

The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds in Violation of County of Riverside v. McLaughlin

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Table of Contents

- I. INTRODUCTION
- II. DIVERGING AUTHORITY
- III. THE PROPER INTERPRETATION OF THE *GERSTEIN/McLAUGHLIN* RULE
 - A. *The Constitutional (In)significance of a Probable Cause Determination Made by an Arresting Officer*
 - B. *The Continued Survival of Gerstein’s “Administrative Steps” Requirement After McLaughlin*
 - C. *The Propriety of Continuing an Investigation While Administrative Steps Are Simultaneously Being Completed*
 - D. *Rendering McLaughlin’s Prohibition on Investigative Detentions Superfluous*
 - E. *Undermining the Underlying Purpose of Gerstein and McLaughlin*
- IV. CONCLUSION

I. INTRODUCTION

In the landmark criminal procedure case *Gerstein v. Pugh*, the U.S. Supreme Court held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”¹ Just how “prompt[ly]” such a probable cause determination must be made, however, was never defined by the *Gerstein* Court.² Instead, the Court simply explained that “a policeman’s on-the-scene assessment of probable cause provides legal justification for . . . a brief period of detention to take the administrative steps incident to

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¹ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

² *See id.*; *see also* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 47 (1991) (“In *Gerstein* . . . , this Court held that the Fourth Amendment requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. This case requires us to define what is ‘prompt’ under *Gerstein*.”); Steven J. Mulroy, “Hold” On: *The Remarkably Resilient, Constitutionally Dubious 48-Hour Hold*, 63 CASE W. RES. L. REV. 815, 846 (2013) (“The *Gerstein* Court provided no guidance as to how ‘promptly’ after the warrantless arrest the *Gerstein* hearing must be.”).

arrest” before a person who has been arrested without a warrant must be afforded “a neutral determination of probable cause” by a judge or magistrate.³

Finding *Gerstein*’s “brief period of detention to take the administrative steps incident to arrest”⁴ standard to be insufficiently precise in practice, in *County of Riverside v. McLaughlin*, the Supreme Court endeavored “to articulate more clearly the boundaries of what is permissible under the Fourth Amendment” by establishing a burden-shifting rule that set forty-eight hours as the pivotal dividing line.⁵ Under *McLaughlin*, if the government does not afford a warrantless arrestee a judicial determination of probable cause (known as a “*Gerstein* hearing”⁶) within the first forty-eight hours of his or her arrest, then the government bears the burden of proving that “a bona fide emergency or other extraordinary circumstance” justified the delay.⁷ In contrast, however, if a warrantless arrestee does receive a *Gerstein* hearing within the first forty-eight hours of being arrested, then it is the arrestee who bears the burden of proving that his or her *Gerstein* hearing was delayed unreasonably.⁸

Emphasizing with some force that *McLaughlin*’s burden-shifting rule was not intended to convey the erroneous impression that a “probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours[,]”⁹ the Supreme Court provided three examples of delays to an arrestee’s *Gerstein* hearing that remained categorically impermissible—even if they were modest in length, and even if they occurred within the first forty-eight hours of an arrest. Specifically, the *McLaughlin* Court identified: “[1] delays for the

³ *Gerstein*, 420 U.S. at 113–14.

⁴ *Id.* at 114.

⁵ *McLaughlin*, 500 U.S. at 56.

⁶ The judicial determination of probable cause to which all warrantless arrestees are constitutionally entitled is commonly referred to as a “*Gerstein* hearing.” See, e.g., *United States v. Daniels*, 64 F.3d 311, 313 (7th Cir. 1995) (“[Defendant] claims that he failed to receive a timely judicial determination of probable cause to support his arrest, commonly referred to as a *Gerstein* hearing.”). This Article adopts that terminology.

⁷ *McLaughlin*, 500 U.S. at 57.

⁸ *Id.* at 56.

⁹ *Id.*

purpose of gathering additional evidence to justify the arrest, [2] a delay motivated by ill will against the arrested individual, or [3] delay for delay's sake" as "[e]xamples of unreasonable delay[s]" that violate the Fourth Amendment's protection against unreasonable seizures under all circumstances.¹⁰

Strangely, however, and despite the Supreme Court's admonition that *McLaughlin*'s three examples of unreasonable delays were indeed just "[e]xamples,"¹¹ numerous courts have held that because *McLaughlin* only expressly prohibited delays "for the purpose of gathering additional evidence to justify [an] arrest,"¹² *McLaughlin* must therefore permit delays for the purpose of gathering additional evidence if law enforcement has already acquired sufficient evidence to justify the defendant's arrest in the first place.¹³ Consequently, these courts have held that deliberately delaying a warrantless arrestee's *Gerstein* hearing for investigative reasons does not violate the Fourth Amendment so long as law enforcement had probable cause to support the defendant's arrest at the time the defendant was arrested.¹⁴ This Article critiques this holding, arguing instead that law enforcement may never intentionally delay a warrantless

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* (emphasis added).

¹³ See, e.g., *United States v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995) (emphasis added) ("[The arrestee's] argument seems to interpret [*McLaughlin*] to preclude law enforcement from bolstering its case against a defendant while he awaits his *Gerstein* hearing; that is a ludicrous position. *Gerstein* and its progeny simply prohibit law enforcement from detaining a defendant to gather evidence to justify his arrest, which is a wholly different matter. Probable cause to arrest [the defendant] already existed We therefore reject [the defendant's] contention that he did not receive a prompt *Gerstein* hearing."); *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005) ("[The arrestee] argues that [his judicial probable cause] determination was unreasonably delayed due to the investigating officers' desire to find more evidence. However, . . . the *McLaughlin* [C]ourt condemned as unreasonable a search for additional evidence only when the evidence is being sought in order to justify the arrest. Here, because [the defendant] confessed to the shooting shortly after being brought to the police station, the officers already had a sufficient amount of evidence to justify his arrest. As such, there was no unreasonable delay"); *State v. Brown*, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014) ("In this case, . . . there was probable cause to arrest Defendant. . . . Any delay in a judicial determination in this case was not shown to be 'for the purpose of gathering additional evidence to justify the arrest' The officers were simply trying to verify Defendant's alibi.").

¹⁴ See, e.g., *Daniels*, 64 F.3d at 314–15; *Otis*, 217 S.W.3d at 847–48; *Brown*, 2014 WL 4384954, at *15.

arrestee's constitutional right to a judicial determination of probable cause for investigative reasons under any circumstances.

Although this issue has largely escaped review within academic literature, the practice of employing investigative detentions against warrantless arrestees is relatively widespread among law enforcement.¹⁵ Of note, whether such detentions comport with the Fourth Amendment has also generated a circuit split between the Eighth Circuit Court of Appeals and one of two irreconcilable lines of authority within the Seventh Circuit Court of Appeals. The issue has similarly divided the appellate courts of at least nine states.

Part II of this Article explores the divergence of authority that has resulted from the Supreme Court's holding in *McLaughlin*.

Part III argues that the conclusion reached by several courts that police may intentionally delay a warrantless arrestee's *Gerstein* hearing for the purpose of further investigation so long as probable cause existed to justify the defendant's arrest in the first place is inconsistent with the Fourth Amendment for five separate reasons. First, this conclusion confounds the essential distinction between a judicial determination of probable cause, which is a constitutional right, and a probable cause determination made by law enforcement, which carries no constitutional significance. Second, it violates the "administrative purpose" requirement initially established by the Supreme Court in *Gerstein* and subsequently reaffirmed in *McLaughlin*, which permits law enforcement to delay a warrantless arrestee's *Gerstein* hearing for administratively necessary reasons only. Third, this conclusion fails to grasp the crucial distinction between, on the one hand, delaying a warrantless arrestee's *Gerstein* hearing for investigative reasons, and on the other, continuing an investigation while the administrative steps leading up to a warrantless

¹⁵ See generally Mulroy, *supra* note 2, at 816–19 (discussing use of forty-eight hour holds by law enforcement in several jurisdictions throughout the United States).

arrestee's *Gerstein* hearing are simultaneously being completed. Fourth, such a holding renders *McLaughlin*'s express prohibition on "delays for the purpose of gathering additional evidence to justify [an] arrest"¹⁶ superfluous, because all arrests that are unsupported by probable cause are already prohibited by the Fourth Amendment. Fifth, by introducing hindsight bias into probable cause determinations and by allowing a substantial number of warrantless arrests to evade judicial review of any kind, this holding substantially diminishes the value of the check on law enforcement that *Gerstein* was meant to provide.

Part IV concludes that the Supreme Court should resolve the existing split of authority by holding that law enforcement may never intentionally delay a warrantless arrestee's constitutional right to a judicial determination of probable cause for investigative reasons under any circumstances.

II. DIVERGING AUTHORITY

Relying on the fact that the Supreme Court's decision in *McLaughlin* only expressly prohibited delays "for the purpose of gathering additional evidence to justify [an] arrest,"¹⁷ several courts have cited *McLaughlin* for the proposition that law enforcement may delay a warrantless arrestee's *Gerstein* hearing for the purpose of further investigation if police have already developed sufficient evidence to justify the defendant's arrest in the first place. Of note, this issue is also the subject of a circuit split between the Eighth Circuit and one of two irreconcilable lines of authority within the Seventh Circuit, and it has similarly separated the appellate courts of Alaska, Arkansas, Indiana, New York, North Carolina, and Tennessee from those of California, Massachusetts, and Michigan.

¹⁶ *McLaughlin*, 500 U.S. at 56.

¹⁷ *Id.* (emphasis added).

Following *McLaughlin*, the view that delaying a warrantless arrestee’s *Gerstein* hearing for investigative reasons is categorically prohibited by the Fourth Amendment was first and most forcefully articulated by the Seventh Circuit in *Willis v. City of Chicago*.¹⁸ In *Willis*, the Seventh Circuit held that even within the first forty-eight hours of an arrest—and even if law enforcement already has sufficient evidence to justify an arrest—the Fourth Amendment still prohibits law enforcement from delaying a warrantless arrestee’s *Gerstein* hearing for the purpose of allowing police to investigate the arrestee’s participation in other crimes.¹⁹ Subsequently, in *Lopez v. City of Chicago*, the Seventh Circuit extended the reasoning of *Willis* to its logical conclusion by holding unequivocally that “delays for the purpose of gathering additional evidence are per se unreasonable under *McLaughlin*.”²⁰

The Eighth Circuit has also adopted the view that delaying a warrantless arrestee’s *Gerstein* hearing for investigative reasons violates the Fourth Amendment. In *United States v. Davis*, for example, the Eighth Circuit held that even assuming that probable cause existed to arrest a defendant, a mere two-hour delay in the defendant’s *Gerstein* hearing was still unreasonable where the sole purpose of the delay was to promote further investigation by law enforcement.²¹ This view of *McLaughlin* has also been adopted with varying degrees of clarity by the appellate courts of California,²² Massachusetts,²³ and Michigan,²⁴ as well as federal district courts in Illinois,²⁵ Washington,²⁶ and Wisconsin.²⁷

¹⁸ 999 F.2d 284, 289 (7th Cir. 1993).

