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# Mary D. Branch, Plaintiff-Appellant, v. Officer Timothy Gorman, et al., Defendants-Appellants: Brief of Appellant

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No. 12-3545

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IN THE  
**United States Court of Appeals for the Eighth Circuit**

Mary D. Branch,

Plaintiff-Appellant,

v.

Officer Timothy Gorman, et al.,

Defendants-Appellants.

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**On Appeal from the  
United States District Court for the District of Minnesota  
in Case No. CIV. 11-2155 (RHK/JJG)**

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**BRIEF OF APPELLANT**

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## SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellant Mary Branch appeals a judgment from the district court erroneously granting summary judgment to Appellees. Branch, a passenger in a car driven by her husband, was arrested without arguable probable cause by Minneapolis police officers under Minnesota's open container law. After she was released without any charges filed, she filed this action for the unlawful arrest.

Under the facts and inferences viewed in the light most favorable to Branch, the officers did not have arguable probable cause to arrest Branch. Officers based the arrest on a flask found in the car, but there are disputed issues of fact regarding the location of the flask, whether Branch had constructive possession of the flask, and whether the flask contained any alcohol at the time of the arrest. Moreover, the parties agree that there are disputed *inferences* from the agreed-upon facts. The Defendants admitted at the hearing on their motion for summary judgment that they believe there are no factual disputes but, "really more, we believe, disputes of interpretation of the facts." A jury should resolve those disputes.

Without arguable probable cause, the officers are not protected by qualified immunity. And there are disputes of the inferences and facts supporting the Defendants' claim to qualified immunity. Thus, the district court erred by granting summary judgment in the Defendants' favor. Oral argument will assist the Court with these issues, and Branch requests twenty minutes to present her case.

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## **JURISDICTIONAL STATEMENT**

Jurisdiction in the trial court was based on 28 U.S.C. § 1331. Appellant brought claims under 42 U.S.C. § 1983 and state law. JA8. Summary judgment was granted to Defendants and judgment was entered in their favor on September 27, 2012. JA181-82. Branch timely filed a Notice of Appeal on October 26, 2012. JA185. This court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF THE ISSUE**

**Whether the district court's grant of summary judgment for the defendants based on finding that they are entitled to qualified immunity was improper.**

U.S. Const., amend. IV

U.S. Const., amend. XIV

Minn. Stat. § 169A. 35, subd. 3 (2008)

*Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010)

*Guidry v. Boyd*, No. 06-1600, 20087 WL 2317174 (N.D. Ill. July 17, 2007)

*Minnesota v. Florine*, 226 N.W.2d 609 (Minn. 1975)

## **STATEMENT OF THE CASE**

Mary Branch filed this action against the Defendants on July 29, 2011. JA7. The Defendants filed a motion for summary judgment, asserting that they were entitled to qualified immunity. JA3. Then Branch filed a cross-motion for summary judgment of the Defendants' liability. JA4. After a hearing, the district court

granted summary judgment in the Defendants' favor, finding they were entitled to immunity against Branch's claims. JA166. The court then entered judgment, JA184, and Branch timely appeals. JA185.

## **STATEMENT OF FACTS**

### **A. Mary Branch**

Appellant Mary Branch is a fifty-one year old African-American female. JA129. She holds a Bachelor of Science Degree in Addiction Counseling from Metropolitan State University and a Master of Arts Degree in Marriage and Family Therapy from St. Mary's University. JA129. Branch is a licensed drug and alcohol counselor and, with her educational background in addiction counseling, works with DWI classes. JA129. She suffers from several medical conditions, including high blood pressure and high cholesterol. JA131. In order to manage these conditions, Branch takes both Hydrochlorothiazide and Simvastatin which cause dehydration, dry mouth, and frequent urination. JA131.

