for misdemeanor crimes. *Furlow*, 52 F.4th at 398.

[27] *Furlow*, 52 F.4th at 397. SLCPD Policy does not specifically require the officer to input the charges under investigation or any other description of the crime under investigation beyond the number of the police report filed. DEPARTMENTAL GEN. OR. 20-026, *supra* note 23, at 3.

[28] *Furlow*, 52 F.4th at 397.

[29] *Id.* at 398. In fact, normally Wanteds in the REJIS system are *only* viewable by REJIS system users, and such users must be trained and certified to have authority to operate a REJIS terminal. DEPARTMENTAL GEN. OR. 20-026, *supra* note 23, at 1, 3. If the charge identified in the Wanted amounts to a felony offense, the Wanted may also be available nationally on the National Crime Information Center as a "temporary wanted," which automatically expires after forty-eight hours. *Furlow*, 52 F.4th at 398.

[30] *Furlow*, 52 F.4th at 398. Wanteds for individuals suspected of a misdemeanor offense remain active for one year, but will be removed when the suspect is arrested, the statute of limitations is less than one year, or the Wanted is canceled. *Id.* Wanteds for non-Class A felony offenses remain active for up to three years unless the person suspected of the offense is arrested, the statute of limitations runs, or the Wanted is canceled. *Id.* Wanted for Class A felony offenses remain active until they are canceled or the individual is arrested. *Id.*

[31] *Id.*

effectuate arrests and conduct interrogations pursuant to those Wanteds per SLCPD policy.[32]

B. Individual Plaintiffs and their Fourth Amendment Challenge

In *Furlow v. Belmar*, the Eighth Circuit had its opportunity to evaluate the facial constitutionality of the Wanteds System in a putative class action lawsuit brought by Plaintiffs Dwayne Furlow and Ralph Torres. Plaintiff Dwayne Furlow was arrested pursuant to a Wanted following a traffic stop on January 28, 2016.[33] The Wanted was issued just three days prior when SLCPD Officer Kevin Walsh responded to a 911 call at Furlow's home for a domestic assault complaint made by his wife.[34] Upon Officer Walsh's arrival at the scene, Furlow was not present; however, Officer Walsh spoke with Furlow on the phone and notified him that a Wanted would be issued.[35] Later that day, Officer Walsh did, in fact, issue a Wanted for Furlow.[36] Furlow's wife recanted her statements the following day on January 26, but the Wanted remained active.[37] Two days later, on January 28, Furlow was stopped for a traffic violation and arrested on the basis of the charges listed in the Wanted—domestic assault and domestic peace disturbance.[38] He was detained and held for over twenty-four hours.[39]

Plaintiff Ralph Torres was arrested by SLCPD Officer Scott Leible on April 1, 2015, when Officer Leible was patrolling near Torres's home and discovered a Wanted.[40] The Wanted had been issued on February 23, 2015, by SLCPD Detective Laura Clements during her investigation into complaints from Torres' ex-wife that Torres had sexually assaulted his minor child.[41] Detective Clements had previously attempted to speak with Torres' attorney and issued a Wanted when she failed to make contact.[42]

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[32] *Id.* at 397.

[33] *Id.* at 399. Furlow previously had a Wanted entered for his arrest on November 11, 2015 that was canceled over a month later on December 15, 2015, when he entered an appearance at the St. Louis County Justice Center. *Id.* at 398–99. On November 11, SLCPD Officer Christopher Partin responded to a dispatch call to Furlow's home based on an alleged altercation between Furlow's child and the child of the neighbor. *Id.* at 398. Partin entered the Wanted when Furlow refused to return to the home and speak in person with Partin. *Id.*

[34] *Id.* at 399.

[35] *Id.* at 398–99.

[36] *Id.* at 399.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

On March 30, 2015, the Department of Social Services, which had received the initial complaint of sexual abuse, concluded that there was insufficient evidence to corroborate the allegation, and the state court subsequently found that the allegations were fabricated by Torres's ex-wife.[43] Nonetheless, Torres was arrested two days later at his home on April 1.[44] There were no facts or indication that Torres was engaged in any criminal activity or sexual abuse of a minor child at the time of his arrest.[45]

On February 24, 2016, plaintiffs Dwayne Furlow and Ralph Torres brought a putative class action claim under 42 U.S.C. § 1983 against SLCPD Chief of Police Jon Belmar, in his official capacity; St. Louis County; and Officer Christopher Partin, Officer Kevin Walsh, and Detective Laura Clements, in their individual capacities.[46] The § 1983 claim alleged that the defendants violated the plaintiffs' Fourth, Fifth, and Fourteenth Amendment rights.[47] The district court granted summary judgment to the defendants, finding that the plaintiffs' facial challenge to the Wanteds System under the Fourth Amendment failed because the System's application was broad enough to encompass lawful arrests under the Constitution.[48] Furlow and Torres appealed to the Eighth Circuit.[49] The Eighth Circuit affirmed the decision; despite acknowledging some of the Fourth Amendment problems posed by the Wanteds System, it agreed that the facial challenge failed.[50]

III. LEGAL BACKGROUND

The Fourth Amendment protects individuals against unreasonable searches and seizures.[51] It states, in its entirety:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

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[43] *Id.*

[44] *Id.*

[45] *Id.* at 399–400. Torres was detained for approximately 24–25 hours and questioned by both Leible and Clements during which he invoked his Fifth Amendment rights to remain silent and have counsel present, and was later released when officers did not obtain a warrant from a judge. *Id.*

[46] *Id.* at 400. Plaintiff later added Ralph Torres and Howard Liner as individual plaintiffs and putative class representatives. *Id.* Section 1983 allows citizens to sue state government officials to recover damages for civil rights violations. 42 U.S.C. § 1983 (1996).

[47] *Furlow*, 52 F.4th at 400.

[48] *Id.* at 403–04.

[49] *Id.* at 400–01.

[50] *Id.* at 404.

[51] U.S. CONST. amend. IV.

> and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[52]

To understand the *Furlow* court's analysis, several areas of Fourth Amendment doctrine are relevant. First, the Fourth Amendment distinguishes between types of seizures—"arrests" and "*Terry* stops"—and requires different levels of suspicion by a law enforcement officer to effectuate them.[53] Not all seizures mandate a warrant from the judiciary; however, where a warrant is necessary, the Fourth Amendment imposes requirements on the issuing judge.[54] In addition, where a warrantless arrest has been made, courts require a showing of probable cause by the law enforcement officer and a judicial determination of probable cause following the warrantless arrest.[55] Further, in the context of warrantless arrests, the courts prohibit seizures for the sole purpose of gathering more evidence.[56] An examination of each of these relevant areas of Fourth Amendment doctrine, along with case law which permits officers to make lawful seizures on the basis of information imputed to them by other officers, is helpful when understanding the court's analysis in *Furlow*. Finally, this Part will evaluate the legal standard for the type of lawsuit the *Furlow* plaintiffs brought: facial challenges in the context of the Fourth Amendment.