¹⁹ *Id.* at 288–89.

²⁰ *Lopez v. City of Chicago*, 464 F.3d 711, 714 (7th Cir. 2006).

²¹ *United States v. Davis*, 174 F.3d 941, 944 (8th Cir. 1999).

²² *People v. Jenkins*, 122 Cal. App. 4th 1160, 1175–76 (2004) (holding that a sixteen-hour delay in a defendant’s *Gerstein* hearing was unlawful where the purpose of the delay was to question the defendant about shootings, notwithstanding the officer’s lawful arrest of the defendant for a traffic violation which was supported by probable cause).

²³ *Commonwealth v. Woodley*, No. 9211358, 1993 WL 818559, at *7 (Mass. Super. Ct. Oct. 12, 1993) (“It is well established, moreover, that a delay is unreasonable when it is contrived by the police to elicit incriminating statements.”).

In direct contrast to these cases, however, numerous other courts have expressed the view that the Fourth Amendment does not prohibit law enforcement from intentionally delaying a warrantless arrestee's *Gerstein* hearing for the purpose of further investigation if the police have already developed sufficient evidence to justify the defendant's arrest in the first place. Oddly, the most pointed authority for this position emanates from a series of cases decided by the Seventh Circuit as well. First, in *United States v. Daniels*, the Seventh Circuit emphatically rejected the argument that *McLaughlin* categorically prohibits delaying a warrantless arrestee's *Gerstein* hearing for investigative reasons. Describing such a claim as "a ludicrous position," the *Daniels* court explained that:

[The arrestee's] argument seems to interpret [*McLaughlin*] to preclude law enforcement from bolstering its case against a defendant while he awaits his *Gerstein* hearing; that is a ludicrous position. *Gerstein* and its progeny simply prohibit law enforcement from detaining a defendant to gather evidence *to justify his arrest*, which is a wholly different matter. Probable cause to arrest [the defendant] already existed We therefore reject [the defendant's] contention that he did not receive a prompt *Gerstein* hearing.²⁸

Confronting the question again two years later in *United States v. Sholola*, the Seventh Circuit extended *Daniels* even further by holding that:

²⁴ *Artley v. City of Detroit*, No. 199080, 1998 WL 1990893, at *3 (Mich. Ct. App. July 17, 1998) ("Plaintiff correctly asserts that even where a judicial determination of probable cause is held within forty-eight hours, a plaintiff arrested without a warrant has an opportunity to prove that the determination was unreasonably delayed Here, plaintiff asserts that the purpose of the delay in this case was to elicit an incriminating statement from her.").

²⁵ *Cornish v. Papis*, 962 F. Supp. 1103, 1110 (C.D. Ill. 1997) (emphasis added) (rejecting defendant's *McLaughlin* challenge where the delay "was not to enable the police to locate some incriminating evidence *or to build a case against [him]*").

²⁶ *United States v. Garcia*, No. CR99-172WD, 1999 WL 1499258, at *2-3 (W.D. Wash. June 30, 1999) (finding a *McLaughlin* violation where "the delay resulted from the officers' use of [the arrestee] to gather evidence").

²⁷ *Farr v. Paikowski*, No. 11-C-789, 2013 WL 160268, at *7 (E.D. Wis. Jan. 14, 2013) ("The defendants concede that the real purpose for arresting [the plaintiff] was simply to interrogate her This concession renders [her] detention *per se* unreasonable under *Gerstein*.").

²⁸ *United States v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995) (emphasis added).

Under the clear and straightforward logic of our decision in *Daniels*, police may conduct further investigation of a crime to “bolster” the case against a defendant while the defendant remains in custody, and they may likewise hold an individual while investigating *other* crimes that he may have committed, *so long as they have sufficient evidence to justify holding the individual in custody in the first place.*²⁹

The Seventh Circuit’s decisions in *Daniels* and *Sholola* are not realistically compatible with either the Eight Circuit’s decision in *Davis* or its own holdings in *Willis* and *Lopez* that “delays for the purpose of gathering additional evidence are per se unreasonable under *McLaughlin*.”³⁰ Even so, however, neither *Daniels* nor *Sholola* has been overruled, and district courts within the Seventh Circuit continue to rely on both of these cases in an unsuccessful attempt to reconcile the two conflicting lines of authority.³¹

Further reflecting the ongoing conflict over the correct interpretation of *McLaughlin*, the precise reasoning articulated by the Seventh Circuit in *Daniels* and *Sholola* also appears unmistakably in decisions reached by appellate courts in Alaska,³² Arkansas,³³ Indiana,³⁴ and Tennessee.³⁵ For example, in *Otis v. State*, the Arkansas Supreme Court held that:

²⁹ United States v. Sholola, 124 F.3d 803, 820 (7th Cir. 1997).

³⁰ Lopez v. City of Chicago, 464 F.3d 711, 714 (7th Cir. 2006). The author is not the first commentator to recognize this split of authority. See Mark J. Goldberg, Note, *Weighing Society’s Need for Effective Law Enforcement Against an Individual’s Right to Liberty: Swinney v. State and the Forty-Eight Hour Rule*, 24 MISS. C. L. REV. 73, 106 (2004) (“There is one major distinction between the way *Willis/Davis* and *Daniels/Sholola* interpreted and applied *McLaughlin*. The courts in *Willis* and *Davis* looked beyond the exact wording of the Supreme Court’s opinion and sought to execute the policy rationale behind the decision. On the other hand, the Seventh Circuit in *Daniels* and *Sholola* narrowly interpreted the language in *McLaughlin* in furtherance of other policy justifications. . . . [T]he *Willis/Davis* approach is the appropriate method . . .”).

³¹ See, e.g., Bailey v. City of Chicago, No. 10-C-5735, 2013 WL 5835851, at *4 (N.D. Ill. Oct. 30, 2013) (“All the Detectives can be accused of is taking time to ‘bolster’ the case against Bailey, and the Seventh Circuit has held that it is ‘ludicrous’ to argue that the Supreme Court intended to prevent the police from detaining suspects for that reason. . . . Unlike in *Willis*, the Detectives here only detained Bailey to gather evidence on the charge for which he was initially arrested based on probable cause. Thus, Bailey’s post-arrest detention did not violate the Fourth Amendment.” (citing *Daniels*, 64 F.3d 311, 314 (7th Cir. 1995))).

³² See Riney v. State, 935 P.2d 828, 835 (Alaska Ct. App. 1997) (“So long as the police do not detain a suspect for the purpose of gathering probable cause to justify the arrest after the fact, questioning an arrestee about the crime(s) for which he or she has been arrested does not constitute an ‘unreasonable’ delay under *Gerstein* and *McLaughlin*.”).

³³ See *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005).

[The defendant] argues that [his judicial probable cause] determination was unreasonably delayed due to the investigating officers' desire to find more evidence. However, . . . the *McLaughlin* [C]ourt condemned as unreasonable a search for additional evidence only when the evidence is being sought in order to *justify* the arrest. Here, because [defendant] confessed to the shooting shortly after being brought to the police station, the officers already had a sufficient amount of evidence to justify his arrest. As such, there was no unreasonable delay . . .

. . .³⁶

The appellate courts of North Carolina³⁷ and New York,³⁸ along with a federal district court in New York,³⁹ appear to have adopted this view as well, albeit far less clearly.

Although the propriety of temporary investigative delays following a warrantless arrest obviously represents an extremely narrow issue of criminal procedure, the scope of this practice is anything but. In the time since the Supreme Court issued its decision in *McLaughlin*, law

³⁴ See *Peterson v. State*, 653 N.E.2d 1022, 1025 (Ind. Ct. App. 1995) (holding that law enforcement's decision to interrogate an arrested suspect prior to affording him a probable cause hearing did not constitute an unreasonable delay because the police already had probable cause for the arrest).

³⁵ See, e.g., *State v. Walker*, No. W2010-00122-CCA-R3-CD, 2011 WL 2120102, at *2 (Tenn. Crim. App. May 17, 2011) (finding no constitutional violation where a defendant "was placed on a forty-eight-hour investigative hold and put into the jail."); *State v. Brown*, No. W2013-00182-CCA-R3-CD, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014) ("In this case . . . there was probable cause to arrest Defendant. . . . Any delay in a judicial determination in this case was not shown to be 'for the purpose of gathering additional evidence to justify the arrest' The officers were simply trying to verify Defendant's alibi."); *State v. Hayes*, No. W2010-02641-CCA-R3-CD, 2012 WL 3192827, at *13 (Tenn. Crim. App. Aug. 6, 2012) ("the record in the present case establishes that probable cause for the defendant's arrest existed at the time he was booked into the jail on the 48-hour hold. Under these circumstances, the trial court did not err by refusing to suppress his statements."). *But see* *State v. Carter*, 16 S.W.3d 762, 768 (Tenn. 2000) (emphasis added) ("[Defendant] concedes that probable cause existed for the initial warrantless arrest. Moreover, there is no evidence that [defendant] was held for the purpose of gathering additional evidence *or for other investigatory purposes.*") (emphasis added).

³⁶ *Otis*, 217 S.W.3d at 847.

³⁷ See *State v. Chapman*, 471 S.E.2d 354, 356 (N.C. 1996) ("From the time the defendant was arrested at 9:30 a.m. until he was taken before a magistrate at 8:00 p.m., a large part of the time was spent interrogating the defendant. There were several crimes involved. The officers had the right to conduct these interrogations, and it did not cause an unnecessary delay for them to do so.")

³⁸ See *People v. Haywood*, 280 A.D.2d 282, 282 (N.Y. App. Div. 2001) (citation omitted) ("The approximately 20-hour delay between the time of defendant's arrest and his final statement was not extraordinary and was explained by the fact that the police needed to continue the investigation in an effort to unravel the conflicting accounts of what had transpired.")