### **B. The Traffic Stop**

Late in a Sunday evening in September 2007 Branch was on her way home from a church fellowship event in Stillwater, Minnesota. JA132. Branch was riding with her husband in his car when he made a short stop at a gas station. JA132. Officer Garbisch, was patrolling the neighborhood, randomly running license plates for outstanding warrants, when he discovered that Johnson had an

outstanding arrest warrant for failing to appear. JA95-97. At approximately 12:30 a.m., Officer Garbisch, along with several other officers, pulled Branch and her husband over after he had left the gas station and arrested Branch's husband for failing to appear at a court hearing. JA86, 131 & 134. As her husband was taken from the car, arrested and placed into a squad car, Branch remained in the passenger seat. JA132-33.

Officer Gorman then approached Branch and spoke to her through the rolled down window. JA133. Gorman said, "Nigger, your black ass is going to jail." JA133, 138. A few seconds later, Officer Gorman demanded Branch exit the vehicle and she complied. JA133. Officer Gorman then told Branch to "[g]et back in." JA133. Because Branch believed she had done nothing wrong and thought the officers would let her drive home, she walked around the vehicle and got in on the driver's side. JA133. To Branch's surprise, Officer Gorman then removed her from the vehicle and sat her on the curb. JA133. As Branch recounts, Officer Gorman stood towering over her while she was seated on the ground with her head lowered in fear and praying for safety. JA133. Branch alleges Officer Gorman repeatedly called her the "N-word," belittled her, and pushed her shoulders back forcing her to look up at him. JA133. Branch remained silent other than her repeated requests to use the restroom due to her medical condition. JA134-35. Branch was so nervous that she sat on the curb clenching her phone with both

hands contemplating whether she should dial 911 because of the officers' behavior. JA134. When Officer Gorman saw Branch holding her cell phone he snatched the phone from her hands and threw it to the ground. JA134. According to Branch, she overheard the officers discussing whether she would be going to jail and alleges Officer Gorman stated: "I promised her black ass jail." JA135. Branch requested to use the restroom several more times, but her requests were denied. JA134. Branch was eventually placed in the back of the squad car with her husband. JA135.

**C. Officer Garbisch Retrieves A Flask From Under The Passenger Seat**

After Branch was removed from the vehicle, Officer Garbisch retrieved a small metal flask from the car. JA105. Branch saw the officers open the flask, shake the flask, and proclaim it empty. JA135. Branch did not know the flask was in the vehicle and had not been drinking any alcohol on that night. JA135. In fact, neither Officer Garbisch nor Officer Gorman asked Branch whether she had been drinking or if the flask belonged to her. JA92. More importantly, Branch's husband, stated to the officers that the flask belonged to him. JA135. Branch had not seen the flask for an entire year because it was a birthday gift someone had given to her husband. JA135. Although Officer Garbisch could not see through the opening in the flask, he detected an odor of alcohol. JA92-93. However, the

officers indicated that, at the time of the arrest, the “flask appeared to contain no liquid.” JA26.

Garbisch described Branch’s behavior on the night of the incident as belligerent, yet upon a request for explanation of Branch’s behavior, he described her behavior as that of an average person in a police situation. JA91-92. Garbisch described Branch as uncooperative because she was “questioning what I was doing, if I knew what I was doing, why I was doing it, that sort of thing.” JA90. He described Branch’s verbal expressions as typical of people who are in a police situation, because they are generally not happy to be there. JA91.

#### **D. Garbisch Arrests Branch**

At Officer Garbisch’s discretion, Branch was arrested for violating Minnesota’s Open Bottle Law, making it unlawful for a person to possess any open bottle containing an alcoholic beverage while in a vehicle. JA117. While Branch was seated in the squad car, her urge to use the restroom did not subside. Branch has several medical conditions, two of which are high blood pressure and high cholesterol. JA131. In order to control these conditions, Branch takes medication (Hydrochlorothiazide and Simvastatin) that leaves her mouth dry and causes her to feel dehydrated. JA131.