A. Seizures Under the Fourth Amendment

Not all interactions between police officers and citizens trigger Fourth Amendment protections. Even where an interaction does constitute a seizure, there are different standards that govern the level of suspicion an officer must have to continue the interaction with that individual. The most invasive type of seizure is what is commonly referred to as an "arrest," which the Supreme Court has held to be *only* reasonable when based upon probable cause to believe that an individual has committed a crime.[57] Probable cause, an important touchstone of the Fourth

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[52] *Id.* The Fourth Amendment is applicable to the federal government as well as to the States through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[53] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21–22 (1968).

[54] U.S. CONST. amend. IV.

[55] *See* Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975).

[56] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[57] Bailey v. United States, 568 U.S. 186, 192 (2013) (citing Dunaway v. New York, 442 U.S. 200, 213 (1979)).

Amendment,[58] is a determination that, based on the facts known to the officer at the time and for which they had reasonably trustworthy knowledge, the circumstances are sufficient to warrant a person of reasonable caution to believe that an offense has been committed, or is being committed, by the suspect.[59]

A less invasive type of seizure is referred to as a "*Terry* stop," which acquired its name from the landmark Supreme Court case, *Terry v. Ohio*.[60] *Terry* stops, the Court held, permit an officer to conduct a brief stop—brief enough to pose questions to a suspect or search for weapons—on the basis of reasonable suspicion.[61] Reasonable suspicion requires a lower level of suspicion than probable cause, with the relevant inquiry being whether a reasonably prudent person under the circumstances would believe that their own safety or the safety of others was in jeopardy.[62] This holding demonstrated two acknowledgements from the Court: first, the Court recognized that the Fourth Amendment's protection against unreasonable seizures covers a spectrum of interactions with the police; in other words, there are times when a person's freedom may be restrained but the restraint does not amount to the person's detention at the police station.[63] Second, the Court suggested that there must be a less demanding standard for less restrictive seizures, as the law enforcement benefits of quicker and more efficient *Terry* stops would be rendered obsolete should probable cause be required.[64]

Though there is no definitive test available to determine whether a seizure is merely a *Terry* stop or rises to the level of an arrest, courts often look to the duration of the interaction and whether the officers "diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[65] Courts have found an "arrest-like seizure" where there was

[58] *See Dunaway*, 442 U.S. at 213 ("'The requirement of probable cause has roots that are deep in our history.'" (quoting Henry v. United States, 361 U.S. 98, 100 (1959)).

[59] Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (citing Carroll v. United States, 267 U.S. 132, 162 (1925). The standard for probable cause, the Court has said, provides clarity and straightforwardness, and assists law enforcement officers by providing a consistent standard to be applied to each new situation they encounter. *Dunaway*, 442 U.S. at 213–14 (1979) (citing *Brinegar*, 338 U.S. at 175–76).

[60] 392 U.S. 1 (1968).

[61] *Id.* at 27.

[62] *Id.*

[63] *Id.* at 26–27.

[64] *Id.*

[65] United States v. Sharpe, 470 U.S. 675, 686 (1985).

an in-custody interrogation,[66] the police transported the suspect to the police station to obtain fingerprints,[67] and the police seized personal belongings, such as luggage, from individuals, such that they could not leave the scene without them.[68] While *Terry* stops do not require an officer to have a warrant, under some circumstances, an officer making an *arrest* will need one.[69]

B. Requirements for Judicially Issued Warrants and Arrests Without Warrants

The Fourth Amendment outlines several requirements for a warrant to be constitutionally valid.[70] Warrants must (1) be supported by probable cause, (2) be supported by oath or affirmation, such as an affidavit, (3) particularly describe the persons or things to be seized, and (4) particularly describe the place or person to be searched.[71] In addition, the Fourth Amendment requires that warrants be issued by a neutral and detached magistrate,[72] who makes the determination that there is probable cause to believe that the individual has committed an offense such that an arrest warrant should be issued.[73] The Court has explained that this checkpoint

[66] Florida v. Royer, 460 U.S. 491, 499 (1983) (explaining that "reasonable suspicion of crime is insufficient to justify custodial interrogation even though the interrogation is investigative" because "[d]etentions may be 'investigative' yet violative of the Fourth Amendment" as an arrest lacking probable cause); Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding that detention for custodial interrogation constituted an arrest for which probable cause was required).

[67] Davis v. Mississippi, 394 U.S. 721, 727 (1969) ("Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment."); Hayes v. Florida, 470 U.S. 811, 814 (1985) (reversing on the grounds that there was no probable cause for an arrest, no consent for the transportation of the defendant to the police station, and no judicial authorization, such as a warrant, for a detention for the purpose of obtaining fingerprints).

[68] United States v. Place, 462 U.S. 696, 701, 708 (1983) (explaining that the seizure of personal property is per se unreasonable without a judicial warrant issued upon a finding of probable cause and holding that law enforcement officers seizing the luggage of a passenger at the airport for 90 minutes constituted a seizure for which probable cause was required); *see also* Steven J. Mulroy, *"Hold" on: The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 832–33 (2013).

[69] *See, e.g.*, Payton v. New York, 445 U.S. 573, 602–03 (1980) (warrant need for arrest at suspect's home).

[70] U.S. CONST. amend. IV.

[71] *Id.*

[72] Coolidge v. New Hampshire, 403 U.S. 443, 449 (1971) (holding that a warrant was invalid on the grounds that it was issued by the state official who was the lead investigator and prosecutor on the case and thus was not a neutral or detached judicial officer).

[73] Steagald v. United States, 451 U.S. 204, 213 (1981).

between law enforcement and an individual is important because the core of the Fourth Amendment "often is not grasped by zealous officers" who are "engaged in the often competitive enterprise of ferreting out crime."[74] Warrants ultimately serve to protect individuals by limiting the conduct of law enforcement to only those actions specified with sufficient particularity in the warrant.[75]

Warrants are not required in every circumstance to effectuate a lawful arrest under the Fourth Amendment.[76] The Court has held, in accordance with the common law rule, that an officer may effectuate a lawful, warrantless arrest in a public place for either a felony or misdemeanor offense when the officer has probable cause based on the commission of an offense in the officer's presence.[77] The Court has also held that, even where the offense was not committed in an officer's presence, officers may still make a warrantless arrest in a public place based on probable cause for *felony* offenses if there was "reasonable ground for making the arrest."[78] More recently, the Court ruled that a warrantless arrest effectuated with "[a] policeman's *on-the-scene assessment* of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest."[79] However, arrests made in an individual's own home or in the home of a third party are different from arrests in public places. In those circumstances, even with probable cause, the Constitution requires law enforcement officers to obtain a warrant prior to making such arrests absent consent or exigent circumstances.[80]

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[74] Johnson v. United States, 333 U.S. 10, 13–14 (1948). The Court additionally reasoned in *Johnson* that "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *Id.* at 14. Police officers engaged in this competitive enterprise "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." *Steagald*, 451 U.S. at 212 (citing *Coolidge*, 403 U.S. at 449–51; McDonald v. United States, 335 U.S. 451, 455–56 (1948)).

