IN THE SUPREME COURT OF GUAM

THE PEOPLE OF GUAM,
Plaintiff-Appellee,

v.

MARK ANTHONY BRYAN,
aka Mark Anthony Brian Camacho,
aka Mark Anthony Cruz,
Defendant-Appellant.

Supreme Court Case No.: CRA17-004
Superior Court Case No.: CF0013-17

OPINION

Cite as: 2019 Guam 8

Appeal from the Superior Court of Guam
Argued and submitted on July 11, 2018
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; ROBERT J. TORRES, Associate Justice.

MARAMAN, C.J.:

[1] This case involves first appearances and the consequences of the government's failure to bring a criminal arrestee before a judge within 48 hours of his or her arrest. We granted Defendant-Appellant Mark Anthony Bryan's Petition for Permission to Appeal to review questions related to his 28-day post-arrest detention before his first appearance. At the core of this appeal, we must determine whether Plaintiff-Appellee People of Guam ("People") met their burden of proving the existence of "a bona fide emergency or an extraordinary circumstance" based on Bryan's hospitalization, to justify the excessive delay in bringing Bryan before a judge of the Superior Court after his arrest. Ultimately, the People failed to meet their burden.

[2] We hold that the People violated both Bryan's constitutional right to a prompt probable cause determination after arrest and his statutory first appearance rights. Therefore, we reverse the trial court's denial of Bryan's Motion to Dismiss and remand the matter with directions to dismiss the Indictment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The facts are not in dispute. Bryan was arrested on January 4, 2017, on one charge of felony robbery of a motor vehicle and one charge of misdemeanor theft. On January 5, 2017, while in custody,[1] Bryan was taken to Guam Memorial Hospital ("GMH"). Bryan's magistrate hearing was first scheduled for January 6, 2017, but it was continued because of his

[1] Bryan submitted a Motion for Judicial Notice asking this court to take notice of Guam Memorial Hospital Policy No. 411 regarding the "Forensic Patient" and Guam Memorial Hospital Policy No. 6301-I-F-8 regarding the "Jail Custody Patient." *See* Mot. Judicial Notice (May 2, 2018). The People filed a statement of non-opposition. *See* Non-Opp'n to Mot. Judicial Notice (May 9, 2018). The People also concede in their brief that Bryan was admitted to GMH while in custody, Appellee's Br. at 6 (May 9, 2018), and their arguments on appeal assume Bryan was in custody while at GMH. Based on the People's concession and non-opposition to the motion, we determine for purposes of this appeal that Bryan was "in custody" while at GMH.

hospitalization. The Superior Court scheduled, and continued, magistrate hearings for Bryan on January 7, 2017, and every day from January 9, 2017, until January 13, 2017. Until the last scheduled hearing, it was continually noted that the defendant was still at GMH.

[4] A grand jury indicted Bryan on January 13, 2017. No further magistrate hearings were scheduled. Bryan's arraignments scheduled for January 18, 2017, and January 25, 2017, were also continued due to his hospitalization. Bryan was formally discharged from GMH on January 26, 2017. Bryan first appeared before a judge on February 1, 2017, for an arraignment hearing. As he was not represented by counsel, the court postponed the arraignment and appointed the Alternate Public Defender to represent him. Bryan was formally arraigned on February 3, 2017.

[5] On April 14, 2017, Bryan filed a Motion to Dismiss and Motion for Immediate Release, arguing that failing to bring him before a judge within 48 hours of his arrest warranted dismissal of the Indictment with prejudice, or at least immediate release pending trial. Record on Appeal ("RA"), tab 60 (Ex Parte Mot. Immediate Release & Mot. Dismiss, Apr. 14, 2017). He attached to his motion: (1) his own declaration he had been cleared by Dr. Philips on January 8, 2017, to attend court, and (2) a note from Dr. Czerniakow dated January 25, 2017, confirming that Bryan had been cleared since January 8, 2017, to go to court while hospitalized. *Id.* at Ex. A. In Bryan's declaration, he admits to being formally discharged from the hospital on January 26, 2017. *Id.* The trial court heard the motion on April 17, 2017, during which the People presented no evidence, but asked for time to respond. The People never responded before the court denied the motion on May 4, 2017. RA, tab 64 (Dec. & Order, May 4, 2017).