In order to satisfy her dehydration, Branch carries several water bottles with her, thus increasing her frequency of urination. JA131. Branch usually keeps four

or five bottles with her most of the time. JA131. On the night Branch was arrested, she was drinking a water bottle on the way home. JA131. The officers continued to refuse Branch's pleas to use the restroom, and Branch unable to control it any longer, urinated on herself in the back of the squad car as they rode away from the scene. JA135. Eventually, Branch was released and the charge was dropped. JA39.

**E. Branch Sues, And The District Court Grants Summary Judgment to the Officers**

Branch immediately filed a Charge of Discrimination with the Minneapolis Department of Civil Rights. JA169. She ultimately sued the city and the officers, asserting claims for: (1) deprivation of civil rights under 42 U.S.C. § 1983 due to unreasonable seizure in violation of the Fourth Amendment; (2) false arrest and false imprisonment; (3) civil conspiracy depriving her of her civil rights; and (4) violation of the Minnesota Human Rights Act ("MHRA") because she experienced discrimination based on her race. JA170. Early in the litigation, Branch moved for summary judgment of liability against Gorman and Garbisch, and the motion was denied. JA2.

Defendants later moved for summary judgment on all of Branch's claims based on qualified immunity, and an argument that the officers had arguable probable cause to arrest Branch. JA4-5. Branch cross-moved for summary judgment as to liability and opposed the Defendants' motion for summary

judgment. JA4-5. Branch conceded dismissal of her race-based MHRA claim to the extent it is asserted against Garbisch, and did not proceed with claims against the city with discovery completed. JA170-71. In opposition to the remainder of the motion for summary judgment, Branch denied possession of the flask and stated she was not drinking on the night she was arrested. JA173-74. Further, she argued that there were disputes of fact regarding whether she possessed the flask and whether the flask was empty. *Id.*

At the hearing on the motions for summary judgment, Defendants claimed that there were no disputes of fact, but admitted that there were “disputes of interpretation of the facts.” JA152. Still the court granted summary judgment, dismissing Branch’s federal claim and some state claims with prejudice, and dismissing the remaining state claims without prejudice. JA181-82. The court resolved that the officers had arguable probable cause to arrest Branch because of Branch’s proximity to the flask, her requests to use the bathroom, her presence in a vehicle at night, and her alleged belligerence. JA176-79. It did so despite conflicting evidence on the location of the flask and her proximity to the flask and also despite conflicting potential inferences to arise from the facts that Branch was in a car at night and had to use the bathroom. JA167-70. Indeed, the court stopped short of stating that the need to use the bathroom suggested Branch was drinking alcohol—it concluded that the fact that she urinated indicated she was “drinking

*something* before the car was stopped”—but the Court still considered this enough to warrant Branch’s arrest. JA177.

### **SUMMARY OF ARGUMENT**

Defendants openly admit there are “disputes of interpretation of the facts.” JA152. In light of such disputes—as well as disputes of the facts themselves—the district court’s grant of summary judgment was improper. Summary judgment is not appropriate when either material facts are in dispute or when a reasonable jury could draw differing interpretations or inferences from those material facts. Defendants’ statement that they “believe” disputes exist as to “interpretation of the facts” prohibit summary judgment in their favor.

The Defendants’ claims to qualified immunity cannot be effective, because their arrest of Branch violated her Fourth Amendment Rights, which were clearly established at the time of the violation. For qualified immunity to bar a Section 1983 claim based on the Fourth Amendment right against unlawful arrests, there must be arguable probable cause to arrest. And Minnesota law is clear that to establish probable cause to arrest under the open container law, mere proximity to an open container is not enough. Defendants certainly have not met this “proximity plus” standard to a degree that there is no reasonable inference that the officers lacked arguable probable cause to arrest Branch.

The district court did not demonstrate a compelling factor beyond mere proximity. The factors it addressed, such as Branch's request to use the restroom and the time of day, are inadequate to rule that no reasonable jury could find that the officers lacked arguable probable cause. Given the number of water bottles on the floor of the car, it was a far more reasonable presumption that Branch drank some or all of those. Indeed, the district court recognized that all it could find based on Branch's need to use the restroom is that she drank something sometime to being pulled over. That is no evidence at all to support an arrest. Nor does the time provide support, given that any person may be on the road for any reason at any time, and this was a Sunday night turning into Monday morning. If facts like these can support a finding that no jury could find a lack of arguable probable cause, the standard is meaningless in light of the fact that *any* arrest will involve some benign facts like this.