[75] ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION 130 (4th ed. 2022).

[76] *See* United States v. Watson, 423 U.S. 411, 417–18 (1976); Gerstein v. Pugh, 420 U.S. 103, 112–13 (1975) ("Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, . . . it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant" (internal citations omitted)).

[77] *Watson*, 423 U.S. at 418.

[78] *Id.*

[79] *Gerstein*, 420 U.S. at 113–14 (emphasis added).

[80] Payton v. New York, 445 U.S. 573, 600 (1980); Steagald v. United States, 451 U.S. 204, 221 (1981).

Once an officer has effectuated a warrantless arrest, the Court has further required "a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[81] The requirement of a speedy judicial probable cause determination is in line with the Court's prohibition on detention solely for the purpose of investigating crime.[82] While law enforcement "can certainly interact with an individual found in a public place on less than probable cause," police can transport individuals from one location to another only for such purposes as fingerprinting, interrogation, or photographing, and upon a finding of probable cause.[83]

C. Collective Knowledge Doctrine and Seizures Made Pursuant to Wanted Flyers

There are two contexts where courts have held that a reasonable suspicion or a probable cause determination by one officer may be imputed to another officer so as to authorize the other officer to make a lawful seizure. One context is what courts have called the doctrine of collective knowledge.[84] This doctrine permits a probable cause determination by one officer to be credited to another officer when the officers can be considered to have been working together in a search team.[85] The officers must have had some degree of communication amongst themselves to warrant a finding that the officers involved in the search or seizure were working together so as to have collective knowledge.[86] A second context where an individualized suspicion determination by one officer may be imputed to another officer unconnected with the investigation is in the context of communications, including wanted flyers and other announcements or communications.[87]

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[81] *Gerstein*, 420 U.S. at 113–14. In such cases, the court, in determining whether the arresting officer had sufficient probable cause, examines the events leading up to the arrest and determines whether the facts, viewed from the perspective of an objectively reasonable law enforcement officer, amounts to probable cause. D.C. v. Wesby, 538 U.S. 48, 56–57 (2018) (citing Maryland v. Pringle, 540 U.S. 366, 371 (2003)).

[82] Mulroy, *supra* note 68, at 832–34.

[83] *Id.* at 832–33.

[84] *See* United States v. Gillette, 245 F.3d 1032, 1034 (8th Cir. 2001).

[85] *See id.*

[86] *Id.* (citing United States v. Morales, 238 F.3d 952, 953 (8th Cir. 2001); United States v. Twiss, 127 F.3d 771, 774 (8th Cir.1997)). Courts have explained that this communication requirement distinguishes officers working as a search team from officers acting independently who happen to be working on the same investigation. *Id.*

[87] *See* United States v. Hensley, 469 U.S. 221 (1985).

In *Whiteley v. Warden, Wyoming State Penitentiary*, the Supreme Court held that when officers receive a communication from another jurisdiction with an alert to arrest a particular suspect, those officers are entitled to rely on that communication and act on its strength when effectuating an arrest.[88] *Whiteley* concerned a radio bulletin that led to the arrest of Harold Whiteley.[89] The radio bulletin described the suspects with detailed physical descriptors, as well as the amounts of money they were alleged to have stolen.[90] According to the Court, however, the radio bulletin consisted of "nothing more than the complainant's conclusion that the individuals named therein perpetrated the offense described in the complaint."[91] The Court concluded that the officers that relied on the bulletin did not have the authority to make an arrest, because the officer who issued the bulletin in the first instance did not have sufficient probable cause.[92] The Court reasoned that police officers receiving an announcement are entitled to act on it and assume that the issuing officers had the requisite probable cause, but are not authorized to act where probable cause is missing.[93]

In a subsequent decision, *United States v. Hensley*, the Court held that if a flyer or an announcement was issued by an officer on the basis of reasonable suspicion that the suspect had committed a crime, officers receiving the flyer and acting on its information are justified to rely on it and effectuate a *Terry* stop.[94] At issue in *Hensley* was a flyer which identified Thomas Hensley as wanted for the investigation of an aggravated robbery.[95] The flyer provided Hensley's description and the date and location of the alleged robbery.[96] In asking other departments to detain Hensley, the flyer warned them to use caution due to the potential danger he posed.[97] The flyer led officers to stop Hensley's vehicle and, upon discovering weapons in the vehicle, arrest him.[98]

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[88] 401 U.S. 560, 568 (1971).

[89] *Id.* at 560.

[90] *Id.*

[91] *Id.* at 565.

[92] *Id.* at 568.

[93] *Id.*

[94] 469 U.S. 221, 232 (1985). The Court stated that reliance on a flyer or announcement by the receiving officer justified that officer to make a *Terry* stop to check identification, pose questions to the suspect, or temporarily detain the person to obtain further information. *Id.*

[95] *Id.* at 223.

[96] *Id.*

[97] *Id.*

[98] *Id.* at 224–25. Upon making the traffic stop, the officers in *Hensley* approached the vehicle and discovered the butt of a revolver protruding from beneath the passenger's seat. *Id.* at 224. Based on the knowledge from one of the officers of the scene that the passenger was a previously convicted felon, Hensley's passenger

The *Hensley* Court began its analysis by stating that *Terry v. Ohio* authorizes law enforcement officers to briefly stop individuals, including in their vehicles, on the basis of reasonable suspicion that the person is about to or has committed a crime.[99] The Court next discussed *Whiteley*, and concluded that when evidence is uncovered during a search incident to arrest made pursuant to a flyer or announcement, its admissibility turns on whether the officers who issued the flyer had probable cause to make the arrest.[100] In applying *Whitley*, the *Hensley* Court further elaborated that the admissibility of the evidence did not turn on whether those relying on the flyer themselves were aware of the specific facts which led the issuing officers to issue the flyer.[101] The Court held that flyers or other announcements may authorize a *Terry* stop when the issuing officers had reasonable suspicion; however, the Court noted that flyers issued without reasonable suspicion would not authorize the officers relying on that flyer to make a stop of the suspect.[102]

In *United States v. Smith*,[103] the Eighth Circuit applied *Hensley* in the specific context of the Wanteds System in St. Louis County, concluding that the Wanted at issue provided the officers with sufficient reasonable suspicion to make a *Terry* stop.[104] There, the court held that Mario Smith was lawfully stopped for a brief investigatory detention pursuant to a Wanted, because the officers had sufficient reasonable suspicion available from the Wanted.[105] Later in the encounter, when Smith fled from the scene of the stop, the court determined that the officers then had sufficient probable cause to make a full arrest.[106]

Following a bank robbery on April 10, 2009, SLCPD Detective Vogel issued a Wanted for the vehicle that drove the suspect away from the scene.[107] A few days later, Detective Vogel also issued a Wanted for Smith.[108] Smith was arrested on April 15, 2009, when a different SLCPD

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was arrested, the vehicle was searched, and upon the discovery of two other firearms, Hensley was also arrested. *Id.* at 225.