³⁹ See, e.g., *Irons v. Ricks*, No. 02 Civ. 4806(RWS), 2003 WL 21203409, at *10 (S.D.N.Y. May 22, 2003) ("Since the robbery investigations were necessary and conducted with reasonable dispatch, and there is no evidence that the police delayed [defendant's] arraignment in an attempt to keep him from consulting an attorney or to violate his other rights")

enforcement agencies have formally employed the use of investigative holds against warrantless arrestees in multiple jurisdictions within Illinois, Louisiana, Michigan, Missouri, Ohio, and Texas.⁴⁰ By far, however, the most pervasive use of this practice existed in Tennessee, where until recently, law enforcement agencies regularly utilized investigative holds throughout the state.⁴¹ Astoundingly, in the Memphis area alone, such investigative holds were used by law enforcement “approximately 1,000 times per year.”⁴²

In light of the considerable split of authority addressing this issue, the Supreme Court should promptly resolve the growing dispute over the proper interpretation of *McLaughlin*. In so doing, the Court should articulate with unmistakable clarity that law enforcement may never intentionally delay a warrantless arrestee’s constitutional right to a prompt judicial determination of probable cause for investigative reasons under any circumstances.⁴³

III. THE PROPER INTERPRETATION OF THE *GERSTEIN/MCLAUGHLIN* RULE

The conclusion that police may intentionally delay a warrantless arrestee’s *Gerstein* hearing for the purpose of further investigation so long as probable cause existed to justify the defendant’s arrest in the first place is inconsistent with the Fourth Amendment for five separate reasons:

⁴⁰ See Mulroy, *supra* note 2, 816–18.

⁴¹ *Id.* at 819–21.

⁴² *Id.* at 826.

⁴³ Unfortunately, however, the appropriate remedy for violating this rule is beyond the scope of this Article. As *McLaughlin* itself demonstrates, a civil remedy is available to an aggrieved arrestee by way of a 42 U.S.C. § 1983 action. See *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 47 (1991). However, plaintiffs in such suits may frequently receive only nominal damages without an award of attorney’s fees, providing strong reason to be concerned that civil remedies alone are sufficient to deter law enforcement from committing *Gerstein* violations in the first place. See, e.g., *Willis v. City of Chicago*, 999 F.2d 284, 290 (7th Cir. 1993) (upholding an award of one dollar in damages and denying attorney’s fees). Alternatively, it may be appropriate to subject any evidence obtained as a result of a *Gerstein* violation to exclusion. Whether the exclusionary rule applies to *Gerstein* violations, however, remains an open question that has similarly divided lower courts. See *Powell v. Nevada*, 511 U.S. 79, 85 (1994) (“Whether a suppression remedy applies [to *Gerstein* violations] remains an unresolved question.”); see also *People v. Willis*, 831 N.E.2d 531, 538 (Ill. 2005) (collecting cases and noting the “split in authority.”). Finally, another potential solution could come in the form of immediate habeas corpus relief. The relative merits of each of these options, however, is a topic worthy of its own separate publication.

First, it confounds the essential distinction between a judicial determination of probable cause—which is a constitutional right—and a determination of probable cause that is made by law enforcement, which carries no constitutional significance.

Second, it violates the “administrative purpose” requirement initially established by *Gerstein* and subsequently reaffirmed by *McLaughlin*, which permits law enforcement to delay a warrantless arrestee’s *Gerstein* hearing for administratively necessary reasons only.

Third, it fails to grasp the crucial distinction between, on the one hand, delaying a defendant’s *Gerstein* hearing for investigative reasons, and on the other, continuing an investigation while the administrative steps leading up to a defendant’s *Gerstein* hearing are simultaneously being completed.

Fourth, it renders *McLaughlin*’s express prohibition on “delays for the purpose of gathering additional evidence to justify [an] arrest”⁴⁴ superfluous, since the Fourth Amendment already prohibits arrests that are unsupported by probable cause.

Fifth, it significantly diminishes the value of the check on law enforcement that *Gerstein* was meant to provide by introducing hindsight bias into probable cause determinations and by allowing a substantial number of warrantless arrests to evade judicial review of any kind.

A. The Constitutional (In)significance of a Probable Cause Determination Made by an Arresting Officer

At common law, both in England and the United States, the rule was that “a person arresting a suspect without a warrant must deliver the arrestee to a magistrate ‘as soon as he reasonably can.’”⁴⁵ *Gerstein* relied heavily on this common law rule in holding that the Fourth Amendment permits law enforcement only “a brief period of detention to take the administrative

⁴⁴ *McLaughlin*, 500 U.S. at 56.

⁴⁵ *Id.* at 61 (Scalia, J., dissenting) (citations omitted).

steps incident to arrest” before law enforcement must afford a warrantless arrestee a judicial determination of probable cause.⁴⁶

The public policy justifications for the *Gerstein* rule are numerous. First and foremost, in the United States, accused persons are presumed innocent until proven guilty,⁴⁷ and investigative arrests are considered anathema to our system of justice.⁴⁸ Consequently, because a judicial officer has not yet determined that there is even probable cause to believe that a suspect has committed a crime when law enforcement makes a warrantless arrest, “[e]veryone agrees that the police should make every attempt to minimize the time a presumptively innocent individual spends in jail.”⁴⁹ Furthermore, “[o]nce [a] suspect is in custody, . . . [t]here no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate.”⁵⁰ As a result, the Supreme Court has explained, after a suspect has been arrested, “the reasons that justify dispensing with the magistrate’s neutral judgment

⁴⁶ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

⁴⁷ Historically, this bedrock constitutional principle has separated our justice system from those of other countries. *See Mulroy, supra* note 2, at 822 (footnote omitted) (“[W]hile ‘investigative detentions’ are common in other countries, they have long been outside the traditions of the American criminal justice system. The abuses occurring in other countries from the use of investigative holds remind us why.” (citing *Zemel v. Rusk*, 381 U.S. 1, 15 (1965))); *see also Amenu v. Holder*, 434 Fed. App’x 276, 280 (4th Cir. 2011) (criticizing the Ethiopian government’s arbitrary arrest and detention without charge of members of the opposing political party); *Haile v. Holder*, 658 F.3d 1122, 1133 (9th Cir. 2011) (noting that Amnesty International had criticized Eritrea for indefinite detentions and for holding political and religious dissidents “without charge or trial”). Even today, this principle continues to distinguish the United States from nations like China, which still employs the sordid practice of extended pre-trial punishment. *See China: “Work Camps” Constitute Detention Without Trial*, ASIANEWS.IT (May 21, 2005), <http://www.asianews.it/news-en/China:-Work-camps-constitute-detention-without-trial-3334.html>.

⁴⁸ *See, e.g., Dunaway v. New York*, 442 U.S. 200, 216 (1979) (“Detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.”); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (citation omitted) (“The impropriety [sic] of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was ‘for investigation’ or for ‘questioning.’ The arrest, both in design and in execution, was investigatory.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) (“Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system”); *cf. McLaughlin*, 500 U.S. at 65–66 (Scalia, J., dissenting) (citation omitted) (“Some Western democracies currently permit the executive a period of detention without impartially adjudicated cause. In England, for example, the Prevention of Terrorism Act . . . permits suspects to be held without presentation and without charge for seven days. It was the purpose of the Fourth Amendment to put this matter beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest.”).

⁴⁹ *McLaughlin*, 500 U.S. at 58.

⁵⁰ *Gerstein*, 420 U.S. at 114.

evaporate.”⁵¹ Moreover, following the Supreme Court’s recent decision in *Florence v. Board of Chosen Freeholders of the County of Burlington*, warrantless arrestees may also be forced to submit to the humiliating and dehumanizing mandate that they “expose their body cavities for visual inspection as a part of a [suspicionless] strip search” shortly after being arrested.⁵² Finally, given that “[p]retrial confinement may imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships,”⁵³ and in light of the additional fact that “freedom before conviction permits the unhampered preparation of a defense,”⁵⁴ a prompt determination of probable cause is also closely related to the requirement that pre-trial detention comport with basic notions of fundamental fairness.

More important than any of these compelling public policy justifications, however, is the constitutional basis for the rule established by *Gerstein*, which is rooted in the separation of powers doctrine.⁵⁵ Requiring that a neutral and detached magistrate evaluate the legitimacy of every arrest—either by signing off on an arrest warrant or by conducting a *Gerstein* hearing—

⁵¹ *Id.*

⁵² *Florence v. Bd. of Chosen Freeholders of the Cnty. of Burlington*, 132 S. Ct. 1510, 1516 (2012). At its core, the purpose of the *Gerstein* rule is to prevent innocent people from being arrested in the first place. As Justice Scalia has noted:

The common-law rule of *prompt* hearing had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them.

McLaughlin, 500 U.S. at 71 (Scalia, J., dissenting).

⁵³ *Gerstein*, 420 U.S. at 114 (citations omitted).

⁵⁴ *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

⁵⁵ *Gerstein*, 420 U.S. at 118 (“[P]robable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. The reason for this separation of functions was expressed by Mr. Justice Frankfurter in a similar context: A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

provides an essential check on the abuse of executive power by ensuring that arresting officers are not passing on the legitimacy of their own arrests themselves.⁵⁶ As the *Gerstein* Court noted:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.⁵⁷

Considered from this perspective, it becomes clear that a police officer's own determination that he or she was justified in making an arrest carries no constitutional significance with respect to the judicial probable cause requirement.⁵⁸ Instead, the *Gerstein* right is premised upon the presumption that only an impartial member of the judiciary can be trusted to evaluate the legitimacy of an arrest made by law enforcement.⁵⁹ As a result, the conclusion that law enforcement may lawfully delay a warrantless arrestee's right to a prompt judicial determination of probable cause so long as a judge eventually determines that the arrest was permissible betrays a fundamental misunderstanding of both the nature and the purpose of the right that *Gerstein* protects.

According to those courts that permit investigative delays to a defendant's *Gerstein* hearing so long as law enforcement had already developed probable cause to make an arrest, the

⁵⁶ *Gerstein*, 420 U.S. at 118.

⁵⁷ *Id.* at 112 (quoting *Johnson v. United States*, 333 U.S. 10, 13–14, (1948)).

⁵⁸ Of note, *Gerstein* itself actually *presupposed* the existence of police officers' on-the-scene assessment of probable cause, making clear that such a determination is merely a precursor to complying with the Fourth Amendment. *See Gerstein*, 420 U.S. at 113–4 (“[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.”).