Further, there are issues of material fact that remain unresolved regarding Branch's arrest, including the location of the flask in question and whether the officers believed it contained any alcohol. Properly construing these facts in the light most favorable to Branch, there is not enough evidence to support the District Court's finding of summary judgment for the Defendants.

For these reasons, as more fully explained below, the grant of summary judgment to Defendants is improper, should be overturned, and this case should be remanded to the District Court for a trial on the merits.

## **ARGUMENT**

### **I. MINNESOTA HAS ESTABLISHED A PROXIMITY PLUS TEST FOR DETERMINING PROBABLE CAUSE TO ARREST FOR VIOLATING THE OPEN CONTAINER LAW.**

#### **A. When Violating and Individual's Fourth Amendment Rights with a Warrantless Arrest an Officer is Only Entitled to Qualified Immunity if There Was Arguable Probable Cause to Arrest.**

When analyzing a qualified immunity claim in a Section 1983 case, courts have looked to whether the facts show that the conduct at issue violated a constitutional right, and whether that right was clearly established at the time of the alleged violation. *Avalos v. City of Glenwood*, 382 F.3d 792, 798 (8th Cir. 2004), *Saucier v. Katz*, 533 U.S. 194 (2001). The Fourth Amendment's bar against unreasonable searches and seizures was a clearly established right at the time of Branch's arrest; therefore, appellants need only demonstrate that the facts establish a violation of that right. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010); *see also Johnson v. Phillips*, 664 F.3d 232, 236-37 (8th Cir. 2011) (finding that an officer going outside his clearly established duties is not entitled to qualified immunity).

In Section 1983 cases involving violation of a plaintiff's Fourth Amendment rights, police officers may be able to avail himself of qualified immunity. *Saucier v. Katz*, 533 U.S. 194 (2001). Under such circumstances, officers are immune to suit if "they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the mistake is objectively reasonable." *Amrine v. Brooks*, 522 F.3d 823, 832 (8th Cir. 2008). Stated another way, the legal standard through which to evaluate the factual claims is, arguable probable cause; however, even with this lower standard, when there is a genuine issue of probable cause a grant of qualified immunity is improper. *See Anderson v. Creighton*, 483 U.S. 635, 657 n.12 (1987), *Reardon v. Wroan*, 811 F.2d 1025, 1027 (7th Cir. 1987), *Jasinski v. Adams*, 781 F.2d 843, 845-46 (11th Cir. 1986) (per curiam), *Deary v. Three Unnamed Police Officers*, 746 F.2d 185, 190-91 (3d Cir. 1984). The facts in this case demonstrate that, at the least, a genuine issue fact exists as to whether the officers had probable cause to arrest Branch. The factual circumstances of this case are so unclear, based on disputes in testimony and evidence presented, that this case improperly granted the defendants' motion for summary judgment. The lower court failed to construe pertinent facts and inferences in favor of the non-moving party; had it done so, the court could not have granted the Defendants' motion for summary judgment.

**B. To Establish Constructive Possession, Minnesota Law Requires Proximity and Additional Plus Factors That Confirm the Individual's Conscious Control.**