[99] *Id.* at 225–27.

[100] *Id.* at 231.

[101] *Id.*

[102] *Id.* at 232.

[103] 648 F.3d 654 (8th Cir. 2011).

[104] *See id.*

[105] *Id.* at 659.

[106] *Id.* at 659–60.

[107] *Id.* at 656.

[108] *Id.* The first Wanted of the vehicle provided the following information: the description of the vehicle (color, make, license plate number), a general description of the suspect, and a request for law enforcement officers to hold the vehicle for prints and to field interview any passengers. *Id.* The second Wanted for Smith contained "identifying information" and requested that he be held for 24 hours "per Detective Vogel." *Id.* Detective Vogel, according to the court, described a Wanted as "an

officer ran a license plate check on his vehicle and conducted a traffic stop following notification that the vehicle had a Wanted for involvement in the bank robbery.[109] The court concluded that this arrest was lawful because the Wanted communicated reasonable suspicion to effectuate a *Terry* stop of the vehicle from the primary officer to the arresting officer.[110] Smith's subsequent flight from the scene, combined with the information supporting the stop, gave rise to a probable cause finding sufficient for an arrest.[111]

D. Facial Challenges Under the Fourth Amendment

A facial constitutional challenge is one where a complaining party alleges that a provision of law or policy violates constitutional rights in all of its applications.[112] To successfully bring a facial challenge, "the challenger must establish that no set of circumstances exists under which the Act would be valid."[113] A facial challenge differs from an as-applied constitutional challenge because "[a]n as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court. If an as-applied challenge is successful, the statute may not be applied to the challenger but is otherwise enforceable."[114] In a facial challenge, by contrast, the challenging party seeks to invalidate the entire provision of law in question, since it allegedly has no constitutionally valid applications.[115]

In 2015, the Supreme Court held that facial challenges under the Fourth Amendment were neither categorically barred nor especially disfavored.[116] In *City of Los Angeles v. Patel*, the Court explained the

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investigative tool that allows law enforcement to gather information or evidence of a crime and locate people who might have such information or evidence and possibly take them into custody." *Id.* at 656 n.2.

[109] *Id.* at 657.

[110] *Id.* at 659 ("Those particularized, objective facts and the inferences rationally drawn from them justified Officer O'Neill stopping the Cadillac and detaining Smith to determine if the Cadillac or Smith were involved in the bank robbery or could provide information helpful to the investigation.").

[111] *Id.* at 659–60.

[112] United States v. Salerno, 481 U.S. 739, 745 (1987).

[113] *Id.*

[114] Republican Party of Minn., Third Cong. Dist. v. Klobuchar, 381 F.3d 785, 790 (8th Cir. 2004).

[115] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 331 (2010).

[116] City of Los Angeles v. Patel, 576 U.S. 409, 412–15, 428 (2015). In *City of Los Angeles v. Patel*, the Court ultimately struck down a city municipal code which required hotel operators to make available guest information to law enforcement officers upon request on the basis that it facially permitted warrantless searches. *Id.* Such facial challenges, at least in the context of invalidating statutes on the basis that they permit warrantless searches, have been successful before the Court previously.

standard for facial challenges.[117] The most demanding standard the Court applies to facial challenges requires a plaintiff to establish that a law is unconstitutional in all of its applications.[118] The *Patel* Court further explained that when assessing this standard, a court should consider only applications of the statute in which it actually authorizes or prohibits conduct.[119]

The City of Los Angeles (the City), the petitioner, argued that a facial challenge to its municipal code failed because the searches it authorized would never be unconstitutional in all applications, particularly where police were responding to an emergency, where the party to be searched gives consent, and where the police were acting under the authority of a search warrant.[120] In applying the Court's standard for facial challenges, the Court held that the City's argument failed.[121] The searches the City argued were constitutional did not involve applications of the statute, and thus were not to be considered in the facial challenge analysis.[122] The Court reasoned that where an exigency or a warrant justified the officer's search, the individual facing the intrusion must permit the search to proceed regardless of whether it was authorized by statute.[123] Additionally, the Court noted that statutes authorizing warrantless searches are inapplicable where the individual has consented.[124] With this background of the substantive doctrine of the Fourth Amendment, as well as the legal standard for facial challenges, the *Furlow* court determined the Wanteds System was constitutional in at least some applications of its use.[125]

IV. INSTANT DECISION

While the *Furlow* court acknowledged some of the Wanteds System's inconsistencies with the Fourth Amendment, it ultimately held that "arrests may be effectuated under this system that do not violate the

See id. at 416–17 (first citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995); then Skinner v. Ry. Labor Execs.' Ass'n., 489 U.S. 602, 633 n.10 (1989); then Illinois v. Krull, 480 U.S. 340, 354 (1987); then Chandler v. Miller, 520 U.S. 305, 308–09 (1997); then Ferguson v. Charleston, 532 U.S. 67, 86 (2001); then Payton v. New York, 445 U.S. 573, 574, 576 (1980); and then Torres v. Puerto Rico, 442 U.S. 465, 466, 471 (1979)).

[117] 576 U.S. at 418.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 417–18.

[121] *See id.* at 427–28.

[122] *Id.* at 418–19.

[123] *Id.*

[124] *Id.*

[125] Furlow v. Belmar, 52 F.4th 393, 403 (8th Cir. 2022).

Constitution."[126] As a result, the plaintiffs' facial challenge to the constitutionality of the system failed.[127] This Part details the Eighth Circuit's two-fold conclusion in *Furlow*.