⁵⁹ Toward this end, the *Gerstein* Court explained that even probable cause determinations made by *prosecutors*—who are presumably both trained in the law and comparatively removed from the “the often competitive enterprise of ferreting out crime”—still cannot justify eschewing a warrantless arrestee's right to a prompt judicial determination of probable cause. *Id.* at 117 (“Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment.”).

measure of a defendant's *Gerstein* right hinges entirely upon a post-hoc determination of whether probable cause existed to make the arrest in the first place. In these jurisdictions, if a court ultimately determines that probable cause to make an arrest existed at the time of a defendant's arrest, then law enforcement's decision to delay bringing the defendant before a judge to determine whether probable cause existed is considered unobjectionable. In contrast, if probable cause to arrest did not exist at the time of a defendant's arrest, then an officer's decision to delay bringing the defendant before a judge to determine whether probable cause existed will be considered a *Gerstein* violation. Such fallacious reasoning provides a classic example of a *non-sequitur*.⁶⁰

Fortunately, the error committed by those courts that have conducted a post-hoc determination of probable cause in order to determine whether a defendant's right to a prompt judicial determination of probable cause was violated is an obvious one, and it is easily exposed. Put simply: it is "[a] false arrest claim [that] alleges lack of probable cause. A *Gerstein* claim alleges lack of the opportunity for a prompt judicial determination of probable cause. The claims are not identical and, therefore, are not subject to the same analysis."⁶¹ As a result, whether law enforcement was initially justified in making an arrest is utterly irrelevant to a *Gerstein* claim; instead, the question is merely whether the police unreasonably delayed a defendant's

⁶⁰ See, e.g., *Willis v. Bell*, 726 F. Supp. 1118, 1127 n.20 (N.D. Ill. 1989) ("[The] City makes a lame attempt to argue it did not have a policy of detaining individuals in the absence of probable cause. That of course is beside the point. What is relevant is that in constitutional terms, *Gerstein* teaches that after the time required for truly administrative processing, . . . the arrestee promptly must be brought before a magistrate for . . . a [probable cause] determination."), *aff'd sub nom. Willis v. City of Chicago*, 999 F.2d 284 (7th Cir. 1993).

⁶¹ *Webster v. Gibson*, 913 F.2d 510, 513 n. 7 (8th Cir. 1990); see also *Hunt v. Roth*, 11 C 4697, 2013 WL 708116 at *6 (N.D. Ill. Feb. 22, 2013) ("A claim that [a defendant] was denied a probable cause hearing within a reasonable period of time after arrest is different from a claim that he was arrested and detained without probable cause."); *State v. Huddleston*, 924 S.W.2d 666, 675 (Tenn. 1996) ("Unlike illegal arrest cases, the Fourth Amendment violation in *McLaughlin* cases is the unreasonable detention of an arrestee without a judicial determination of probable cause."); cf. *Powell v. Nevada*, 511 U.S. 79, 90 (1994) (Thomas, J., dissenting) (observing that a "violation of *McLaughlin*" is distinct from unlawful "arrest and custody").

Gerstein hearing after making a warrantless arrest. Those courts that have held otherwise have misunderstood the constitutional inquiry, and their reasoning fails accordingly.

B. The Continued Survival of Gerstein’s “Administrative Steps” Requirement After McLaughlin

For obvious reasons, investigative detentions would have been inconceivable under *Gerstein*’s rule that law enforcement is entitled to only “a brief period of detention to take the administrative steps incident to arrest” before a warrantless arrestee must be afforded a judicial determination of probable cause.⁶² Consequently, it is incumbent upon proponents of the view that investigative detentions became permissible after *McLaughlin* to identify the language in *McLaughlin* that supports this theory. Tellingly, however, no such language exists.

In those jurisdictions that have permitted law enforcement to delay a warrantless arrestee’s *Gerstein* hearing for investigative reasons following a valid arrest, the following forms of delay are currently permitted: (1) administrative delays for the purpose of completing the steps incident to a defendant’s arrest; (2) administrative delays for the purpose of arranging for a defendant’s *Gerstein* hearing; (3) administrative delays for the purpose of preparing for certain pre-trial combination proceedings; and (4) investigative delays for the purpose of gathering additional evidence, provided that probable cause to arrest existed at the time of the arrest.⁶³ Crucially, however, nothing in *McLaughlin* supports the creation of this fourth, previously unfathomable type of delay. Stated simply: “One of these things is not like the others. One of these things doesn’t belong.”⁶⁴

Gerstein’s central holding was that the Fourth Amendment permits police officers only “a brief period of detention to take the administrative steps incident to arrest” before a warrantless

⁶² *Gerstein*, 420 U.S. at 113–14.

⁶³ See, e.g., *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005).

⁶⁴ Sesame Street, *One of These Things - Circles*, YOUTUBE (Apr. 27, 2007), <https://www.youtube.com/watch?v=FCIGht01vIg>.

arrestee must be afforded a judicial determination of probable cause.⁶⁵ The Court’s subsequent decision in *McLaughlin*, however, modified this holding in two material ways. First, *McLaughlin* established a forty-eight hour burden-shifting rule for proving *Gerstein* violations.⁶⁶ Second, over two vigorous dissenting opinions, *McLaughlin* held that even though the government’s preparation for pre-trial “combination proceedings”—such as a bail hearing or an arraignment—does not constitute an administrative step “incident to arrest,” delaying a warrantless arrestee’s *Gerstein* hearing in order to prepare for certain pre-trial combination proceedings still comports with the Fourth Amendment.⁶⁷

In support of its holding that delaying a warrantless arrestee’s *Gerstein* hearing in order to prepare for pre-trial combination proceedings is reasonable under the Fourth Amendment, the *McLaughlin* Court explained that “[o]ur purpose in *Gerstein* was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework.”⁶⁸ Additionally, offering substantial practical support for its holding that delays within the first forty-eight hours of an arrest are presumptively reasonable, the Court went to great lengths to point out eight examples of “inevitable” and “often unavoidable” administrative delays created by “an overly burdened criminal justice system” that must necessarily be accommodated by the judiciary. Specifically, the Court explained that:

[S]ome delays are inevitable. . . . [1] Records will have to be reviewed, [2] charging documents drafted, [3] appearance of counsel arranged, and [4] appropriate bail determined. On weekends, when

⁶⁵ *Gerstein*, 420 U.S. at 113–14.

⁶⁶ *See* *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

⁶⁷ *Id.* at 58 (“[J]urisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process—such as bail hearings and arraignments—may be chosen.”).

⁶⁸ *Id.* at 53.

the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further. In our view, the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system. . . . Courts cannot ignore the often unavoidable delays in [5] transporting arrested persons from one facility to another, [6] handling late-night bookings where no magistrate is readily available, [7] obtaining the presence of an arresting officer who may be busy processing other suspects or [8] securing the premises of an arrest, and other practical realities.⁶⁹

These eight examples of “inevitable” and “often unavoidable” administrative delays shed considerable light on why the *McLaughlin* Court thought it necessary to modify the rule established in *Gerstein* and to allow states additional administrative flexibility in preparing for *Gerstein* hearings. Even more instructive, however, is what the Court did *not* hold. Specifically, nothing in *McLaughlin* suggests or even intimates that non-administrative delays to a defendant’s *Gerstein* hearing that have been deliberately created by law enforcement in order to facilitate further investigation suddenly became permissible after *McLaughlin*. *McLaughlin* simply does not support such a view.

Although *McLaughlin* was meant to promote administrative flexibility in states’ pre-trial proceedings, the eight specific examples of the “inevitable” and “often unavoidable” administrative delays of the judicial process that the Court identified in *McLaughlin* make clear that it did not abandon *Gerstein*’s “administrative steps” requirement.⁷⁰ “[F]lexibility has its

⁶⁹ *Id.* at 55–57.

⁷⁰ *Id.*; cf. Administrative Comment, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 408 (2001) (footnote omitted) (“[*McLaughlin*] specified that only those delays attributable to ‘practical realities’ are reasonable, and thus constitutional [sic].”).

limits,” the *McLaughlin* Court cautioned, and “*Gerstein* is not a blank check.”⁷¹ By sanctioning deliberate delays that are wholly unrelated to any administrative purpose at all, however, several jurisdictions have erroneously issued law enforcement the “blank check” that *McLaughlin* expressly reserved.⁷²

In contrast, however, several other courts have correctly concluded that the Fourth Amendment categorically prohibits law enforcement from deliberately delaying a defendant’s *Gerstein* hearing for any administratively unnecessary reason⁷³—especially when the reason for the delay is to accommodate further investigation of the arrestee.⁷⁴ Of note, this view also comports with numerous pre-*McLaughlin* decisions that found Fourth Amendment violations where the sole purpose of delaying a defendant’s *Gerstein* hearing was to extract a confession.⁷⁵

⁷¹ *McLaughlin*, 500 U.S. at 55.

⁷² *See id.*; *see also* *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005); *State v. Walker*, No. W2010-00122-CCA-R3-CD, 2011 WL 2120102, at *2 (Tenn. Crim. App. May 17, 2011) (finding no constitutional violation where a defendant “was placed on a forty-eight-hour investigative hold and put into the jail.”).

⁷³ *See, e.g.,* *Portis v. City of Chicago, Ill.*, 613 F.3d 702, 705 (7th Cir. 2010) (“[D]elay deliberately created so that the process becomes the punishment . . . violates the [F]ourth [A]mendment”); *Wayland v. City of Springdale, Ark.*, 933 F.2d 668, 670 (8th Cir. 1991) (internal citations omitted) (“*Gerstein* may be violated even in situations where probable cause for the arrest exists. The issue is whether the delay in arraignment was permissible. A defendant may be detained only for as long as it takes to process ‘the administrative steps incident to arrest.’”); *Guy v. Lara*, No. 98 C 3741, 1999 WL 675296, at *6 (N.D. Ill. Aug. 18, 1999) (“[Arrestee] asserts that her amended complaint specifically alleges that the delay in her probable cause hearing was deliberate [Arrestee]’s allegations that [the officers] deliberately slowed down her detention state a valid claim of unreasonable detention.”); *Clay v. State*, 883 S.W.2d 822, 827 (Ark. 1994) (“The delay . . . was not only unnecessary, it was . . . deliberate . . .[,] which should not be countenanced.”).

⁷⁴ *See, e.g.,* *Farr v. Paikowski*, No. 11-C-789, 2013 WL 160268 (E.D. Wis. Jan. 14, 2013) (“The defendants concede that the real purpose for arresting [the arrestee] was simply to interrogate her This concession renders [the arrestee]’s detention *per se* unreasonable under *Gerstein*.”); *United States v. Vilches-Navarrete*, 413 F. Supp. 2d 60, 67 (D.P.R. 2006) (holding that Fed. R. Crim. P. 5(a), which is analogous to the *McLaughlin* requirement, “was designed to prevent federal law enforcement from using the time between arrest and presentment before a magistrate to procure a confession”), *aff’d*, 523 F.3d 1 (1st Cir. 2008); *Williams v. State*, 825 A.2d 1078, 1090 (Md. 2003) (“The sole, unadulterated purpose of the subsequent interrogation was to obtain incriminating statements, and that, nearly all courts agree, is not a proper basis upon which to delay presentment.”); *Commonwealth v. Woodley*, No. 9211358, 1993 WL 818559, at *7 (Mass. Super. Ct. Oct. 12, 1993) (“It is well established, moreover, that a delay is unreasonable when it is contrived by the police to elicit incriminating statements.”); *cf. People v. Richardson*, 183 P.3d 1146, 1167 n.13 (Cal. 2008) (“[B]ecause [the] delay was not for purposes of eliciting incriminating statements, there was no federal constitutional violation.”). *United States v. Davis* provides a single reasoned exception to this rule, holding that a “delay that is attributable to . . . custodial interrogation” is reasonable where the defendant “initiate[s] contact” with and “voluntarily sp[ea]ks to law enforcement.” *United States v. Davis*, 235 F.R.D. 292, 313–14 (W.D. Pa. 2006).