Courts look to the relevant law under which a person was arrested to determine whether arguable probable cause existed. *Galarnyk v. Fraser*, 687 F.3d 1070, 1074 (8th Cir. 2012) (looking to Missouri state law to determine if officers had qualified immunity); *Stepnes v. Ritschel*, 663 F.3d 952, 960 (8th Cir. 2011) ([T]he relevant inquiry [for qualified immunity] is whether the sergeant had probable cause, or at least arguable probable cause, to believe that [the defendant] was violating Minnesota gambling law . . . .”). Minnesota law requires that constructive possession be shown by establishing either that the item in question was in a place under the defendant's control, in a fashion in which others do not normally have access, or that “there is a strong probability” that the defendant was “consciously exercising dominion and control” over the item. *Minnesota v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975). This standard requires more than mere proximity to contraband; it requires some affirmative additional plus-factor that confirms a finding of conscious control. *Compare Minnesota v. Cusick*, 387 N.W.2d 179, 181 (Minn. 1986) (finding constructive possession of cocaine when, in addition to physical proximity of the contraband, defendant's wallet was found near the cocaine and none of the possessions of the person claiming ownership were found in the immediate area), *with Minnesota v. Rhodes*, No. A11-770, 2012

WL 1380325, 2012 Minn. App. Unpub. LEXIS 328 (Minn. App. Apr. 23, 2012) (finding that mere proximity of the defendant to drug paraphernalia was not enough to show constructive possession, when the paraphernalia was found in a house where several drug users resided). Without the additional factor confirming possession, mere proximity “fail[s] to exclude the reasonable, rational inference that someone other than respondent possessed” the item. *Minnesota v. Rhodes*, at \*4, 2012 Minn. App. Unpub. LEXIS at \*10.

**II. A REASONABLE TRIER OF FACT COULD FIND THAT THERE WAS NO ARGUABLE PROBABLE CAUSE TO ARREST BRANCH UNDER THE PROXIMITY PLUS TEST.**

A district court’s grant or denial of summary judgment is reviewed de novo. *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992). Summary judgment is properly granted only if there exists no genuine issue of material fact when viewing the facts in a light most favorable to the nonmoving party. *McCuen v. Polk County, Iowa*, 893 F.2d 172, 173 (8th Cir. 1990). When there is a material issue of fact, summary judgment must be denied, because “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Likewise, “when conflicting inferences can be drawn from the facts, summary judgment is inappropriate.” *Snyder v. U.S.*, 717 F.2d 1193, 1195 (8th Cir. 1983). Denial of summary judgment only requires that “sufficient evidence supporting the claimed factual dispute”

would require a finder of fact to assess the “differing versions of the truth at trial.”

*Id.* at 249.

**A. A Reasonable Jury Could Infer From The Facts, Taken In The Light Most Favorable To Branch, That She Was Not In Proximity To The Flask.**

In order to be found in violation of Minnesota’s open container law, one must “have in [their] *possession*, while in a private motor vehicle . . . , any bottle or receptacle *containing an alcoholic beverage.*” Minn. Stat. § 169A. 35, subd. 3 (2008) (emphasis added). There are a number of material facts that, based on the discrepancy in testimony and other evidence presented, are disputed or have disputed interpretations. Defendants admitted at the hearing on summary judgment when they stated that there are “disputes of interpretation of the facts.” JA152. These disputed facts and inferences alone should be enough to deny the defendants’ motion for summary judgment, and when these facts are construed in the light most favorable to Branch, it is clear that summary judgment is inappropriate in this case.

First, there is a dispute as to the material fact of the flask’s location in the vehicle and thus a dispute as to whether Branch was in proximity to that flask. The district court acknowledged this discrepancy stating that “[t]he record is unclear (1) which officer first spotted the flask and (2) precisely where it was located.” JA168. The flask could have been located in three different places: “either

completely under the passenger seat where Branch had been sitting, partially under that seat with its end exposed, or on the floor in front of the passenger seat, near where Branch's feet had been located." JA168. In addition, "Branch denied knowing the flask was in the car or drinking on the night in question." JA168. When construed in the light most favorable to Branch, the court must accept the possibility that the flask was fully under the passenger seat, completely hidden from Branch's view and not in her "possession." As a result of the disputed nature of this material fact, summary judgment in Defendant's favor is inappropriate.