A. Wanteds are Problematic in Light of the Fourth Amendment

The Eighth Circuit's analysis began by stating that Wanteds are more than a mere investigatory tool, as they prompt arrests of individuals without a warrant.[128] Because Wanteds are not supported by a judicially-issued warrant, the court explained that they needed to fall within an exception to the warrant requirement to be constitutional.[129] The court next addressed and rejected several arguments by the defendants that the Wanteds system was reasonable under the Fourth Amendment. First, the court rejected that Wanteds were reasonable under the doctrine of collective knowledge.[130] The doctrine, courts have explained, applies where law enforcement officers are working as a search team, such that the collective knowledge shared by the officers through some degree of communication can impute one officer's determination of probable cause to another.[131] The court reasoned that officers utilizing the Wanteds system were not acting as a team because (1) the seizures were often made as a result of one officer who merely happened to come across someone with an active Wanted when the database was checked; and (2) Wanteds relied on one officer's determination of probable cause and imputed that information to an officer virtually anywhere in the country.[132] Thus, the officers using the Wanteds system lacked the element of communication necessary for them to have been considered a search team for purposes of the doctrine of collective knowledge.[133]

The court next rejected the defendants' claim that warrants were unduly burdensome.[134] The court acknowledged that the vast majority of other police units in the United States do not operate with a similar system and, absent exigent circumstances or an urgent threat to public safety, officers are not considered to be inconvenienced by the constitutional

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[126] *Id.* at 403–04.

[127] *Id.* The court ultimately remanded the case to the district court on other grounds. *See id.* at 407 (remanding on the district court's granting of qualified immunity to a detective).

[128] *Id.* at 401.

[129] *Id.* at 401–02.

[130] *Id.*

[131] United States v. Gillette, 245 F.3d 1032, 1034 (8th Cir. 2001) (citing United States v. Morales, 238 F.3d 952, 953 (8th Cir. 2001); United States v. Twiss, 127 F.3d 771, 774 (8th Cir. 1997)).

[132] *See Furlow*, 52 F.4th at 402.

[133] *Id.*

[134] *Id.* at 402–04.

requirement of obtaining a judicially-issued arrest warrant.[135] The court further pointed out that a Wanted and a warrant would, theoretically, contain overlapping information.[136] Then, the court analogized a Wanted to a "wanted flyer" that the Supreme Court has previously evaluated in light of the Fourth Amendment.[137] In *United States v. Hensley*, the Court explained that "while a wanted flyer is sufficient to justify a *Terry* stop allowing an officer 'to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further information,' it is insufficient to support an arrest or a *de facto* arrest unless there is a showing of probable cause."[138] The Eighth Circuit extended this same reasoning to the Wanteds System.

The court first pointed out that Wanteds are not warrants supported by probable cause, nor do they sufficiently relay enough facts to the arresting officer to allow that officer to make a probable cause determination.[139] Thus, the court concluded that, at their best, Wanteds may sometimes authorize a brief, *Terry*-like investigatory stop, which would require the slightly less stringent standard of reasonable suspicion.[140] Ultimately, the court stressed that Wanteds cannot provide a sufficient foundation for arresting officers to effectuate a prolonged detention under the Constitution.[141]

B. Wanteds Have Some Constitutional Applications

Despite the Fourth Amendment problems posed by some features of the Wanteds System, the Eighth Circuit ultimately held that the plaintiffs' facial challenge failed because the System's application was broad enough to encompass lawful arrests under the Constitution.[142] The court relied on the longstanding rationales for certain exceptions to the warrant requirement, including the need to assist law enforcement with the practical demands of the job like securing individuals before they evade law enforcement officers and before the officers have time to secure a warrant.[143] The court supported its reasoning by citing to case law identifying exigent circumstances that permit police officers to arrest

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[135] *Id.*

[136] *Id.* at 402. The court noted that the only additions required, in many cases, for the officer to obtain the warrant from the magistrate, would be the officer's grounds for determining the existence of probable cause, provided in a written affidavit, and the presentation of that information to the court. *Id.*

[137] *Id.* at 403–04.

[138] *Id.* at 403 (internal citations omitted).

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* at 403–04.

[143] *Id.*

individuals without a warrant.[144] Such circumstances include the committing of an offense in an officer's presence, a potential for the loss of evidence, and hot pursuit of a suspect who has committed a felony offense.[145] Thus, the court ultimately upheld the Wanteds System because these circumstances indicated that the Wanteds System can sometimes comply with the Constitution.[146] In making this conclusion, however, the court ignored both the correct standard for evaluating a Fourth Amendment facial challenge and the practical implications of its decision.

V. COMMENT

In *Furlow*, the Eighth Circuit denied the plaintiffs' facial challenge to the SLCPD Wanteds System because it found that some arrests made under the system may be made in compliance with the Fourth Amendment.[147] In coming to this decision, the court first misapplied the holdings of *Whiteley* and *Hensley* to conclude that Wanteds do not provide a sufficient basis for arrests to be made under the Constitution when, in fact, both cases inform that the information communicated to the officers effectuating the seizure is irrelevant to the seizure's constitutionality.[148] The *Furlow* court, under different logic, still concluded that Wanteds passed constitutional muster despite acknowledging the problems it creates and the original purpose for which it was created.[149] In reaching this conclusion, the court ignored the correct standard for evaluating a facial challenge under the Fourth Amendment. The Supreme Court, in a Fourth Amendment facial challenge, requires an examination of arrests that the Wanteds System *actually* permits, not arrests that would be lawful regardless of the use of a Wanted or not. An examination of the arrests that the Wanteds System does in fact permit, including *de facto* arrests in the absence of probable cause, warrantless arrests at a suspect's home, and investigatory detentions for the purpose of obtaining further evidence, demonstrates that the court should have held the Wanteds System facially unconstitutional. Further, regardless of the legal validity of the Wanteds System under the Constitution, the court, in deciding to allow the Wanteds System to continue, ignored the practical implications of its decision, such

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[144] *Id.* at 404.

[145] *Id.* at 403–04 (8th Cir. 2022) (citing Virginia v. Moore, 553 U.S. 164, 171 (2008) (stating a warrantless arrest may be justified even if the suspect committed "a minor crime in [the officer's] presence"); then citing United States v. Janis, 387 F.3d 682, 687 (8th Cir. 2004) (exigent circumstances), then citing Cupp v. Murphy, 412 U.S. 291, 296 (1973) (circumstances involving evanescent evidence); and then citing Tennessee v. Garner, 471 U.S. 1, 12 (1985) (incidents involving a fleeing felon)).

[146] *Id.* at 403–04.

[147] *Id.*

[148] *Id.* at 403–05.

[149] *Id.* at 397, 403.

as the burdens on citizens who are unlawfully arrested and the dangers of pretrial detention, as well as the erosion of judicial integrity.