[6] In denying the motion, the trial court found that Bryan's hospitalization constituted an extraordinary circumstance because "hauling a defendant under hospital care into court for a First Appearance and to be informed of his rights would be inhumane." *Id.* at 7. The court also found that Bryan's declaration and Dr. Czerniakow's note indicated that no notice was presented

to the Department of Corrections or the court before January 25, 2017. *Id.* The court found: "Absent such evidence, the Court can only conclude that the Court, in good faith, continued the First Appearance as long as Bryan remained under GMH care, and Bryan's hospitalization constitutes an extraordinary circumstance the government must demonstrate to justify the delay." *Id.* at 7-8. The court also added that, even if there were a violation, dismissal would not be the appropriate remedy. *Id.* at 8-9.

[7] Bryan filed a Petition for Permission to Appeal, which we granted.

II. JURISDICTION

[8] This court has jurisdiction to review an interlocutory order of the Superior Court when we determine that "resolution of the questions of law on which the order is based will: (1) [m]aterially advance the termination of the litigation or clarify further proceedings therein; (2) [p]rotect a party from substantial and irreparable injury; or (3) [c]larify issues of general importance in the administration of justice." 7 GCA § 3108(b) (2005); *see also* 48 U.S.C.A. § 1424-1(a) (Westlaw through Pub. L. 116-21 (2019)); *People v. Angoco*, 2006 Guam 18 ¶¶ 14, 19.

III. STANDARD OF REVIEW

[9] This court reviews questions of law *de novo*. *See People v. Rasauo*, 2011 Guam 1 ¶ 13. Claims of constitutional violations are also reviewed *de novo*. *See, e.g.*, *People v. Guerrero*, 2017 Guam 4 ¶ 16; *People v. Mendiola*, 2015 Guam 26 ¶ 11; *People v. Diego*, 2013 Guam 15 ¶ 8.

IV. ANALYSIS

[10] The Fourth Amendment requires the existence of probable cause to authorize an arrest and prohibits "unreasonable . . . seizures" of a person. U.S. Const. amend. IV; 48 U.S.C.A. § 1421b(c), (u) (Westlaw through Pub. L. 116-21 (2019)); *California v. Hodari D.*, 499 U.S. 621,

624 (1991); *Henry v. United States*, 361 U.S. 98, 100 (1959). The Fourth Amendment—along with the Fifth and Sixth Amendments—was adopted, in part, to prohibit the use of general warrants and indefinite detentions that had historically occurred at common law. *See, e.g.*, Joseph J. Stengel, *The Background of the Fourth Amendment to the Constitution of the United States*, 3 U. Rich. L. Rev. 278, 291-98 (1969); F.W. Maitland, *The Constitutional History of England* 263 (Cambridge 1919).

[11] The United States Supreme Court, in *Gerstein v. Pugh*, 420 U.S. 103 (1975), held that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite" to extended restraint of liberty following arrest. 420 U.S. at 126. The Supreme Court later elaborated that a jurisdiction that provides "judicial determinations of probable cause within 48 hours of arrest" would generally comply with *Gerstein*'s "promptness requirement." *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). "Guam has enacted 8 GCA § 45.10 to codify the principles of *Gerstein*." *People v. Tedtaotao*, 2014 Guam 33 ¶ 14. The statute provides:

> **§ 45.10. Duty to Deliver Arrestee to Judge, or to Peace Officer.**
>
> (a) An officer making an arrest under a warrant or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a judge of the Superior Court.
>
> . . . .
>
> (c) The person arrested *shall* in all cases be taken before the judge within forty-eight (48) hours after the arrest, *except* that when the forty-eight (48) hour period expires, it is the burden of the government to demonstrate that a bona fide emergency *or* an extraordinary circumstance existed.