⁷⁵ *See, e.g.,* *United States v. Wilson*, 838 F.2d 1081, 1087 (9th Cir. 1988) (holding that a delay was unreasonable where it was deliberate and for purpose of obtaining a confession); *United States v. Perez*, 733 F.2d 1026, 1036 (2d

Additionally, in keeping with *McLaughlin*'s express prohibition on “delay for delay’s sake,”⁷⁶ several post-*McLaughlin* decisions—which stand for the general proposition that law enforcement may never intentionally prevent a warrantless arrestee from receiving a *Gerstein* hearing if a judicial officer is available to conduct one—offer support for this view as well.⁷⁷

The continued survival of *Gerstein*'s “administrative steps” requirement following *McLaughlin* is also underscored by the three examples of unreasonable delays that the *McLaughlin* Court itself explained remained categorically unlawful within that very decision. As other commentators have observed, what is most revealing about the three examples of unreasonable delays that were specified in *McLaughlin*—(1) delays “to justify the arrest,” (2) delays “motivated by ill will,” and (3) “delay for delay’s sake”⁷⁸—is that these examples have

Cir. 1984) (holding that a delay for the sole purpose of interrogation is unreasonable). Additionally, many jurisdictions that have not applied the exclusionary rule to *McLaughlin* violations have mandated exclusion when officers seek to exploit an unreasonable delay in a defendant’s *Gerstein* hearing by attempting to extract a confession. See, e.g., *United States v. Mullin*, 178 F.3d 334, 342 (5th Cir. 1999) (“There is no evidence that the Military Police delayed turning [defendant] over to civil authorities for the purpose of extracting a confession, or that the delay caused him to confess.”); *People v. Henderson*, No. 179496, 1997 WL 33353393, at *2 (Mich. Ct. App. Mar. 4, 1997) (“[A] confession or other incriminating evidence should be suppressed as a result of an unduly long delay in arraignment only where the delay was used to extract the confession or evidence.”).

⁷⁶ *McLaughlin*, 500 U.S. at 56.

⁷⁷ See, e.g., *Brennan v. Twp. of Northville*, 78 F.3d 1152, 1155 (6th Cir. 1996) (reversing the lower court’s determination that a twenty-two-hour detention constituted a “delay for delay’s sake” under *McLaughlin* on the basis that “there [was] nothing in the record to support the [finding] that a magistrate was available”); *Anderson v. Romanowski*, No. 1:08-CV-801, 2012 WL 6596118, at *10 (W.D. Mich. Dec. 4, 2012) (finding that a delay within forty-eight hours violates *McLaughlin* “if it is determined to be unnecessary”); *Gonzalez v. Bratton*, 147 F. Supp. 2d 180, 200 (S.D.N.Y. 2001) (“[T]he jury could have concluded that . . . [plaintiff’s twenty-seven-hour detention was not] reasonably justified by the needs of ordinary police procedures.”), *aff’d*, 48 F. App’x 363 (2d Cir. 2002); *Williams v. Van Buren Twp.*, 925 F. Supp. 1231, 1235 (E.D. Mich. 1996) (“[I]f a magistrate was available during the day of Saturday . . . and the officers made no effort to arrange a probable cause determination, but rather were delaying to gather more evidence against [the arrestee] or simply for delay’s sake . . . then the delay would be unreasonable, and violative of the Fourth Amendment.”); *Clay*, 883 S.W.2d at 827 (“The delay in taking [the defendant] before a judge was unnecessary. There is no question but that he could have been presented on Monday The only reason that did not occur was the order of the deputy prosecutor to ‘continue to the next court date for evidence involving this case.’ The State presented nothing to show that [the defendant] could not have been taken before a judge on Monday”); cf. *Perez*, 733 F.2d 1026, 1035–36 (2d Cir. 1984) (finding that an eight-hour arraignment delay was unreasonable because law enforcement could have brought defendant before an available magistrate); James R. Dyer, Comment, *Criminal Law--Constitutional Rights of Arrestees at Bail Hearings and After Warrantless Arrests*, 79 MASS. L. REV. 84, 86 (1994) (“Whether a delay in issuing the warrant is reasonable, is based not on the arresting officer’s need to collect additional information but on the arresting officer’s ability to secure a magistrate who can issue the warrant.”).

⁷⁸ *McLaughlin*, 500 U.S. at 56.

nothing in common within one another other than the fact that they are intentional and administratively unnecessary.⁷⁹ Accordingly, the very portion of *McLaughlin* that so many courts have cited as support for the constitutionality of investigative detentions in fact supports the contrary view that intentionally delaying a warrantless arrestee's *Gerstein* hearing for an administratively unnecessary reason continues to violate the Fourth Amendment.⁸⁰

Finally, the view that *Gerstein*'s "administrative steps" requirement survived *McLaughlin* is also expressly reflected by Justice Scalia's understanding of the majority opinion. Addressing in dissent "[which] factors determine whether [a] post[-]arrest determination of probable cause has been . . . 'reasonably prompt,'" Justice Scalia explained: The Court and I both accept two . . . factors, completion of the administrative steps incident to arrest and arranging for a magistrate's probable-cause determination. . . . [W]e disagree, however, upon a third factor—the Court believing, as I do not, that 'combining' the determination with other proceedings justifies a delay"⁸¹

This passage of Justice Scalia's dissent makes clear that despite disagreeing about the constitutionality of delaying a defendant's *Gerstein* hearing in order to prepare for certain pre-trial "combination proceedings," no member of the *McLaughlin* Court endorsed the view that intentionally delaying a defendant's *Gerstein* hearing for a wholly non-administrative reason

⁷⁹ See Goldberg, *supra* note 31, at 106 (footnotes omitted) ("[T]here is no common rationale shared among the examples of impermissible delays. . . . Consequently, if an individual can show that their judicial determination of probable cause was intentionally delayed for a purpose not relating to circumstances beyond law enforcement's control, a Fourth Amendment violation should be declared.").

⁸⁰ See, e.g., *Smith v. Davidson*, Civil No. 11-00498 LEK-RLP, 2013 WL 2420894, at *8 (D. Haw. May 31, 2013) ("[T]he [F]ourth [A]mendment does not permit the police to detain a suspect merely to investigate. Such conduct does not constitute 'administrative steps incident to arrest.'"); *United States v. Davis*, 21 F. Supp. 2d 979, 982 (D. Minn. 1998) ("[Defendant's] interrogation . . . was neither part of nor incident to the administrative steps leading to an arraignment. Thus, the detention in this case . . . was inherently unreasonable, regardless of its modest length."), *aff'd*, 174 F.3d 941 (8th Cir. 1999).

⁸¹ *McLaughlin*, 500 U.S. at 66-67 (Scalia, J., dissenting).

suddenly became permissible after *McLaughlin*.⁸² There is simply no language in *McLaughlin* that supports this view, and given that *Gerstein* had previously prohibited investigative detentions of any kind, that omission is outcome-determinative.

C. The Propriety of Continuing an Investigation While Administrative Steps Are Simultaneously Being Completed

Those courts that have held that *McLaughlin* permits delaying a warrantless arrestee's *Gerstein* hearing for investigative reasons under circumstances when law enforcement has already gathered sufficient evidence to justify an arrest have primarily based their reasoning on the notion that it would be "ludicrous" to handicap law enforcement by forcing them to stop investigating a case while a defendant awaits a *Gerstein* hearing.⁸³ This reasoning, however, presents a false choice between only two alternatives, when in fact a third option is available. As courts in both the Eighth Circuit and the Ninth Circuit have recognized, the Fourth Amendment's prohibition on investigative detentions does not require police to cease investigating someone who has been arrested without a warrant until he or she has been afforded a *Gerstein* hearing.⁸⁴ Instead, the proper reading of *McLaughlin* is that law enforcement may not *delay* a defendant's *Gerstein* hearing in order to facilitate further investigation, but that police may continue investigating a defendant while the administrative steps leading up to his or her *Gerstein* hearing are simultaneously being completed.

⁸² See David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1298 (2002) ("Although the two sides differed regarding whether one particular purpose—the administrative convenience of combining a probable cause hearing with other procedures—should count as legitimate, they agreed that certain other motivations were clearly off-limits.").

⁸³ See, e.g., *United States v. Sholola*, 124 F.3d 803, 820 (7th Cir. 1997); *United States v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995); *Riney v. State*, 935 P.2d 828, 835 (Alaska Ct. App. 1997); *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005); *Peterson v. State*, 653 N.E.2d 1022, 1025 (Ind. Ct. App. 1995).

⁸⁴ See *Davis*, 174 F.3d at 945 n.7 ("[N]othing we say today prevents police from investigating a detained suspect on the crime for which he or she was arrested, or for other unrelated charges, while the suspect is being booked or waiting for an available magistrate."); see also *Kanekoa v. City & Cnty. of Honolulu*, 879 F.2d 607, 612 (9th Cir. 1989) ("The [F]ourth [A]mendment does not prohibit the police from investigating a suspect while the suspect is legally detained.").

As explained above, *Gerstein* categorically prohibited law enforcement from intentionally delaying a warrantless arrestee's judicial probable cause hearing for non-administrative reasons, and nothing in *McLaughlin* suggests that the Supreme Court intended to change that.⁸⁵ Even so, however, it does not follow that the police must immediately cease investigating a warrantless arrestee until he or she has been afforded a *Gerstein* hearing. In evaluating a *Gerstein* claim, a court's sole task is to determine whether the police unreasonably *delayed* a defendant's *Gerstein* hearing after making a warrantless arrest.⁸⁶ Consequently, there can be no basis for a claim that a warrantless arrestee's *Gerstein* hearing was delayed unreasonably if law enforcement's continued investigation of the arrestee did not delay the arrestee's *Gerstein* hearing at all.

A pre-*McLaughlin* decision from the Ninth Circuit helpfully explains this distinction. As that court held in *Kanekoa v. City and County of Honolulu*:

The [F]ourth [A]mendment does not prohibit the police from investigating a suspect while the suspect is legally detained. Because the police had legitimate reasons for detaining the [defendants], we cannot conclude as a matter of law that the police violated their [F]ourth [A]mendment rights by conducting an investigation while the suspects were in custody. Rather, this is an issue of fact: if the [defendants] were detained so the police could conduct an investigation, then the police violated their [F]ourth [A]mendment rights; but if the [defendants] were detained while the police promptly conducted administrative procedures, then the police did not violate their [F]ourth [A]mendment rights.⁸⁷

⁸⁵ See *supra* Part III.B.