A. The Eighth Circuit's Misapplication of Hensley *and* Whiteley

The *Furlow* court, in analyzing the application of the *Whiteley* and *Hensley* line of cases to the Wanteds System, stated that the Wanteds "cannot provide a sufficient basis to justify the arrest and prolonged detention of a suspect under the Constitution."[150] In reaching this conclusion, the court stated that Wanteds do not convey sufficient facts to provide the arresting officer enough information to make a probable cause determination before making a lawful arrest.[151] However, this consideration contradicts the Supreme Court's case law concerning imputed individualized suspicion. In *Whiteley*, the Court broadly stated that officers receiving a communication from another jurisdiction, such as a radio announcement, are entitled to rely on the strength of that communication when making an arrest.[152] The constitutionality of that arrest, the Court stated, turned not on the level of information communicated to the arresting officers but, rather, whether the underlying officers who issued the communication actually had sufficient probable cause to have made the initial lawful arrest themselves.[153] In *Hensley*, the Court further extended this logic to the context of reasonable suspicion for *Terry* stops, concluding that if a flyer or bulletin had been issued on the basis of reasonable suspicion, officers were justified in relying on that flyer to make a brief stop such as to check for identification, pose brief questions, or briefly detain the person to obtain further information.[154] The *Hensley* Court reiterated *Whiteley*'s reasoning that the arrest's lawfulness and the admissibility of any evidence obtained therein does not turn on whether those relying on the flyer themselves were aware of all specific facts that led their colleagues to make an individualized suspicion requirement.[155]

Based on the foregoing reasoning, the *Furlow* court's broad reading that Wanteds do not convey sufficient information to the arresting officers to allow them to make an arrest is irrelevant and without basis in the context of the *Hensley* and *Whiteley* holdings. Both *Hensley* and *Whiteley* inform an officer that the constitutionality of the arrest made pursuant to a Wanted turns not on the information relayed in the Wanted, but whether

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[150] *Id.* at 403.
[151] *Id.*
[152] *See* Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 568 (1971).
[153] *Id*. at 568–69.
[154] United States v. Hensley, 469 U.S. 221, 232 (1985).
[155] *Id.* at 230–31.

the issuing officer had probable cause to have made the arrest themself.[156] The *Furlow* court did not fully discuss whether all Wanteds are issued on the basis of probable cause for the purpose of determining whether the System is constitutional on its face. However, a proper examination of the standard for facial challenges under the Fourth Amendment will inform that they are not.

B. A Correct Application of the Facial Challenge Standard and the Unconstitutionality of the Wanteds System

Prior to its *Furlow* decision, the Eighth Circuit previously encountered arrests effectuated by the Wanteds System, but this case represented the first constitutional challenge to the System on its face.[157] The type of claim the plaintiffs brought in this case, a facial challenge under the Fourth Amendment, is not particularly common due to the individualized nature of an inquiry into the lawfulness of a particular search or seizure.[158] In 2015, however, the Supreme Court held in *Patel* that such claims are neither categorically barred nor especially disfavored, and further explained that Fourth Amendment facial challenges are to examine *actual* applications of the law or statute in question.[159] In *Furlow*, neither party nor the Court mentioned *Patel*. Nonetheless, its outcome is certainly relevant to this case, and a proper application of the facial challenge standard would compel a different outcome than the Eighth Circuit reached.

At the outset, the *Furlow* court incompletely stated that the standard applicable to the plaintiff's challenge demanded the plaintiff to establish

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[156] *See Furlow*, 52 F.4th at 397.

[157] *Id.* at 401.

[158] *See Fourth Amendment—Standing—Facial Versus As-Applied Challenges—* City of Los Angeles v. Patel, 129 HARV. L. REV. 241, 247 (2015) ("Many cases in this area concern the actions of individual government officials who carry out searches or seizures, and litigants who attack the constitutionality of such actions seldom frame their suits as challenges to statutes. This mode of litigation often also renders Fourth Amendment adjudication fact-intensive and context-sensitive in nature.").

[159] City of Los Angeles v. Patel, 576 U.S. 409, 412–15, 428 (2015). In *City of Los Angeles v. Patel*, the court ultimately struck down a city municipal code which required hotel operators to make available guest information to law enforcement officers upon request on the basis that it facially permitted warrantless searches. *Id.* Such facial challenges, at least in the context of invalidating statutes on the basis that they permit warrantless searches, have been successful before the Court previously. *See id.* at 416–17 (2015) (first citing Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995); then Skinner v. Ry. Labor Execs' Ass'n., 489 U.S. 602, 633 n.10 (1989); then Illinois v. Krull, 480 U.S. 340, 354 (1987); then Chandler v. Miller, 520 U.S. 305, 308–09 (1997); then Ferguson v. Charleston, 532 U.S. 67, 86 (2001); then Payton v. New York, 445 U.S. 573, 574, 576 (1980); and then Torres v. Puerto Rico, 442 U.S. 465, 466, 471 (1979)).

that there is no set of circumstances under which an act would be valid.[160] The court held that the plaintiffs failed to meet this burden because the exceptions to the warrant requirement allow officers to capture suspects rather than risk losing them in the intervening time it takes to obtain a warrant.[161] The court cited several cases to support its conclusion, including *Virginia v. Moore* and *United States v. Watson*.[162] Both cases support the common law rule that warrantless arrests may be justified when the suspect commits an offense, whether a felony or a misdemeanor, in the officer's presence.[163] The court went on to cite additional case law to support its conclusion that the Wanteds System encompasses some situations in which arrests are lawful under the Constitution, including exigent circumstances.[164]

The *Furlow* court's reliance on these cases is inconsistent with the Supreme Court's guidance on how to evaluate Fourth Amendment facial challenges. The court's reliance on the cases it cites is improper because *Patel* instructs the court to examine the Wanteds System in light of the *arrests it actually authorizes*, not those arrests that would be lawful regardless of whether they were effectuated pursuant to a Wanted or not.[165] The types of arrests the Eighth Circuit relied on to uphold the Wanteds System are all lawful regardless of whether the arresting officer is acting pursuant to a Wanted. For example, an officer making an arrest in an exigent circumstance, such as in hot pursuit of a suspect, does not rely on a Wanted; instead, they rely on the scope of the Fourth Amendment.[166] An officer making an arrest when they have witnessed an offense happen in their presence, or when there is an exigent circumstance such as fleeting evidence, are not situations involving application or use of the Wanteds System at all.[167] Thus, under the applicable Fourth Amendment standard for facial challenges, as explained by the Supreme Court in *Patel*, the Eighth Circuit should not have considered circumstances outside of *actual*

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[160] *Furlow*, 52 F.4th at 400 (8th Cir. 2022) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).

[161] *Id.* at 403.

[162] *Id.* at 403–04.