8 GCA § 45.10 (as amended by Guam Pub. L. 29-075:1 (May 9, 2008)). In *Tedtaotao*, we observed *Gerstein*'s explanation that fundamental reasons for requiring a prompt judicial determination of probable cause include the possibility that "[p]retrial confinement may imperil

the suspect's job, interrupt his source of income, and impair his family relationships." 2014 Guam 33 ¶ 14 (alteration in original) (quoting *Gerstein*, 420 U.S. at 114). We held that a criminal defendant already in custody for a different crime does not have a constitutional or statutory right to a prompt judicial hearing because there is no new "arrest" to trigger those rights. *Id.* ¶ 15. Under *Gerstein*, and implicitly under *Tedtaotao*, a defendant not previously in custody has the right to a prompt probable cause determination and the right to be promptly brought before a judge for a first appearance—that is, within 48 hours of arrest. *See Gerstein*, 420 U.S. at 123 & n.24, 126; *Tedtaotao*, 2014 Guam 33 ¶¶ 14-15; *see also McLaughlin*, 500 U.S. at 56-57.

[12] We must now examine the extent of a criminal defendant's first appearance right—and the related right to a prompt probable cause determination—and the applicability of any justifications for the government's failure to uphold this "very old right."[2] *McLaughlin*, 500 U.S. at 60 (Scalia, J., dissenting).

A. A Defendant's Hospitalization Alone Does Not Constitute a Bona Fide Emergency or Extraordinary Circumstance under Guam's First Appearance Statute

[13] All parties agree that Bryan was hospitalized and remained in custody from January 5, 2017, until January 26, 2017. We must determine whether admission to the hospital, with nothing else, constitutes a bona fide emergency or an extraordinary circumstance under 8 GCA § 45.10(c).

[14] The People argue that their failure to bring Bryan before a judge of the Superior Court within 48 hours of his arrest is based on the bona fide emergency or extraordinary circumstance

[2] To be clear, we are dealing with two separate, but related, rights: the right to a first appearance for a defendant not previously in custody, and the right to a prompt judicial determination of probable cause following arrest. *Compare* 8A Am. Jur. 2d *Bail and Recognizance* § 52 (May 2019 Update) (right to hearing after arrest), *with* 21 Am. Jur. 2d *Criminal Law* § 517 (May 2019 Update) (warrantless arrest; judicial determination of probable cause as prerequisite to detention). While both rights may be satisfied in a single judicial or magistrate's hearing, they are nonetheless distinct.

exception in 8 GCA § 45.10(c). Appellee's Br. at 17-21 (May 9, 2018). Relying on the California Supreme Court cases of *People v. Lane*, 366 P.2d 57 (Cal. 1961) (in bank), and *In re Walker*, 518 P.2d 1129 (Cal. 1974) (in bank), the People argue there was no obligation to bring Bryan for a first appearance until he was discharged from the hospital. Appellee's Br. at 18-19. A close inspection of those cases, however, demonstrates their limitations. In both *Lane* and *Walker*, the defendants were transported to the hospital after suffering serious injuries. *See Lane*, 366 P.2d at 61; *Walker*, 518 P.2d at 1138. In *Lane*, the defendant suffered gunshot wounds to both his legs just below the kneecaps during a shootout. 366 P.2d at 60. In *Walker*, the defendant was shot twice during a struggle with officers over the control of a gun, causing the defendant to bleed badly and complain of significant pain. 518 P.2d at 1135.

[15] These and other cases address the level of injury or illness required to constitute a bona fide emergency or an extraordinary circumstance. In *Meskimen v. Commonwealth*, 435 S.W.3d 526 (Ky. 2013), the defendant was taken to the hospital following "excruciating pain as a result of a visible head injury" where "it was determined that Appellant had a skull fracture and brain injury that had likely occurred at least five days prior to his hospital admission." *Id.* at 530. The *Meskimen* court held that the Appellant's injuries "would justify a delay in a probable cause hearing." *Id.* at 534. In *United States v. Murray*, 197 F.R.D. 421, 422 (S.D. Cal. 2000), the trial court excused a delay because the defendant was receiving necessary medical treatment for psychological issues. The Alaska Supreme Court similarly found that short-term hospitalization for emergency evaluation of psychiatric disorders seldom runs afoul of the Constitution and due process. *In re Daniel G.*, 320 P.3d 262, 271-73 (Alaska 2014). In *Waganfeald v. Gusman*, 674 F.3d 475, 482 (5th Cir. 2012), the Fifth Circuit found that a devastating hurricane constituted a bona fide emergency that suspended the 48-hour rule.