Second, there is a dispute as to the material fact of whether the flask contained any alcohol at the time of the arrest. A plain reading of the law indicates that the receptacle must *contain* an alcoholic beverage or spirit at the time of the arrest. However, the record clearly reflects conflicting testimony about whether the flask contained any alcohol whatsoever. JA169. As the District Court noted, "According to Branch, the officers opened the flask, shook it, and proclaimed it empty. Garbisch testified that he opened the flask's cap but could not see through its narrow opening. He detected a strong odor of alcohol, however, suggesting to him that at least some amount of alcohol was in the flask." JA169. A critical and material element, necessary to establish probable cause of a violation of Minnesota's open container law, is whether the officers really believed the flask

contained alcohol. Because this necessary, material fact is disputed, summary judgment is inappropriate.

The district court postulates that one might be found in violation of an open container law even when the container is empty, “as long as an officer has an objectively reasonable basis to conclude that [the container] contained alcohol *at some point* while in a moving vehicle.” JA178. The court cites several cases stating that it is irrelevant whether there was alcohol in the container at the time of arrest. JA178-80. That is true only insofar as it strays from whether the arresting officers *believed* there was alcohol in the container at the time of arrest. But their subjective beliefs on the contents of the flask are relevant to the totality of the circumstances supporting the arrest. And here, there is a dispute as to whether the officers believed there was alcohol in the flask—the officers proclaimed the flask empty. JA169.

The open container law requires that one must possess a “*receptacle containing an alcoholic beverage.*” Minn. Stat. § 169A. 35, subd. 3. (2008) (emphasis added). Thus, the district court’s theory relies on an officer finding abundant circumstantial evidence to support that basis for arrest and render it “objectively reasonable.” Such evidence does not exist here.

The court gave a hypothetical that proves this point. In the hypothetical, a driver was found in violation of the open container law when after being pulled

over for “weaving erratically” on the road and “manifest[ing] other symptoms of intoxication,” officers found six empty beer cans at his feet, in the driver’s seat of the car that were cold to the touch. *Id.* In stark contrast to the present case, the District Court’s hypothetical contains a number of factors indicating intoxication, and the operation of a vehicle while intoxicated, which simply are not existent here. Branch was not the driver of the vehicle, she was not manifesting other symptoms of intoxication and only one small empty receptacle was found out of view, somewhere under the passenger’s seat. Moreover, there was no evidence, like the flask being “cold to the touch,” suggesting that it recently held alcohol.

A closer analog would involve a passenger in a vehicle carrying a recycling bin containing empty beer bottles on their way to a recycling center. So long as there are minor other factors, such as a passenger needing to go to the bathroom, or the passenger being angry at being questioned by police, an officer is entitled to summary judgment based on qualified immunity under the district court’s reasoning. The absurdity of such a conclusion shows how the district court’s interpretation cannot be correct. Construing the disputed facts in the light most favorable to Branch, the officers must be assumed to have believed that the flask contained no alcohol at the time of the arrest. More importantly, when viewed in the light most favorable to Branch, it must be concluded that the officers opened the flask, determined it was empty, had a belief that it was empty, yet still

proceeded to arrest Branch. A reasonable jury could find that there was never in possession of receptacle containing alcohol because the receptacle had clearly been empty for a long time and that the officers lacked arguable probable cause.

Therefore, summary judgment in the Defendants' favor is inappropriate because there is a dispute of material fact regarding whether the officers could reasonably believe that Branch was even in proximity to an open container with alcohol in it while the car was moving.

**B. A Reasonable Jury Could Infer That There Were No “Plus Factors” Supporting a Determination of Constructive Possession Sufficient to Provide the Arguable Probable Cause to Arrest Branch.**

Even if Branch had been in proximity to the flask, and it contained alcohol, a reasonable jury could infer that there were no plus factors on which a reasonable officer would find probable cause to arrest Branch. The flask was not on Branch's person, but rather was somewhere in the vicinity of the passenger seat. JA168-69. Upon the flask's discovery, Branch's husband admitted the flask belonged to him and was part of a gift set that he had received for his birthday. JA135. There is no evidence that Branch even knew of the flask's existence in the car. The officers never asked Branch if she had been drinking or if she knew of the flask's presence, and she never took any affirmative action during the stop to show that she knew the flask was there. JA168 n 3. There is no evidence that Branch knew of the flask's presence, and therefore no evidence that she exercised control over it.