⁸⁶ See *McLaughlin*, 500 U.S. at 56.

⁸⁷ *Kanekoa*, 879 F.2d at 612.

This precise reasoning is also reflected by the Eighth Circuit’s opinion in *United States v. Davis*, which explained that: “nothing we say today prevents police from investigating a detained suspect on the crime for which he or she was arrested, or for other unrelated charges, while the suspect is being booked or waiting for an available magistrate.”⁸⁸

The *Kanekoa* and *Davis* courts have correctly identified the crucial distinction between, on the one hand, delaying a warrantless arrestee’s *Gerstein* hearing for investigative reasons, and on the other, continuing an investigation while the administrative steps incident to a defendant’s arrest are simultaneously being completed. Interestingly, the State of Tennessee—the nation’s most frequent *Gerstein* violator⁸⁹—has identified this distinction as well. In *Norris v. Lester*, for example, a defendant contended that law enforcement had intentionally delayed his *Gerstein* hearing for investigative reasons.⁹⁰ In response, the state offered two arguments. First, the state argued that the police had not delayed the defendant’s *Gerstein* hearing “to justify [his] arrest” because police had already developed probable cause to arrest the defendant.⁹¹ Second, the state argued that the defendant’s *Gerstein* hearing had not been delayed for any investigative reason at all because “the evidence reasonably shows only that the police continued their investigation into the murder *in parallel* to the [defendant]’s detention, not that the prolonged detention was because of the continuing investigation.”⁹² In the author’s view, this interpretation of *McLaughlin* is correct.

D. Rendering *McLaughlin*’s Prohibition on Investigative Detentions Superfluous

⁸⁸ *Davis*, 174 F.3d at 945 n.7.

⁸⁹ See Mulroy, *supra* note 2, at 822 (noting that, “in Tennessee, [investigative detentions] seem[] to be used most frequently, broadly, and recently”).

⁹⁰ See *Norris v. Lester*, 545 Fed. App’x 320, 328 (6th Cir. 2013).

⁹¹ Brief of Respondent-Appellee at 21, *Norris*, 545 Fed. App’x 320 (No. 10-5842).

⁹² *Id.* at 33 (emphasis added).

A fourth, major problem with the conclusion that *McLaughlin* only prohibits investigative delays under circumstances when law enforcement did not have probable cause to make an arrest in the first place is that such a prohibition would not actually prohibit anything at all. Thus, if *McLaughlin*'s express prohibition on "delays for the purpose of gathering additional evidence to justify the arrest"⁹³ is to have any meaning, then a contrary result must have been intended.

When a person has been arrested without a warrant, only six scenarios are possible:

1. Law enforcement *believed* that it had probable cause to make the arrest, and law enforcement *did* in fact have probable cause to make the arrest;
2. Law enforcement *believed* that it had probable cause to make the arrest, but law enforcement actually *did not* have probable cause to make the arrest;
3. Law enforcement *did not believe* that it had probable cause to make the arrest, but law enforcement actually *did* have probable cause to make the arrest;
4. Law enforcement *did not believe* that it had probable cause to make the arrest, and law enforcement in fact *did not* have probable cause to make the arrest;
5. Law enforcement was *unsure* about whether it had probable cause to make the arrest, but law enforcement *did* in fact have probable cause to make the arrest; or
6. Law enforcement was *unsure* about whether it had probable cause to make the arrest, but law enforcement *did not* in fact have probable cause to make the arrest.

Chart I

	Had Probable Cause	Did Not Have Probable Cause
Believed Had Probable Cause	1	2

⁹³ Cnty. of Riverside v. *McLaughlin*, 500 U.S. 44, 56 (1991).

Did Not Believe Had Probable Cause	3	4
Unsure Whether Had Probable Cause	5	6

Given these possibilities, if *McLaughlin* permits delays for the purpose of gathering additional evidence so long as an arrest was supported by probable cause to begin with, then *McLaughlin*'s express prohibition on "delays for the purpose of gathering additional evidence to justify [an] arrest"⁹⁴ is merely superfluous, and it actually prohibits nothing. This is necessarily the case because arresting a defendant without probable cause already violates the Fourth Amendment,⁹⁵ and consequently, Scenarios 2, 4 and 6 are already unlawful.⁹⁶ Similarly, Scenario 1—in which police correctly believe that they have probable cause to make an arrest⁹⁷—is not realistically implicated by *McLaughlin* either, because law enforcement has no reason to attempt to justify an arrest that is already believed to be, and is in fact, justified.

Accordingly, only Scenarios 3 and 5—situations in which some degree of additional justification for an arrest could be considered necessary by law enforcement—would appear to be implicated by *McLaughlin*.⁹⁸ However, even these two situations would avoid *McLaughlin*'s prohibition on "delays for the purpose of gathering additional evidence to justify [an] arrest"⁹⁹ due to the longstanding rule that the subjective belief of law enforcement is irrelevant to the determination of whether or not probable cause exists.

As the U.S. Supreme Court has consistently and repeatedly explained: "an arresting officer's state of mind . . . is irrelevant to the existence of probable cause."¹⁰⁰ According to the

⁹⁴ *Id.*

⁹⁵ *See, e.g.,* Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.").

⁹⁶ *See supra* Chart I.

⁹⁷ *See supra* Chart I.

⁹⁸ *See supra* Chart I.

⁹⁹ *McLaughlin*, 500 U.S. at 56.

¹⁰⁰ *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Supreme Court, “[t]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent” of law enforcement.¹⁰¹ Put simply, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”¹⁰² Consequently, in those jurisdictions that permit investigative detentions so long as probable cause existed to justify a defendant’s arrest in the first place, courts have held that the Fourth Amendment is not violated *even when police officers have candidly admitted—in express violation of McLaughlin—that they delayed a warrantless arrestee’s Gerstein hearing “for the purpose of gathering additional evidence to justify the arrest.”*¹⁰³ Such a holding cannot possibly be correct.

A recent decision by the Tennessee Supreme Court offers a particularly instructive example of this flawed reasoning. In *State v. Bishop*, after law enforcement had arrested a defendant without a warrant, the defendant was placed under what the arresting officers described as a “forty-eight-hour hold.”¹⁰⁴ During this “hold,” the defendant was deliberately denied a *Gerstein* hearing—even though a magistrate was immediately available to conduct one¹⁰⁵—and the arresting officers used the time afforded by their “forty-eight-hour hold” to

¹⁰¹ *Whren v. United States*, 517 U.S. 806, 814 (1996).

¹⁰² *Id.* at 813.

¹⁰³ *McLaughlin*, 500 U.S. at 56.

¹⁰⁴ *State v. Bishop*, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *4–5 (Tenn. Crim. App. Mar. 14, 2012), *rev'd*, 431 S.W.3d 22 (Tenn. 2014).

¹⁰⁵ In fact, just two hours and thirty-five minutes after he was arrested, the defendant was actually brought before a magistrate for a non-*Gerstein* hearing that was described as a “hold hearing.” Transcript of Motion to Suppress at 62, *Bishop*, 431 S.W.3d 22 (Tenn. 2014) (No. 08-07886) (“There is a charge listed as what we’re holding him for, but he’s not - judicially speaking, he’s not judicially charged. It’s just a hold.”). Independent of law enforcement’s admittedly investigative motivation to place the defendant under a “hold,” this fact alone represented a clear-cut *Gerstein* violation because it constituted a “delay for delay’s sake.” *See, e.g., State v. Thompson*, 508 S.E.2d 277, 288 (N.C. 1998) (“The failure to provide defendant with a bond hearing before a judge at the first opportunity on Monday morning, and the continued detention of defendant well into the afternoon, was unnecessary, unreasonable, and thus constitutionally impermissible under [*McLaughlin*].”); *Clay v. State*, 883 S.W.2d 822, 827 (Ark. 1994) (“The delay in taking [the defendant] before a judge was unnecessary. There is no question but that he could have been presented on Monday”); *Williams v. Van Buren Twp.*, 925 F. Supp. 1231, 1235 (E.D. Mich. 1996) (“[I]f a magistrate was available during the day of Saturday . . . and the officers made no effort to arrange a probable cause determination, but rather were delaying to gather more evidence against [the arrestee] or simply for delay’s sake . . . then the delay would be unreasonable, and violative of the Fourth Amendment.”); *Brennan v. Twp. of Northville*, 78

interrogate the defendant multiple times and to gather additional evidence against him in connection with a murder investigation.¹⁰⁶ As soon as the police obtained a confession from the defendant, however, law enforcement immediately brought the defendant before a magistrate for his *Gerstein* hearing, after which the magistrate determined that the defendant's arrest had been supported by probable cause at the time he was arrested.¹⁰⁷

Of note, however, during the defendant's suppression hearing, extensive testimony was elicited from the arresting officers indicating that they themselves did not believe that they had had probable cause to arrest the defendant at the time of his arrest.¹⁰⁸ Specifically, the arresting officers testified, among other things, that:

- (1) "If we didn't get any additional evidence, when the forty-eight hours expired, we'd [have] let [the defendant] go[;]";¹⁰⁹
- (2) "[The defendant was] booked in jail on first-degree murder. We fill[ed] out the form to hold him in there until we c[ould] do our additional investigation to come up with the appropriate charges[;]"¹¹⁰

F.3d 1152, 1155 (6th Cir. 1996) (reversing lower court's determination that twenty-two-hour detention constituted a delay "for delay's sake" under *McLaughlin* on the basis that there was "nothing in the record to support the [finding] that a magistrate was available"); *United States v. Perez*, 733 F.2d 1026, 1035–36 (2d Cir. 1984) (finding that an eight-hour arraignment delay was unreasonable because law enforcement could have brought defendant before an available magistrate); *Anderson v. Romanowski*, No. 1:08–cv–801, 2012 WL 6596118, at *10 (W.D. Mich. Dec. 4, 2012) (noting that a delay within forty-eight hours violates *McLaughlin* "if it is determined to be unnecessary."); *see also Dyer*, *supra* note 77, at 86 ("Whether a delay in issuing the warrant is reasonable, is based not on the arresting officer's need to collect additional information but on the arresting officer's ability to secure a magistrate who can issue the warrant."). Thus, given both the clarity and the undisputed content of the record on this point, it is difficult to explain the Tennessee Supreme Court's decision to reject the defendant's *Gerstein* claim on the basis that "neither party presented the sorts of evidence that one would have expected to be introduced on this issue." *Bishop*, 431 S.W.3d 22, 45 (Tenn. 2014), *cert. denied*, 135 S. Ct. 120 (2014).