[16] The facts of these prior cases demonstrate that, to satisfy the bona fide emergency or extraordinary circumstance exception to the 48-hour rule, the government must show more than hospitalization. We find that when an arrestee is hospitalized, the People must show how the hospitalized arrestee's injuries or condition prevent safely transporting him to a first appearance or probable cause hearing, or arranging his appearance through other means. Without this showing, the People cannot justify a delay over 48 hours.

B. The Superior Court Improperly Shifted the Burden to Bryan to Prove the Absence of a Bona Fide Emergency or an Extraordinary Circumstance

[17] In a prior version of 8 GCA § 45.10, the government had to bring an arrestee before a judge within 24 hours of arrest, the only extension being for the closure of the Superior Court. *See* 8 GCA § 45.10 (2005). Subsection (c) was amended by Public Law 29-075:1 to extend the period to 48 hours and allow an extension for bona fide emergencies or extraordinary circumstances. *See* Guam Pub. L. 29-075:1 (May 9, 2008). This amendment codified for Guam the exception announced in *County of Riverside v. McLaughlin*. Under *McLaughlin* and Guam law, as amended:

> Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance.

McLaughlin, 500 U.S. at 57.

[18] In its order denying Bryan's Motion to Dismiss, the trial court found that Bryan's evidence did not support that he had given notice to the Department of Corrections he was cleared to attend court during his hospitalization. RA, tab 64 at 7 (Dec. & Order). The trial court stated: "Absent such evidence, the Court can only conclude that the Court, in good faith, continued the First Appearance as long as Bryan remained under GMH care, and Bryan's

hospitalization constitutes an extraordinary circumstance the government must demonstrate to justify the delay." *Id.* at 7-8. By making findings based on the lack of evidence, the trial court improperly shifted the burden to Bryan to produce evidence that an extraordinary circumstance did not exist.

[19] The People admit they bear the burden under 8 GCA § 45.10. Appellee's Br. at 11-17. The trial court found that the "Court"—*i.e.*, the judge at the original magistrate hearings—acted in good faith in continuing the hearing, given Bryan's hospitalization. RA, tab 64 at 7 (Dec. & Order). In finding that the court acted in good faith, however, the trial court focused on the wrong party. The focus of the burden in 8 GCA § 45.10 is not the court, but the arresting officer and the government. However, the trial court recognized that neither the arresting officer nor the government presented evidence regarding the existence of a bona fide emergency or extraordinary circumstance beyond Bryan being in the hospital. *Id.* The trial court essentially presumed that the People—in addition to the "Court"—were acting in good faith by continuing the hearing.

[20] A legal presumption serves an evidentiary function by placing and shifting the burdens of proof and production. *See Presumption, Black's Law Dictionary* (11th ed. 2019); *see also, e.g.*, *People v. Cox*, 2018 Guam 16 ¶¶ 17-18; *Quijano v. Atkins-Kroll, Inc.*, 2008 Guam 14 ¶ 34; *In re Estate of Hemlani*, 2008 Guam 25 ¶ 42; *Fagan v. Dell'Isola*, 2006 Guam 11 ¶¶ 22-27. A finding of "good faith" governmental conduct, without requiring corroborating evidence, acts as a functional presumption and therefore has an evidentiary effect. *See Cox*, 2018 Guam 16 ¶ 17; *Presumption, Black's Law Dictionary* (11th ed. 2019) ("Something that is thought to be true because it is highly probable."). In certain circumstances, good faith conduct by governmental actors can be presumed, but only when an objective basis—such as a warrant—exists. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 922 (1984) (allowing a good faith presumption even when

police relied on a defective warrant); *United States v. Harrison*, 566 F.3d 1254, 1256 (10th Cir. 2009).

[21] For certain constitutional rights, it is the government's affirmative burden to prove good faith. *See Barber v. Page*, 390 U.S. 719, 725 (1968) (government must make good faith effort to get witnesses to court), *overruled on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004); *Pierson v. Ray*, 386 U.S. 547, 556-58 (1967) (finding a defense of good faith was available to police officer in § 1983 action). Since both *McLaughlin* and our statute specify that the government bears the burden of proof, it is inappropriate to employ a presumption that relieves the People of this burden.