[163] *Id.* (citing Virginia v. Moore, 553 U.S. 164, 171 (2008); United States v. Watson, 423 U.S. 411, 418 (1976)). The Court also found support for its conclusion from *Carroll v. United States*, which noted that officers may make warrantless arrests where the officer has "reasonable cause" to believe an individual is guilty of a felony. *Id.* (citing Carroll v. United States, 267 U.S. 132, 156 (1925)).

[164] *Id.* (citing United States v. Janis, 387 F.3d 682, 687 (8th Cir. 2004) (exigent circumstances); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (evanescent evidence); Tennessee v. Garner, 471 U.S. 1, 12 (1985) (fleeing felon)).

[165] *See* City of Los Angeles v. Patel, 576 U.S. 409, 418–19 (2015).

[166] *See id.*

[167] *See Moore*, 553 U.S. at 171; *Watson*, 423 U.S. at 418; *Carroll*, 267 U.S. at 156; *Janis*, 387 F.3d at 687; *Cupp*, 412 U.S. at 296; *Garner*, 471 U.S. at 12.

applications of the Wanteds System when deciding whether there are any circumstances in which the Wanteds System permits lawful arrests under the Constitution.

An examination of the seizures that the Wanteds System *does* permit, however, would compel the conclusion that it is facially unconstitutional. The Wanteds System clearly authorizes investigatory detentions, *de facto* arrests made without probable cause, and arrests at a suspect's home without a warrant, all of which are unconstitutional.[168] Unlike the flyer in *Hensley* or the radio bulletin in *Whiteley*, Wanteds operate as *de facto* arrest warrants: the *Furlow* court acknowledged that they "have the practical impact of authorizing the seizure, arrest, and custodial interrogation of a person at a remote location."[169] The only assurance that Wanteds are issued on the basis of probable cause is found in the SLCPD's policies.[170] Prior to the commencement of Furlow's lawsuit, however, the SLCPD policies did not require the officer to make a probable cause determination prior to entering a Wanted into the system.[171] The 2016 SLCPD policy amendments now require a supervising SLCPD officer to approve a Wanted prior to its entry into the system, and specifies that Wanteds are for *felony* crimes, but does not speak to its application to misdemeanors.[172]

The problems with the reliance on the Wanted-issuing-officer's probable cause determination analysis is that, even as the *Furlow* court acknowledged, officers are using the Wanteds System not when they have probable cause but, specifically, when they lack it. Investigatory detentions based on warrantless arrests where the judicial probable cause determination is unreasonably delayed for the purpose of gathering additional evidence to justify the arrest are unconstitutional.[173] Yet the facts of *Furlow* itself show this is precisely the function which Wanteds fulfill. As the Eighth Circuit itself wrote in its own opinion, Wanteds were a creation of the SLPAO as a means of conducting interrogations of all suspects involved in an alleged crime prior to submitting an application

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[168] Furlow v. Belmar, 52 F.4th 393, 403 (8th Cir. 2022); Payton v. New York, 445 U.S. 573, 576 (1980).

[169] *Furlow*, 52 F.4th at 397.

[170] *Id.*

[171] *Id.* at 397 n.1.

[172] *Id.* at 397; *see also* DEPARTMENTAL GEN. OR. 20-026, *supra* note 23, at 3.

[173] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); *see* United States v. Lefkowitz, 285 U.S. 452, 467 (1932) ("An arrest may not be used as a pretext to search for evidence."), *abrogated on other grounds by* Arizona v. Gant, 556 U.S. 332, 350 (2009). This protection also extends to full searches of persons and automobiles or other effects in the name of investigating a person merely suspected of criminal activity without the requisite level of probable cause. Florida v. Royer, 460 U.S. 491, 499 (1983).

for a warrant.[174] This type of detention is normally found to require probable cause.[175] Additionally, a report published by the United States Department of Justice ("DOJ") in 2015 recommended that the Ferguson Police Department, a city within St. Louis County, discontinue its use of the Wanteds System for concerns regarding its constitutionality.[176] The DOJ wrote that this system "creates the risk that [W]anteds could be used improperly to develop evidence necessary for arrest rather than to secure a person against whom probable cause already exists."[177] According to the DOJ, this proposition runs contrary to the Supreme Court's jurisprudence prohibiting the detention of individuals on less than probable cause for the sole purpose of continuing an investigation.[178]

The DOJ report also found that the Wanteds operate as an "end-run around the judicial system," allowing officers to circumvent the courts.[179] It reported that, in some cases, an officer specifically used a Wanted when he knew he lacked the requisite probable cause to obtain a warrant.[180] For example, the report stated that some officers use the Wanteds System to detain persons with less than probable cause:

> For example, one veteran officer told us he will put out a wanted "if I do not have enough probable cause to arrest you." He gave the example of investigating a car theft. Upon identifying a suspect, he would put that suspect into the system as wanted "because we do not have probable cause that he stole the vehicle." Reflecting the muddled analysis officers may employ when deciding whether to issue a wanted, this officer concluded, "you have to have reasonable suspicion and some probable cause to put out a wanted."[181]

The *Furlow* court was aware of the DOJ's report and findings, acknowledging them in its opinion,[182] yet it failed to consider these consequences in its analysis.

Additionally, while the Wanteds System and SLCPD's policies state that Wanteds are only for felony crimes, and specifically lack any

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[174] *Furlow*, 52 F.4th at 398.

[175] *Royer*, 460 U.S. at 499.

[176] *Furlow*, 52 F.4th at 398.

[177] UNITED STATES DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION: INVESTIGATION OF FERGUSON POLICE DEP'T 23 (2015) [https://perma.cc/SSH7-XC7L].

[178] *Id.* at 24 (citing Dunaway v. New York, 442 U.S. 200, 216 (1979)).

[179] *Id.* at 22.

[180] *Id.* at 23–24.

[181] *Id.*

[182] Furlow v. Belmar, 52 F.4th 393, 398 (8th Cir. 2022).

information or authorization for misdemeanor crimes, Wanteds are in fact issued for misdemeanors in practice.[183] While the Supreme Court has held that an officer may make an arrest based on probable cause and reasonable grounds to believe that a *felony* crime has been committed even where they personally did not witness the activity in question, the Court has not yet said the same for *misdemeanor* offenses.[184]

A final problem with the Wanteds System operating to effectuate *de facto* arrests is that officers improperly use Wanteds to arrest individuals at their homes, a circumstance in which the Supreme Court specifically requires an arrest warrant.[185] The facts of *Furlow* itself establish this: Ralph Torres was arrested when an officer was patrolling in a certain neighborhood, ran a general check of the Wanteds System for outstanding Wanteds, saw Torres' Wanted, went to his home, found him working with his son in the garage on a bicycle, and arrested him there.[186]

A clear question emerges from examining the types of arrests the Wanteds System actually permits: what is the proper standard the Eighth Circuit should have applied to Furlow's facial challenge? The Wanteds System clearly authorizes investigatory detentions, *de facto* arrests made without probable cause, and arrests at a suspect's home without a warrant, all of which are unconstitutional.[187] The Eighth Circuit's conclusion that *some* applications may be constitutional, including arrests made pursuant to exigent circumstances, such as a person who has committed a felony fleeing from law enforcement or the possibility of losing evidence,[188] are all types of arrests that may be made without consideration of the Wanteds System or its use at all. As such, the Eighth Circuit came to the wrong conclusion when it held that the Wanteds System is not facially unconstitutional.