**1. The District Court Applied only Disputed or Irrelevant Facts as Potential “Plus Factors” for Constructive Possession.**

The “plus factors” cited by the district court do not outweigh the myriad factors indicating that arrest was improper. Indeed, a reasonable jury could infer that they are not plus factors at all. The court relied on three facts to determine that there were sufficient “plus factors” to support probable cause to arrest Branch as a matter of law: (1) “she repeatedly asked the officers to use the bathroom,” (2) it was dark, and so she could not be seen drinking, and (3) Branch was acting belligerently toward officers. JA177. These facts do not rise to the level of legitimate plus factors showing constructive possession.

Branch admits that she repeatedly asked to use the bathroom, which the district court characterizes as proof that she was drinking “something.” JA177. That reasoning has two flaws. First, it assumes that she was drinking something in the car. But it is common experience among all humans that the urge to urinate often—if not usually—occurs with some delay after drinking something. The need to urinate does not tell the officer anything about whether Branch drank something while in the car, and it certainly does not give the officer license to assume she drank something alcoholic, given the empty water bottles also present. Moreover, the fact that she asked repeatedly is irrelevant since she was never provided the opportunity to relieve herself.

Similarly, the fact that it was dark tells the officer nothing. A reasonable jury could find the darkness irrelevant, given the fact that it is dark much of any given day, and allowing such a fact to support probable cause would give police license to arrest anyone for anything so long as it is dark outside.

And Branch's purported "belligerence" was a disputed fact within the officers' own testimony. Garbisch himself testified that Branch's "belligerence" was a typical reaction of someone placed in a similar situation. Indeed, some belligerence is unsurprising, in light of the fact that Branch badly needed to urinate—so badly that she ultimately did so in the back seat of the squad car—and the officers gave her no opportunity to do so. Given the typicality of Branch's behavior, it also cannot support the district court's finding that the officers had arguable probable cause to arrest Branch as a matter of law.

An officer has a duty to look at the cumulative effect of all facts and circumstances at the time of arrest to determine whether probable cause exists. *United States v. Capers*, 685 F.2d 249, 251 (8th Cir. 1982). Under the district court's reasoning, Branch was arrested because she had to urinate at night and happened to have been near a flask that once contained alcohol, but officers believed it to be empty. When those facts are considered in light of the myriad facts establishing that Branch was never in possession of the flask—such as her husband's admission that the flask was his and the empty water bottles in the car—

it is plain that a reasonable jury could infer that a reasonable officer would accept that Branch might have had to urinate because she drank water in the car or might have had to urinate because of whatever she drank before she got into the car, and that a reasonable officer would recognize that there was no probable cause to arrest Branch.

**2. The District Court Ultimately Relied on the Incorrect Mere Proximity Standard.**

While discussing the proximity plus test, the district court implied that, because of the standard for qualified immunity is arguable probable cause, the court “cannot say that a police officer acts unreasonably in concluding that a passenger constructively possesses contraband found in her immediate vicinity in a vehicle.” JA176. The district court essentially conflates the standard of arguable probable cause with the rule requiring a proximity plus test. However, because mere proximity can never create constructive possession, mere proximity alone can never give rise to arguable probable cause. ““The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”” *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010) (citation omitted). And when conduct has been deemed insufficient to support liability under a criminal statute by the Minnesota Supreme Court, officers cannot rely upon it to find probable cause to arrest. *Id.* at 478 (holding officers lacked arguable probable cause to arrest for disorderly conduct when arrestees were engaged in expressive conduct).

Nor can obviously flawed evidence—such as the need to urinate or the fact that it is dark out—support arguable probable cause. *Livers v. Schenck*, \_\_\_ F.3d \_\_\_, No. 11-1877, 2012 WL 5439300 \*15 (8th Cir. Nov. 8, 2012) (coerced confession could not support arguable probable cause to arrest another person implicated in confession).