[22] Although the trial court correctly recited the appropriate burden, it failed to apply the correct standard when it stated, "Absent such evidence, the Court can only conclude that the Court, in good faith . . . ," RA, tab 64 at 7-8 (Dec. & Order), effectively providing a presumption for the government in direct contradiction to 8 GCA § 45.10(c). The correct legal question is whether the People proved the existence of a bona fide emergency or an extraordinary circumstance. Under our *de novo* review, we conclude the People have not met their burdens of proof and production as a matter of law.

[23] "Statements and arguments of counsel are not evidence and are not to be considered as such." *People v. Reyes*, 1998 Guam 32 ¶ 20. A party that bears the burden of proving an issue also must produce evidence to support its position. *See Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 28 (finding that a defendant must affirmatively provide evidence to satisfy his burdens of proof and production on an issue). While a fact-finder may make inferences based on the lack of evidence, *see United States v. Caccia*, 122 F.3d 136, 138-39 (2d Cir. 1997), those inferences do not supply proof of a particular fact, but may be used only to weigh facts already in evidence, *In re Samantha C.*, 847 A.2d 883, 899-900 (Conn. 2004).

[24] Here, the People provided no evidence—such as affidavits, live testimony, or medical records—regarding Bryan's hospitalization or the risks to Bryan's health that would result from being transported from the hospital. Bryan, on the other hand, presented a doctor's note dated January 25, 2017, stating that he was cleared on January 8, 2017, to attend court. The note was attached to Bryan's affidavit confirming this version of events. RA, tab 60 at Ex. A (Ex Parte Mot. Immediate Release & Mot. Dismiss). While the trial court may disbelieve Bryan and need not accept his version of events, the People provided no controverting evidence. Even if Bryan's affidavit and evidence arguably concede the existence of a bona fide emergency until January 8, 2017, nothing in the record indicates any jeopardy to Bryan's health after that date. Without bearing its burden of production, we conclude that the People failed to meet their burden of proof.

[25] Further, the *ex parte* nature of the defense motion does not affect our conclusion. The People argue that they lacked sufficient time to produce evidence because Bryan filed his Motion to Dismiss *ex parte*, which expedited the hearing. At the motion hearing, the People indicated that they wanted "an opportunity to respond for motions to dismiss." Transcript ("Tr.") at 22 (Motion Hearing, Apr. 17, 2017). The court replied: "Right. Okay." *Id.* Although the Motion to Dismiss was heard the business day immediately after it was filed—there was an interceding weekend—the trial court's decision on the Motion to Dismiss was not issued until seventeen days after the hearing. The seventeen-day delay was ample time for the People to submit evidence, ask for another hearing, make an offer of proof, or submit a written response to the motion. Instead, the People submitted no evidence and did not reply to the basis of Bryan's motion. They also never sought a continuance.

[26] If the People are to justify a delay beyond 48 hours, they should have the evidence in their possession at the expiration of the statutory time period. It should not require an extensive

search for evidence that is prejudiced by an *ex parte* hearing. Just as delays in pursuing a probable cause determination are unreasonable if they are for the purpose of obtaining additional evidence to justify an arrest, *McLaughlin*, 500 U.S. at 56-57, the People cannot justify further delay to find evidence to meet their burden of proving a bona fide emergency or extraordinary circumstance. Delays in bringing someone before a judge within 48 hours cannot be justified by evidence discovered after the violation has occurred; otherwise, the People would be attempting a prohibited "eleventh hour rationalization." *People v. Petros*, D.C. No. 84-00043A, S.C. No. 8F-84, 1986 WL 68513, at *3 (D. Guam App. Div. Feb. 20, 1986).

C. A Subsequent Indictment Does Not Excuse the Government's Failure to Bring a Criminal Defendant Before a Judge Within 48 Hours of Arrest

[27] To rationalize the prolonged detention, the People point to the Indictment, obtained on January 13, 2017, and argue that it cures the prior lack of a first appearance and probable cause determination. The People justify the detention before January 13, 2017, based on the existence of a bona fide emergency, and the detention after January 13, 2017, based on the Indictment. There are two distinct, but related, questions about Bryan's eventual indictment: First, does a subsequent indictment excuse the government's failure to bring a defendant before a magistrate within 48 hours for a probable cause determination? Second, if the government obtains a probable cause finding through other means, is the government still required to bring a criminal defendant before a judge within 48 hours of arrest for a first appearance?