¹⁰⁶ *Bishop*, 2012 WL 938969, at *4–5.

¹⁰⁷ *See id.* at *6

¹⁰⁸ *Id.* at *5–6 (noting that one of the arresting officers "acknowledged that [they] did not have enough to charge the defendant with the victim's murder," and that another "admitted that at the time the defendant was placed in custody, officers did not have 'enough to charge him with a crime'").

¹⁰⁹ Transcript of Continuation of the Motion to Suppress at 62, *Bishop*, 431 S.W.3d 22 (Tenn. 2014) (No. 08-07886). This testimony and the testimony that follows—all of which appears in the original trial record—was neither included nor referenced in the opinion of the Tennessee Supreme Court.

¹¹⁰ Transcript of Motion to Suppress at 51, *Bishop*, 431 S.W.3d 22 (No. 08-07886); *see also Bishop*, 2012 WL 938969, at *4.

(3) “[W]e fill[ed] out a forty-eight-hour hold affidavit So that that w[ould] give us more time to either find evidence that [the defendant] did it or find evidence he wasn’t there and didn’t do it[;]”;¹¹¹

(4) “[The defendant] was going to be placed in the jail and placed on a forty-eight-hour hold until we could corroborate [his] statement, where he was, cell phone records, everything we had working at that time[;]”¹¹² and

(5) “[The hold procedure is] basically . . . we have reason to believe that a person is involved in this crime; that we’ll need additional time to investigate it to either corroborate alibis or dispel them.”¹¹³

Given both the number and the specificity of these admissions, two crucial facts were not realistically subject to dispute. First, law enforcement arrested the defendant without believing that it had probable cause to do so.¹¹⁴ Second, law enforcement intentionally delayed the defendant’s *Gerstein* hearing in order to gather additional evidence that it believed was necessary to justify the defendant’s arrest.¹¹⁵ Given these facts, this would appear to be *precisely* the situation prohibited by *McLaughlin*’s proscription on “delays for the purpose of gathering additional evidence to justify [an] arrest”¹¹⁶

Upon review, however, the Tennessee Supreme Court explained that: “It matters not whether the arresting officers themselves believed that probable cause existed.”¹¹⁷ Accordingly, the *Bishop* court dismissed as irrelevant the officers’ repeated admissions that they had

¹¹¹ Transcript of Motion to Suppress, *supra* note 110, at 61; *see also Bishop*, 2012 WL 938969, at *5.

¹¹² Transcript of Motion to Suppress, *supra* note 111, at 65–66; *see also Bishop*, 2012 WL 938969, at *5.

¹¹³ Transcript of Continuation of the Motion to Suppress, *supra* note 109, at 61; *see also Bishop*, 2012 WL 938969, at *6.

¹¹⁴ *See* Transcript of Continuation of the Motion to Suppress at 62. *See also Bishop*, 2012 WL 938969, at *5–6 (noting that one of the arresting officers “acknowledged that [they] did not have enough to charge the defendant with the victim’s murder,” and that another “admitted that at the time the defendant was placed in custody, officers did not have ‘enough to charge him with a crime’”).

¹¹⁵ Transcript of Motion to Suppress, *supra* note 110, at 61, 65–66. *See also Bishop*, 2012 WL 938969 at *8 (“It appears that the [officers] . . . detain[ed the] suspect as an investigative tool specifically designed to acquire additional evidence to support the detention.”).

¹¹⁶ *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

¹¹⁷ *State v. Bishop*, 431 S.W.3d 22, 36 (Tenn. 2014).

intentionally delayed the defendant's *Gerstein* hearing for the purpose of gathering additional evidence to justify the defendant's arrest.¹¹⁸ Next, the court overruled the lower court's holding that the police had violated *Gerstein* and *McLaughlin* on the basis that: "[the defendant] was arrested with probable cause."¹¹⁹ Accordingly—the officers' remarkably candid admissions on the matter notwithstanding—the *Bishop* court found no *Gerstein* violation.

As illustrated by the reasoning of decisions like *Bishop* and others,¹²⁰ if the only consideration relevant to a *Gerstein* claim is whether probable cause existed to justify a defendant's arrest in the first place, then *McLaughlin*'s express prohibition on "delays for the purpose of gathering additional evidence to justify [an] arrest"¹²¹ is rendered superfluous, and it actually prohibits nothing at all. According to the courts that have adopted this view, if probable cause existed at the time of a defendant's arrest, then the Fourth Amendment permits investigative delays for up to forty-eight hours—even when law enforcement openly admits, as it did in *Bishop*, that it delayed a defendant's *Gerstein* hearing "for the [expressly prohibited] purpose of gathering additional evidence to justify the arrest."¹²² In contrast, however, if probable cause did not exist at the time of the defendant's arrest, then any investigative delay is unconstitutional both for lack of probable cause and as a *Gerstein* violation.

¹¹⁸ See *id.* at 43–45. The court subsequently discussed the issue via the "plain error doctrine." *Id.*

¹¹⁹ *Id.* at 45.

¹²⁰ See, e.g., *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005) ("[The arrestee] argues that [his judicial probable cause] determination was unreasonably delayed due to the investigating officers' desire to find more evidence. However, . . . the *McLaughlin* [C]ourt condemned as unreasonable a search for additional evidence only when the evidence is being sought in order to *justify* the arrest. Here, because [the defendant] confessed to the shooting shortly after being brought to the police station, the officers already had a sufficient amount of evidence to justify his arrest. As such, there was no unreasonable delay . . ."); *Peterson v. State*, 653 N.E.2d 1022, 1025 (Ind. Ct. App. 1995) (holding that law enforcement's decision to interrogate an arrested suspect prior to affording him a probable cause hearing did not constitute an unreasonable delay because the police already had probable cause for the arrest); *State v. Brown*, No. W2013-00182-CCA-R3-CD, 2014 WL 4384954, at *17 (Tenn. Crim. App. Sept. 5, 2014) (citation omitted) ("[T]here was probable cause to arrest [the d]efendant. . . . Any delay in a judicial determination in this case was not shown to be 'for the purpose of gathering additional evidence to justify the arrest' The officers were simply trying to verify [the d]efendant's alibi.").

¹²¹ *McLaughlin*, 500 U.S. at 56.

¹²² *Id.* See, e.g., *United States v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995).

In the words of Justice Scalia, this result “taxes the credulity of the credulous.”¹²³ Such reasoning plainly and erroneously conflates the *Gerstein* inquiry and the probable cause requirement, which are not identical.¹²⁴ The result of this reasoning is also directly contradicted by *McLaughlin* itself, which specifically stated in no uncertain terms that “delays for the purpose of gathering additional evidence to justify [an] arrest”¹²⁵ violate the Fourth Amendment. Consequently, to borrow a phrase coined by Chief Justice Marshall, such a holding “is too extravagant to be maintained,”¹²⁶ and those courts that have adopted it should not maintain it any longer.

E. Undermining the Underlying Purpose of Gerstein and McLaughlin

When combined with the warrant requirement, the principal value of the *Gerstein* rule is that it ensures that every person who is arrested by the government will receive a judicial determination of probable cause either before an arrest is made or else shortly thereafter. By contrast, however, the rule applied in those jurisdictions that have permitted investigative detentions for up to forty-eight hours following an arrest does not afford warrantless arrestees this critical check on governmental abuse. Instead, it frequently results in judicial review being conducted only after law enforcement has gathered additional inculpatory evidence, or else not at all. Such a practice inevitably results in judicial determinations of probable cause that are tainted by hindsight bias, significantly diminishing the value of the check on governmental abuse that *Gerstein* was meant to provide. Of equal importance, such a practice also permits a substantial number of warrantless arrests to evade judicial review of any kind.

¹²³ *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (Scalia, J., dissenting).

¹²⁴ *See supra* p. 14 and note 58.

¹²⁵ *McLaughlin*, 500 U.S. at 56.

¹²⁶ *Marbury v. Madison*, 5 U.S. 137, 179 (1803).

Under the Fourth Amendment, “[w]hether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer *at the time of the arrest.*”¹²⁷ Accordingly, in determining whether an arrest was supported by probable cause, a court conducting a *Gerstein* hearing may only consider the evidence that law enforcement had gathered up until the moment that the defendant was arrested.¹²⁸ Thus, at least in theory, whatever evidence police acquire after an arrest takes place may not be considered during a *Gerstein* hearing—even if the after-acquired evidence is highly suggestive of the defendant’s guilt.¹²⁹

The obvious problem, of course, is that judges are human, and humans are influenced by the well-documented phenomenon of “hindsight bias.” Hindsight bias refers to the “tendency for people to overestimate the predictability of past events” based on information acquired after the event took place.¹³⁰ Substantial evidence indicates that judges are not immune from this phenomenon (and in fact, it turns out that judges “exhibit[] hindsight bias to the same extent as . . . laypersons”).¹³¹ For example, research indicates that even in an experimental setting—which

¹²⁷ *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004) (emphasis added).

¹²⁸ *Id.*; *cf.* *Powell v. Nevada*, 511 U.S. 79, 90 (1994) (Thomas, J., dissenting) (“[T]here is no suggestion that the delay in securing a determination of probable cause permitted the police to gather additional evidence to be presented to the [m]agistrate. On the contrary, the [m]agistrate based his determination on the facts included in the declaration of arrest that was completed within an hour of petitioner’s arrest. Thus, if the probable-cause determination had been made within 48 hours as required by *McLaughlin*, the same information would have been presented, the same result would have been obtained, and none of the circumstances of petitioner’s custody would have been altered.”).

¹²⁹ *See Devenpeck*, 543 U.S. at 152. Of course, as a practical matter, nothing would prevent law enforcement from simply re-arresting the defendant on the basis of any newly acquired evidence. Whether evidence acquired as a result of a *Gerstein* violation is subject to the exclusionary rule, however, remains an open question that the U.S. Supreme Court still has yet to resolve. *See Powell*, 511 U.S. at 85 n.* (“Whether a suppression remedy applies [to *Gerstein* violations] remains an unresolved question.”).

¹³⁰ Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 799 (2001).

¹³¹ *Id.* at 818; *see also* John C. Anderson et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 725–30 (1993).

carries none of the public pressure that judges (and popularly elected judges in particular¹³²) face in practice—approximately 24% of judges exhibit measurable hindsight bias.¹³³

Even more troublingly, research also indicates that instructing a person to suppress specific thoughts actually has the anomalous effect of motivating enhanced consideration of those very thoughts.¹³⁴ Assuming that judges are not immune from this phenomenon, either, it follows that judges may be especially likely to focus on after-acquired evidence when conducting *Gerstein* hearings precisely *because* the law prohibits them from doing so.