C. The Court Ignored Important Practical Considerations that Compel Finding the Wanteds System Unconstitutional

Even if, for the sake of argument, the Eighth Circuit correctly upheld the constitutionality of the Wanteds System based on the fact that *some* uses of the Wanteds System are constitutional, the court's failure to consider the practical effects of Wanteds on residents of St. Louis and surrounding jurisdictions will continue to lead to negative results. In fact,

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[183] *Id.*; DEPARTMENTAL GEN. OR. 20-026, *supra* note 23, at 3.

[184] United States v. Watson, 423 U.S. 411, 418 (1976).

[185] Payton v. New York, 445 U.S. 573, 600 (1980); Steagald v. United States, 451 U.S. 204, 221 (1981).

[186] Furlow v. Belmar, No. 4:16CV254 HEA, 2018 WL 4853034, at *4 (E.D. Mo. Oct. 5, 2018), *aff'd in part, rev'd in part and remanded*, 52 F.4th 393 (8th Cir. 2022).

[187] *Furlow*, 52 F.4th at 403; *Payton*, 445 U.S. at 576.

[188] *Furlow*, 52 F.4th at 403–04.

by holding that the system is "sometimes constitutional," the court implicitly admits that it is sometimes *unconstitutional*. The Fourth Amendment demands more than upholding certain police arresting procedures merely because they are efficient. The Eighth Circuit's determination that the Wanteds System is constitutional creates a burden on citizens who are arrested unlawfully pursuant to a Wanted, weakens respect for the courts and the integrity of the judicial system, and potentially permits the introduction of evidence obtained unlawfully against a person charged with a crime.

To begin, the continued existence and use of the Wanteds System perpetuates a system in which individuals with an active Wanted are constantly under the threat of an arrest made with less than probable cause. Under the Wanteds System, as the plaintiffs argued at the district court level, individuals are deprived of their liberty to move about freely and without constant fear and threat of getting arrested, even when acting lawfully.[189] Moreover, in the case of such arrests made pursuant to a Wanted where the arresting officer lacked probable cause to make an arrest, the consequences of an arrest and even a short period of time in jail presents substantial burdens on individuals. Courts and research alike have documented the substantial, harmful impacts even a short period of time spent awaiting potential prosecution can have, including an impairment on a person charged with a crime in assisting their lawyer in meaningfully preparing their defense.[190] Furthermore, individuals who are arrested and detained are at heightened risk for losing their jobs, their vehicles, and custody of their children, as well as a heightened risk for reoffending when released from jail and receiving a sentence of incarceration over probation.[191] These arrestees are also more likely either to be found guilty (because of their inability to help with their case) or to plead guilty because of, in part, a desire to avoid further incarceration.[192]

The *Furlow* court's ability to acknowledge some of the constitutional problems of the Wanteds System and yet reach a conclusion that its use may continue also weakens respect for the judiciary as an entity which enforces the Constitution and protects citizens. The Wanteds System permits at least some types of arrests that are unlawful, including arrests

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[189] *Furlow*, 2018 WL 4853034, at *5.

[190] *In re* Humphrey, 482 P.3d 1008, 1015–16 (2021) ("If not released, courts have observed, the accused may be impaired to some extent in preparing a defense.") (citing Van Atta v. Scott, 613 P.2d 210, 215 (Cal. 1980) (plurality opinion); Gerstein v. Pugh, 420 U.S. 103, 123 (1975)). *See also* Kate Taylor, *System Overload: The Costs of Under-Resourcing Public Defense*, JUST. POL'Y INST. (July 27, 2011), https://justicepolicy.org/wp-content/uploads/2022/02/system_overload_final.pdf [https://perma.cc/ADS5-VYKT] ("By remaining in jail, people are less able to help in their defense . . . . ").

[191] *Humphrey*, 482 P.3d at 1015–16; Taylor, *supra* note 190.

[192] *See* Taylor, *supra* note 190.

at a suspect's home without a warrant, and operates as an end-run around the judicial system, purposefully flouting the protective system of requiring judicially-issued warrants that is already in place and effective.

Additionally, the *Furlow* court's holding ignores practical implications of its decision in that courts making decisions regarding the Fourth Amendment are doing much more than impacting the conduct of the police; their decisions about whether arrests are made lawfully or unlawfully impact what evidence will be admitted against a criminal defendant or excluded under the exclusionary rule. The Eighth Circuit's opinion omits any discussion as to the potential harms that arrests, legal or not, made pursuant to a Wanted leave to the judicial system, complicating the evidence obtained in a search incident to that arrest or any further intrusion into the privacy of an individual. This only further permits the problems that the Wanteds System poses for individuals in St. Louis County and surrounding counties.

VI. CONCLUSION

The Eighth Circuit's interpretation of the law in *Furlow v. Belmar*, and the court's application of the law to the St. Louis County Wanteds System, leaves residents vulnerable to violations of their rights.[193] The court's questionable interpretation that the Wanteds System has some constitutional applications based on the incorrect standard for a facial constitutional challenge provides the people of St. Louis with little judicial recourse where they already lacked the opportunity to challenge the publication of a Wanted in the SLCPD private system.[194] The impacts of this interpretation extend much further than the type of police conduct discussed in this opinion: St. Louis County residents remain at risk of getting arrested and facing the harmful consequences even a small period of time in jail creates. Of course, the problems with the Wanteds System outlined in the Eighth Circuit's opinion, including that it does not give arresting officers enough information for a probable cause determination to make an arrest, are powerful medicine for future as-applied challenges, allowing criminal defendants and individual plaintiffs to argue that their arrest and the Wanteds System—as applied to them—violated their Fourth Amendment rights.[195] Nevertheless, the Eighth Circuit missed an opportunity to ensure the protection of Fourth Amendment rights, instead approving a system that, by design, flouts the judiciary for years to come.

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[193] *See* Furlow v. Belmar, 52 F.4th 393, 404 (8th Cir. 2022).

[194] *See id.* at 398 (describing that citizens do not have the opportunity to challenge a Wanted published for their detention).

[195] *See id.* at 403.