1. The subsequent indictment of Bryan does not cure the violation of his right to a prompt probable cause determination following his arrest

[28] "[I]f [a] person was arrested without a warrant, an indictment eliminates her Fourth Amendment right to a prompt judicial assessment of probable cause to support any detention." *Kaley v. United States*, 571 U.S. 320, 329 (2014); *see also* 8 GCA § 45.20(b) (2005) ("The defendant shall have no right to be present at any hearing leading to such [probable cause]

determination."). Although an indictment may excuse the requirement of a probable cause hearing, a later-obtained indictment does not cure the violation of a constitutional right to a probable cause determination within 48 hours of arrest. *See, e.g.*, *State v. Wallace*, 25 So. 3d 720, 726-27 (La. 2009).

[29] The People obtained an indictment against Bryan on January 13, 2017. Under *Gerstein*, any potential constitutional violation would have occurred beginning 48 hours after his arrest on January 4, 2017, until he was indicted nine days later on January 13, 2017. The People contend that the Indictment cures only a potential violation from January 13, 2017, forward. Because we determined that the People failed to establish the existence of a bona fide emergency or an extraordinary circumstance, Bryan's Fourth Amendment rights were violated based on his detention from January 6, 2017—*i.e.*, 48 hours after his arrest—until January 13, 2017.

2. An indictment does not relieve the People of their statutory obligation to bring a defendant before a magistrate for his first appearance

[30] We also must consider the effect of the subsequent indictment on Bryan's detention from January 13, 2017, through his first appearance before a judge on February 1, 2017, in what was initially scheduled as an arraignment, but ultimately converted to a first appearance.[3] The People argue that the subsequent indictment makes the detention constitutionally permissible after January 13, 2017. Bryan responds that a later grand jury indictment does not cure the failure, and that holding otherwise would allow the prosecution to circumvent its obligations under 8 GCA § 45.10.

[31] We recognize the potential constitutional questions that arise concerning the effect of a later indictment on an already unlawful detention. *See, e.g.*, *Armstrong v. Squadrito*, 152 F.3d

[3] We recognize that, as a practical matter, a first appearance and an arraignment may occur during a single hearing. While there is generally no error in combining the hearings, a defendant has a right to each. If the law does not require either a first appearance or an arraignment in an individual case, it does not automatically excuse the government from the obligation to provide the other hearing.

564, 596 (7th Cir. 1998); *Coleman v. Frantz*, 754 F.2d 719, 731 (7th Cir. 1985) (recognizing a constitutional right to a first appearance), *receded from on other grounds by Benson v. Allphin*, 786 F.2d 268, 279 n.26 (7th Cir. 1986). While the People suggest that a grand jury indictment may substitute for a probable cause determination before a judge and relieve the People of the constitutional obligation to bring a defendant for a first appearance, Appellee's Br. at 24 (citing *Kaley*, 571 U.S. 320), we need not reach those questions here because Guam statutes provide the answer. *See Hammonds v. Boonprakong*, Civ. Nos. 81-003A, 81-00048A, 1983 WL 30221, at *4 (D. Guam App. Div. Apr. 4, 1983) (avoiding constitutional question because issue was resolved on statute's language).

[32] Guam's first appearance statute, 8 GCA § 45.10, requires an arresting officer to bring the arrestee before a judge of the Superior Court within 48 hours of his or her arrest—little else. 8 GCA § 45.10. While the statute was enacted to ensure Guam's compliance with *Gerstein*, *see Tedtaotao*, 2014 Guam 33 ¶ 14, the statute's first appearance right provides more than just the probable cause determination required before a prolonged detention. Besides providing an arrestee a probable cause determination, 8 GCA § 45.20(b), the first appearance serves as a safeguard to ensure that a defendant is informed of his rights, *id.* § 45.30. At a first appearance, the court must inform a defendant:

> (1) of the complaint against him and of any affidavits filed therewith.
>
> (2) of his right to retain counsel.
>
> (3) of his right to request the assignment of counsel if he is unable to obtain counsel.
>
> (4) of the general circumstances under which he may secure his pretrial release.
>
> (5) of his right to prosecution by indictment, where such right is available.
>
> (6) of his right to a preliminary examination, where such right is available.