In light of these concerns, it becomes clear that “post hoc reviews of probable cause determinations inevitably bias the outcome because the judge knows that the police . . . uncovered evidence of criminal behavior.”¹³⁵ Fortunately, though, in jurisdictions that have held that *McLaughlin* categorically prohibits investigative delays to a defendant’s *Gerstein* hearing, judges are largely prevented from considering evidence gathered after an arrest in determining whether probable cause existed to support the arrest in the first place.¹³⁶ This welcome result is obtained because in such jurisdictions, law enforcement understands that any delay resulting from further investigation will automatically trigger a *Gerstein* violation.

¹³² See *Woodward v. Alabama*, 134 S. Ct. 405, 408 (2013) (Sotomayor, J., dissenting) (noting that empirical evidence demonstrates that “Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures[.]” and explaining why electing judges who must be mindful of political considerations “casts a cloud of illegitimacy over the criminal justice system”); Niraj Chokshi, *How Judicial Campaign Ads May be Affecting Legal Decisions*, WASHINGTON POST (Oct. 22, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/10/22/how-judicial-campaign-ads-may-be-affecting-legal-decisions/>. See generally Joanna Shepherd and Michael S. Kang, *Skewed Justice*, SKEWEDJUSTICE.ORG, <http://skewedjustice.org/> (last visited Feb. 12, 2015) (“State supreme court justices, already the targets of sensationalist ads labeling them ‘soft on crime,’ are under increasing pressure to allow electoral politics to influence their decisions, even when fundamental rights are at stake.”).

¹³³ See Guthrie, *supra* note 131, at 818.

¹³⁴ Daniel M. Wegner et al., *Paradoxical Effects of Thought Suppression*, 53 J. PERSONALITY & SOC. PSYCHOL. 5, 8 (1987).

¹³⁵ THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 4 (Michael Klarman et al. eds., 2012).

¹³⁶ See, e.g., *Willis v. City of Chicago*, 999 F.2d 284, 289 (7th Cir. 1993) (holding that delays for the purpose of “gathering additional evidence to justify the arrest” are unreasonable and violate both *Gerstein* and *McLaughlin*).

Conversely, however, in those jurisdictions that permit investigative delays for up to forty-eight hours following a defendant's arrest, then one of two results is likely. First, if law enforcement is able to gather additional evidence tending to prove the guilt of the arrestee in the forty-eight hours following a defendant's arrest, then the integrity of the defendant's *Gerstein* hearing will be tainted by hindsight bias. Alternatively, if law enforcement is unable to gather additional evidence tending to prove the guilt of the arrestee, then experience indicates that police will frequently just release the defendant¹³⁷—meaning that law enforcement will evade judicial review of its arrest altogether. Both results, of course, are undesirable.

The aforementioned Tennessee Supreme Court case *State v. Bishop* is instructive as to each of these problems as well. As noted above, following the defendant's arrest in that case, law enforcement brought the defendant before a magistrate for a "hold hearing" and sought permission to detain the defendant for up to forty-eight hours in order to accommodate further investigation.¹³⁸ During this "hold hearing," the affidavit submitted by law enforcement offered only the following evidence to support of the defendant's arrest: On August 19, 2008 Maurice Taylor was shot and killed at 1548 Cella. The Shelby County Medical Examiners [sic] Office ruled his death a homicide. During the investigation the defendant was named as the shooter. Additional time is needed to show photo spreads and take statements.¹³⁹

¹³⁷ See Mulroy, *supra* note 2, at 819 (noting that in Tennessee, several jurisdictions have an internal policy of placing warrantless arrestees under a forty-eight-hour hold "to allow the police extra time to develop their investigation" in order to see whether the suspect would be charged or released). In the Memphis area alone, one media study determined that approximately forty percent of arrestees subjected to investigative holds were released without charge. *Id.* at 848 & n.197 (citing Chris Conley, *County Jail to Refuse Detainees Not Charged*, COM. APPEAL (Memphis), Nov. 20, 2000, at A1); see also *State v. Bishop*, No. W2010-01207-CCA-R3-CD, 2012 WL 938969, at *5 (Tenn. Crim. App. Mar. 14, 2012); Transcript of Motion to Suppress, *supra* note 111, at 65–66.

¹³⁸ *Bishop*, 2012 WL 938969 at *4–5. There is, of course, actually no such thing as a "[forty-eight]-hour hold." As the intermediate appellate court correctly observed in that case: "The '[forty-eight]-hour hold' does not exist in our constitutional pantheon of acceptable practices." *Id.* at *8.

¹³⁹ Order Granting 48 Hour Detention For Probable Cause at 1, *State v. Bishop*, 431 S.W.3d 22 (Tenn. 2014) (No. 08-07886).

After a full day of additional investigation, however—which was capped by the arresting officers successfully procuring a confession from the defendant at the twenty-four hour mark—the evidence implicating the defendant was markedly improved. Of note, the evidence that law enforcement presented to the magistrate at the defendant’s *Gerstein* hearing also was not limited to the evidence that had been gathered at the time of his arrest. Instead, the affidavit that law enforcement submitted to the presiding magistrate during the defendant’s *Gerstein* hearing stated:

On Tuesday, August 19, 2008, approximately 11:00 p.m., the victim, Maurice Taylor, was shot in front of his home at 1548 Cella by defendant, Courtney Bishop. The victim later died from his injuries. The death of Maurice Taylor was ruled a Homicide by the Shelby County Medical Examiner.

During the course of the investigation, co-defendant Marlon McKay was developed as a suspect in the incident. On Friday, August 22, 2008, co-defendant McKay gave a statement of admission to Homicide investigators as to his part in the attempted robbery and subsequent shooting death of the victim. Co-defendant McKay also identified Courtney Bishop as being the subject that shot and killed the victim.

On Friday, August 22, 2008, defendant Bishop was picked up at 1081 Railton and brought to the Homicide Office. On Saturday, August 23, 2008, the defendant gave a statement of admission to Homicide investigators as being responsible for the attempted robbery and shooting death of the victim.¹⁴⁰

After reviewing this second affidavit, the presiding magistrate determined that law enforcement had already developed probable cause to arrest the defendant at the time that he was

¹⁴⁰ Affidavit of Complaint at 1, *Bishop*, 431 S.W.3d 22 (No. 08-07886).

“picked up” for questioning.¹⁴¹ Initially, this finding was unanimously reversed by a skeptical panel of the Tennessee Court of Criminal Appeals,¹⁴² but it was ultimately affirmed by the Tennessee Supreme Court on direct appeal. Whether hindsight bias created by the defendant’s confession influenced either the trial court’s or the Tennessee Supreme Court’s determination in this regard is unknown, but the potential for such bias is clear. What is known, however, is that according to the arresting officers themselves at the time of the defendant’s arrest: “If we didn’t get any additional evidence, when the forty-eight hours expired, we’d [have] let him go.”¹⁴³

IV. CONCLUSION

It almost goes without saying that if the *Gerstein* Court had intended to sanction deferred judicial determinations of probable cause pending continued investigation by law enforcement, then it would not have stated that: “Once [a] suspect is in custody, . . . the reasons that justify dispensing with the magistrate’s neutral judgment evaporate.”¹⁴⁴ Nothing in *McLaughlin* undermines this view, and several considerations militate against the conclusion that investigative detentions suddenly became permissible after *McLaughlin*. In summary, the notion that law enforcement may deliberately delay a warrantless arrestee’s *Gerstein* hearing for investigative purposes is antithetical to the common law understanding of that right,¹⁴⁵ conflicts

¹⁴¹ Perhaps fearing that the confession they had obtained from the defendant might be suppressed as the fruit of an illegal arrest, during the defendant’s suppression hearing, the officers contended that they had not actually arrested the defendant when they handcuffed him at his home, transported him to the police station in a squad car, and then shackled him to a bench to be interrogated before placing him in jail for forty-eight hours. For example, after explaining that whether the defendant was arrested depends on “what your definition of arrest is,” one officer testified that the defendant was only arrested “[i]f your definition of arrest is not charged yet but placed in the jail on a forty eight hour hold[.]” Transcript of Motion to Suppress, *supra* note 110, at 66. Similarly, another officer testified that rather than being arrested, the defendant was merely “put on a forty-eight-hour hold for investigation, and then he was subsequently charged[.]” Transcript of Continuation of the Motion to Suppress, *supra* note 109, at 16.

¹⁴² *Bishop*, 2012 WL 938969 at *10, *rev’d*, 431 S.W.3d 22 (“[T]he State . . . failed to establish that there was probable cause for the defendant’s arrest.”).

¹⁴³ Transcript of Continuation of the Motion to Suppress, *supra* note 110, at 62.

¹⁴⁴ *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

¹⁴⁵ See *supra* Part III.A.

with the U.S. Supreme Court’s decisions in *Gerstein* and *McLaughlin*,¹⁴⁶ and invites the rampant abuse of investigative detentions that many jurisdictions have permitted to metastasize.¹⁴⁷

Additionally, although ensuring that all warrantless arrestees receive a prompt judicial determination of probable cause does provide a minimum level of protection against “the dangers of the overzealous as well as the despotic” police officer,¹⁴⁸ it is important to keep in mind that such protection is actually comparatively minimal. For example, as the dissenting Justices in *Gerstein* astutely observed, such a rule—by itself—“extends less procedural protection to an imprisoned human being than is required to test the propriety of garnishing a commercial bank account, the custody of a refrigerator, the temporary suspension of a public school student, or the suspension of a driver’s license.”¹⁴⁹ Accordingly, any attempt to undercut even further the already minimal protections afforded to warrantless arrestees—who are supposed to be presumed innocent in the eyes of the law—should be carefully scrutinized. The reasoning of those courts that have sanctioned investigative detentions following *McLaughlin*, however, cannot withstand such scrutiny.

For the reasons presented in this Article, numerous courts have erred by holding that law enforcement may deliberately delay a warrantless arrestee’s *Gerstein* hearing for investigative reasons without violating the Fourth Amendment. Such a conclusion is not at all supported by *McLaughlin*—which is cited as its purported justification—and in those jurisdictions that have endorsed it, this holding has dramatically undermined the value of the check on law enforcement that *Gerstein* hearings were meant to provide. Consequently, the Supreme Court should promptly resolve the confusion created by its decision in *McLaughlin* and hold that law

¹⁴⁶ See *supra* Part III.B.E.

¹⁴⁷ See *Bishop*, 2012 WL 938969 at *4–5; see also *supra* Part III.D.

¹⁴⁸ *Gerstein*, 420 U.S. at 118.

¹⁴⁹ *Id.* at 127 (Stewart, J., dissenting) (citations omitted).

enforcement may never delay a warrantless arrestee's *Gerstein* hearing for investigative reasons under any circumstances.