The cases the court cited for a mere proximity rule do not support the court's conclusion. Rather, they all involve facts supporting the proximity plus standard and highlight the differences from this case. The case the district court relied on most, *Guidry v. Boyd*, No. 06-1600, 20087 WL 2317174 (N.D. Ill. July 17, 2007) bears no resemblance to this one. There, the police arrested the *driver* of a vehicle after seeing two open beer bottles on the passenger side floor of the car. *Id.* at \*2. The officers did not know whether the bottles were empty, but it is undisputed that during the *Terry* stop, but before the arrest, the officers discovered in the back seat of the car an opened 12-pack of beers from which the possibly-empty bottles clearly came. *Id.* Given those facts—empty beer bottles that came from a 12-pack within reach that had full beer bottles in it—there could not be any dispute that the police had arguable probable cause to arrest the driver.

The district court's remaining cases fare no better. In *Jack v. Hansell*, No. 6:08-cv-2069, 2010 WL 3517040 at \*7, 2010 U.S. Dist. LEXIS 92651 at \*20-21 (M.D. Fla. Sept. 7, 2010), the individual in question not only had mere proximity

to the contraband, he was also the only passenger with control over backseat, the area of the car where contraband was found. The extra plus factor of having sole control over the backseat brought the case from mere proximity to constructive possession. *King v. Newell*, No. 7:06–CV–57, 2007 WL 2705553 at \*3, 2007 U.S. Dist. LEXIS 70158 at \*8 (M.D. Ga. Aug. 15, 2007), also contains an additional plus factor the district court did not address; in this case, additional criminal conduct. The defendants admitted to being in possession of a stolen vehicle, and there was an outstanding warrant for his arrest. *Id.* These additional factors of criminal conduct support a proximity plus test, and not that mere proximity, alone, can create constructive possession and establish arguable probable cause.

The cases cited by the District Court to indicate Minnesota’s use of a mere proximity standard also support Branch, for they all indicate a use of the proximity plus test. In *Minnesota v. Olson*, 326 N.W.2d 661, 663 (Minn. 1982), the defendant verbally confirmed ownership of the contraband; in *Minnesota v. Rockett*, No. A07–2318, 2009 WL 910698 at \*1, 2009 Minn. App. Unpub. LEXIS 352 at \*3 (Minn. Ct. App. Apr. 7, 2009), the law enforcement officer saw the defendant shove an unidentified object between the seats of the car; and in *Minnesota v. Wilson*, No. C9-99-1306, 2000 WL 719493 at \*1, 2000 Minn. App. LEXIS 538 at \*4 (Minn. Ct. App. June 6, 2000), the defendant was sitting on top of the object in question. None of these plus factors are present here; Branch did

not claim ownership of the flask (in fact, her husband did), she made no motions to indicate she was hiding the flask during the initial moments of the traffic stop, and the flask was beneath her seat in the car, not directly beneath her person.

Moreover, while each of these cases can be distinguished on their facts, each also stands for the opposite principle from what the District Court indicated, that constructive possession requires more than mere proximity to be valid.

The cases cited by the District Court reinforce the conclusion that constructive possession requires a proximity plus standard. And simply put, the facts in all of those cases go beyond the facts here to establish arguable probable cause, especially when the facts are taken in the light most favorable to Branch. There are disputes of fact over whether Branch was in proximity to an open container with alcohol in it. And there are disputed facts *and inferences* regarding whether a reasonable officer would find the appropriate plus factor to support arrest based solely on the need to urinate, the darkness, and belligerence that the officer himself deemed typical. Thus, the district court's finding that the Defendants are entitled to qualified immunity should be overturned.

## **CONCLUSION**

For the foregoing reasons, the grant of summary judgment to the Defendants in this case should be reversed and the case should be remanded for further proceedings.

Respectfully Submitted

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Dated: December 17, 2012

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I hereby certify that on this 17th day of December, 2012, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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