> (7) that he is not required to make a statement and that any statement made by him may be used against him.

Id. § 45.30(a) (2005). The court is also required to appoint counsel if the defendant desires. *Id.* § 45.30(b). The statutory first appearance right is separate from the constitutional right to a prompt probable cause determination.

[33] The People's obligation under 8 GCA § 45.10(c) continues until the person is presented to the judge. *Cf. Coleman*, 754 F.2d at 731. At a minimum, we recognize this as a statutory right. An indictment or any other interceding event does not relieve the People of this duty; as discussed, the only exception to this duty is if the People prove the existence of a bona fide emergency or an extraordinary circumstance, as required by 8 GCA § 45.10(c).

[34] Here, Bryan was still not brought before a judge until weeks after the Indictment and another five days after he was formally discharged from the hospital. The People simply failed to meet their obligation under 8 GCA § 45.10 for 26 consecutive days following the expiration of the first 48 hours after arrest. No executive authority exists to detain individuals indefinitely without providing access to the courts or due process. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516-39 (2004). While an indictment obtained outside the defendant's presence can provide a sufficient probable cause determination to support continued detention, it is no substitute for a detained defendant's first appearance where he or she is afforded the most basic forms of due process that exist in our justice system and informed of his or her fundamental rights.

D. Dismissal is the Appropriate Remedy

[35] Having determined that Bryan's first appearance rights were violated, we turn to the remedy. The possible remedies, as proposed by the parties, are: (1) dismissing the Indictment; (2) suppressing the evidence obtained during the period of unlawful detention; or (3) limiting Bryan to civil redress.

[36] In *State v. Larson*, 2009 S.D. 107, 776 N.W.2d 254, the South Dakota Supreme Court observed:

> To balance the societal interest in punishing criminal behavior and a defendant's right to due process, we conclude that dismissal would be warranted "in cases of egregious prosecutorial misconduct or on a showing of prejudice (or a substantial threat thereof), or 'irremediable harm' to the defendant's opportunity to obtain a fair trial."

Id. ¶ 16 (quoting *Commonwealth v. Viverito*, 661 N.E.2d 1304, 1306 (Mass. 1996)). The *Larson* court found a *McLaughlin* violation, but remanded to the trial court to assess whether there was a bona fide emergency or an extraordinary circumstance "justifying the unreasonable delay." *Id.* ¶ 17. Under the lens of egregiousness, we review the possible remedies.

[37] The People request we limit the remedy by holding that Bryan may have civil redress. Appellee's Br. at 28-27; *see also United States v. Fullerton*, 187 F.3d 587, 592 (6th Cir. 1999) (discussing *Bivens* claims, under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)). While Bryan may be able to pursue a civil action—though we express no view on this—his redress is not the primary focus when crafting a remedy for Fourth Amendment violations. Instead, the question is whether the remedy will deter police or prosecutorial misconduct in future cases. *Cf. Davis v. United States*, 564 U.S. 229, 236 (2011) (Fourth Amendment exclusionary rule is to deter police misconduct); *Commonwealth v. Jacobsen*, 644 N.E.2d 213, 217-18 (Mass. 1995) (refusing to dismiss indictment because police misconduct was not so egregious that it needed to be deterred).

[38] Civil actions are primarily intended to provide redress for private wrongs. *See, e.g.*, *Lander v. State*, 154 N.E.2d 507, 510-11 (Ind. 1958); *State v. Harold*, 271 S.W.2d 527, 529-30 (Mo. 1954) ("[T]he essential distinction between a civil and a criminal action or proceeding is that the former is for the enforcement of a private right, or the redress of a private wrong, and the latter for the punishment of a public offense." (quoting 1 C.J.S. *Actions* § 43, p. 1096, *currently*

numbered 1A C.J.S. *Actions* § 98)). While civil liability may be an effective deterrent in some cases, *see Hudson v. Michigan*, 547 U.S. 586, 598 (2006), it would not be effective here. Given the number of prosecutors involved in delaying Bryan's first appearance, *see* RA, tab 2 (Min. Entry, Jan. 6, 2017); RA, tab 4 (Min. Entry, Jan. 7, 2017); RA, tab 8 (Min. Entry, Jan. 9, 2017); RA, tab 11 (Min. Entry, Jan. 10, 2017); RA, tab 14 (Min. Entry, Jan. 11, 2017); RA, tab 17 (Min. Entry, Jan. 12, 2017); RA, tab 20 (Min. Entry, Jan. 13, 2017), and the inevitable number of officers involved in Bryan's arrest and prolonged detention who failed to take Bryan before a judge, the prospect of civil liability would likely be ineffective in deterring any single actor's conduct. Given the incongruent nature between civil and criminal remedies and the likely ineffectiveness of civil liability here, we determine that a remedy should be granted within Bryan's criminal case.

[39] Within the criminal context, the People argue that Bryan's remedy is limited to suppression of evidence obtained during the unlawful detention, if any exists. Prior cases, including those cited by the People, support this proposition; however, they do not involve such prolonged detention. *See United States v. Pabon*, 871 F.3d 164 (2d Cir. 2017) (63-hour total detention without being brought before a judge); *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000) (76-hour total detention), *overruled on other grounds by Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002); *Fullerton*, 187 F.3d 587 (4-day total detention); *People v. Valenzuela*, 150 Cal. Rptr. 314 (Ct. App. 1978) (4-day total detention); *People v. Jackson*, 6 Cal. Rptr. 884 (Dist. Ct. App. 1960) (6-day detention before magistrate's hearing).

[40] While even the *Larson* court noted that suppression is often the remedy when defendants make statements during the excess period of detention, it also observed that the most extreme case it could find of excess detention was four days after the initial arrest before a probable cause hearing. 2009 S.D. 107, ¶ 15, 776 N.W.2d at 259-60. The *Larson* court continued that egregious

cases may warrant dismissal. *Id.* ¶ 16. In civil suits, the Seventh Circuit has held that delays between 18 and 57 days before bringing a detainee to court "shock the conscience." *Compare Coleman*, 754 F.2d at 723, *with Armstrong*, 152 F.3d at 581-82. Here, Bryan was detained for 28 days before being brought before a judge of the Superior Court.

[41] Further complicating the matter, there was no evidence obtained during Bryan's detention that can be suppressed. If we adopted suppression as an exclusive remedy in this context, we would be making constitutional rights hollow promises. *See, e.g.*, *United States v. Smead*, 68 M.J. 44, 59 (C.A.A.F. 2009) ("In a criminal context, the government is bound to keep its constitutional promises . . . ." (omission in original) (quoting *United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006))). Based on our survey of prior cases, we find that Bryan's prolonged detention was 26 days beyond his statutory right to a first appearance and 7 days more than his well-established constitutional right to a judicial probable cause determination. *See supra* ¶¶ 3-4 & n.2. This case, because of the length of the detention, is egregious. Therefore, we order the Superior Court to dismiss with prejudice the Indictment filed against Bryan. *See Viverito*, 661 N.E.2d at 1306 ("Dismissal with prejudice is appropriate in cases of egregious prosecutorial misconduct . . . ." (quoting *Commonwealth v. Hernandez*, 656 N.E.2d 1237, 1240 (Mass. 1995))).

[42] We have not come to today's decision lightly. *Cf. People v. Mendiola*, 2010 Guam 5 ¶ 36. We are aware that, with today's Opinion, we are adopting a strong deterrent for a procedural failure. Yet even procedural failures can lead to great harm where a criminal defendant's constitutional rights are not respected. "An individual facing serious criminal charges . . . has little but the Constitution and his attorney standing between him and prison." *Kaley*, 571 U.S. at 341 (Roberts, C.J., dissenting).

V. CONCLUSION

[43] We **REVERSE** the Superior Court's May 4, 2017 Decision and Order denying Bryan's Motion to Dismiss and **REMAND** with directions to dismiss the Indictment with prejudice.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice