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

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

DANIEL A. HORWITZ*

I. INTRODUCTION .................................................................519
II. DIVERGING AUTHORITY ......................................................523
III. THE PROPER INTERPRETATION OF THE 
    GERSTEIN/MCLAUGHLIN RULE ........................................529
A. The Constitutional (In)significance of a Probable 
   Cause Determination Made by an Arresting Officer ....530
B. The Continued Survival of Gerstein’s “Administrative 
   Steps” Requirement After McLaughlin .......................536
C. The Propriety of Continuing an Investigation While 
   Administrative Steps Are Simultaneously Being 
   Completed ........................................................................543
D. Rendering McLaughlin’s Prohibition on Investigative 
   Detentions Superfluous ......................................................545
E. Undermining the Underlying Purpose of Gerstein 
   and McLaughlin .................................................................552
IV. CONCLUSION .....................................................................558

I. INTRODUCTION

In the landmark criminal procedure case Gerstein v. Pugh, the United States 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

* Daniel Horwitz is an appellate attorney in Nashville, Tennessee. He 
is a graduate of Vanderbilt Law School and a former judicial law clerk to Ten-
nessee Supreme Court Justice Sharon G. Lee. The author expresses his thanks 
to R. Andrew Free for his thorough insight and thoughtful analysis.

“promptly” such a probable cause determination must be made, however, was never defined by the Gerstein Court. 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 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.

Finding Gerstein’s “brief period of detention to take the administrative steps incident to arrest” 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. Under McLaughlin, if the government does not afford a warrantless arrestee a judicial determination of probable cause—known as a “Gerstein hearing”—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. 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

2. Id. at 125; 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.” (citing Gerstein, 420 U.S. 103)); 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.”).


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.
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 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

8. Id. at 56.
9. Id.
10. Id.
11. Id.
12. Id. (emphasis added).
13. See, e.g., United States v. Daniels, 64 F.3d 311, 314 (7th Cir. 1995) (“[The defendant’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.” (emphasis added)); 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
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 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

---

14. *See*, e.g., *Daniels*, 64 F.3d at 315; *Otis*, 217 S.W.3d at 848; *Brown*, 2014 WL 4384954, at *16.

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

\(^{16}\) McLaughlin, 500 U.S. at 56.

\(^{17}\) Id. (emphasis added).
the appellate courts of Alaska, Arkansas, Indiana, New York, North Carolina, and Tennessee from those of California, Massachusetts, and Michigan.

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. 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. 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.”

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. This view of McLaughlin has also been adopted with varying degrees of clarity by the courts of California, Massachusetts, and Michigan, as well as federal district courts in Illinois, Washington, and Wisconsin.

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. 174 F.3d 941, 944 (8th Cir. 1999).
22. See People v. Jenkins, 19 Cal. Rptr. 3d 386, 398 (Ct. App. 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. See 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
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 dif-

24. See 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. See Cornish v. Papis, 962 F. Supp. 1103, 1110–11 (C.D. Ill. 1997) (rejecting plaintiff’s McLaughlin challenge where the delay “was not to enable the police to locate some incriminating evidence or to build a case against [him]” (emphasis added) (citing Llaguno v. Mingley, 763 F.2d 1560, 1568 (7th Cir. 1985))).  
27. See 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.”).
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:

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

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

29. 124 F.3d 803, 820 (7th Cir. 1997).

30. Lopez v. City of Chicago, 464 F.3d 711, 714 (7th Cir. 2006) (citing Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991); Willis v. City of Chicago, 999 F.2d 284, 288–89 (7th Cir. 1993)). 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 . . . .”).
Circuit continue to rely on both of these cases in an unsuccessful attempt to reconcile the two conflicting lines of authority.\(^\text{31}\)

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,\(^\text{32}\) Arkansas,\(^\text{33}\) Indiana,\(^\text{34}\) and Tennessee.\(^\text{35}\) For example, in *Otis v. State*, the Arkansas Supreme Court held that:

\(^{31}\) 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 [the arrestee], 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 [the arrestee] to gather evidence on the charge for which he was initially arrested based on probable cause. Thus, [the arrestee’s] post-arrest detention did not violate the Fourth Amendment.” (quoting *Daniels*, 64 F.3d at 314)).

\(^{32}\) 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*.”).


\(^{34}\) 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 State v. Brown, No. W2013-00182-CCA-R3-CD, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014) (“[T]here was probable cause to arrest [the 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 [the defendant’s] alibi.” (citation omitted)); State v. Hayes, No. W2010-02641-CCA-R3-CD, 2012 WL 3192827, at *13 (Tenn. Crim. App. Aug. 6, 2012) (“[T]he 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.”); 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”). But see State v. Carter, 16 S.W.3d 762, 768 (Tenn. 2000) (“[T]he defendant] concedes that probable cause existed for the initial warrantless arrest. Moreover, there is
[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 . . .

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 enforcement agencies have formally employed the use of investigative holds against warrantless arrestees

no evidence that [the defendant] was held for the purpose of gathering additional evidence or for other investigatory purposes.” (emphasis added)).

36. 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, 72 N.Y.S.2d 8, 8 (N.Y. App. Div. 2001) (“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.” (citation omitted)).
39. See 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 [the defendant’s] arraignment in an attempt to keep him from consulting an attorney or to violate his other rights, [the defendant] has not met his burden in showing unreasonable delay.”).
in multiple jurisdictions within Illinois, Louisiana, Michigan, Missouri, Ohio, and Texas. 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. Astoundingly, in the Memphis area alone, such investigative holds were used by law enforcement “approximately 1,000 times per year.”

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.

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 in-

40. See Mulroy, supra note 2, at 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 insufficient 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 n* (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.
vestigation 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, 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” 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.’” 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 steps incident to

44. McLaughlin, 500 U.S. at 56.
45. Id. at 61 (Scalia, J., dissenting) (citations omitted).
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

47. Historically, this bedrock constitutional principle has separated our justice system from those of other countries. See Mulroy, supra note 2, at 822 (“[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.” (footnote omitted) (citing Zemel v. Rusk, 381 U.S. 1, 15 (1965))); see also Amenu v. Holder, 434 F. App’x 276, 280 (4th Cir. 2011) (citing 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 pretrial punishment. See China: “Work Camps” Constitute Detention Without Trial, ASIANNEWS.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) (“The impropriety 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.” (footnote omitted) (citation omitted)); 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) (“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.” (citation omitted)).
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.”

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.” 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 evaporate.” Moreover, following the Supreme Court’s recent decision in Florence v. Board of Chosen Freeholders, 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. Finally, given that “[p]retrial confinement may imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships,” and in light of the additional fact that “freedom before conviction permits the unhampered preparation of a defense,” a prompt determination of probable cause is also closely related to the requirement

49.  McLaughlin, 500 U.S. at 58 (majority opinion).
50.  Gerstein, 420 U.S. at 114.
51.  Id.
52.  132 S. Ct. 1510, 1516 (2012) (quoting Bell v. Wolfish, 441 U.S. 520, 558 (1979)) (internal quotation marks omitted). 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; see also CONSTITUTION PROJECT NAT’L RIGHT TO COUNSEL COMM., DON’T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 1 (2015), available at http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf (“Collateral consequences also flow from unnecessary pretrial incarceration: the accused may lose a job, his or her home, and the ability to support loved ones.”).
that pre-trial detention comport with basic notions of fundamental fairness.\textsuperscript{55}

More important than any of these compelling public policy justifications, however, is the constitutional basis for the rule established by \textit{Gerstein}, which is rooted in the separation of powers doctrine.\textsuperscript{56} 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 \textit{Gerstein} hearing—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.\textsuperscript{57} As the \textit{Gerstein} Court noted:

\begin{quote}
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
\end{quote}

\textsuperscript{55} \textit{Constitution Project Nat’l Right to Counsel Comm., supra} note 53, at 1 (“Defendants incarcerated from the point of arrest . . . experience substantial prejudice in their ability to conduct an immediate investigation, prepare for trial and build a defense.”).

\textsuperscript{56} \textit{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.”). In a similar context, Mr. Justice Frankfurter expressed the reason for this separation of functions:

\begin{quote}
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.
\end{quote}


\textsuperscript{57} \textit{See Gerstein}, 420 U.S. at 118.
of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.\footnote{58. \textit{Id.} at 112–13 (quoting Johnson v. United States, 333 U.S. 10, 13–14 (1948)).}

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.\footnote{59. Of note, \textit{Gerstein} itself actually \textit{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. \textit{See} \textit{Gerstein}, 420 U.S. at 113–14 (“[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.”).} Instead, the \textit{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.\footnote{60. Toward this end, the \textit{Gerstein} Court explained that even probable cause determinations made by \textit{prosecutors}—who are presumably both trained in the law and comparatively removed from “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. \textit{Id.} at 113, 117 (quoting \textit{Johnson}, 33 U.S. at 14) (“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.”).} 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 \textit{Gerstein} protects.

According to those courts that permit investigative delays to a defendant’s \textit{Gerstein} hearing so long as law enforcement had already developed probable cause to make an arrest, the measure of a defendant’s \textit{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 bring-
ing 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.61

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

61. 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).

62. Webster v. Gibson, 913 F.2d 510, 513 n.7 (8th Cir. 1990); see also Hunt v. Roth, No. 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”).
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. 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. 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.”

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 arrestee must be afforded a judicial determination of probable cause. 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. Second, over two vigorous dissenting opinions,

65. Sesame Street, One of These Things - Circles, YouTube (Apr. 27, 2007), https://www.youtube.com/watch?v=FCIGh01vLg.
McLaughlin held that even though the government’s preparation for pre-trial “combined 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.\(^{68}\)

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.”\(^{69}\) 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.\(^{70}\) 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 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. . . .

\(^{68}\) 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.”).

\(^{69}\) Id. at 53.

\(^{70}\) Id. at 55, 57.
... 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.\textsuperscript{71}

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.\textsuperscript{72} “[F]lexibility has its limits,” the McLaughlin Court cautioned, and “Gerstein is not a blank check.”\textsuperscript{73} By sanctioning deliberate delays that are wholly unrelated to any administrative purpose at all, however, several jurisdictions have errone-

\textsuperscript{71} Id. at 55–57.

\textsuperscript{72} See 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) (“[McLaughlin] specified that only those delays attributable to ‘practical realities’ are reasonable, and thus constitutional.” (footnote omitted)).

\textsuperscript{73} McLaughlin, 500 U.S. at 55.
ously issued law enforcement the “blank check” that *McLaughlin* expressly reserved.\textsuperscript{74}

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 reason\textsuperscript{75}—especially when the reason for the delay is to accommodate further investigation of the arrestee.\textsuperscript{76} Of note, this view also comports with nu-


\textsuperscript{75} See, e.g., Portis v. City of Chicago, 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, 933 F.2d 668, 670 (8th Cir. 1991) (“*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.’” (citations omitted) (quoting *Gerstein* v. Pugh, 420 U.S. 103, 114 (1975))); Guy v. Riverside Police Officers, 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.”).

\textsuperscript{76} See, e.g., 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 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 Federal Rule of Criminal Procedure 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...
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.\textsuperscript{77} Additionally, in keeping with McLaughlin’s express prohibition on “delay for delay’s sake,”\textsuperscript{78} 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.\textsuperscript{79}

\begin{footnotesize}
\textsuperscript{77} 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 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 [the 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 3335393, at *2 (Mich. Ct. App. Mar. 4, 1997) (“[A] confession or other incriminating evidence should be suppressed as a result of an unuly long delay in arraignment only where the delay was used to extract the confession or evidence.”).

\textsuperscript{78} McLaughlin, 500 U.S. at 56.

\textsuperscript{79} See, e.g., Brennan v. Twp. of Northville, 78 F.3d 1152, 1155, 1158 (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” (quoting McLaughlin, 500 U.S. at 56)); 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, 199, 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
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” is that these examples have nothing in common within one another other than the fact that they are intentional and administratively unnecessary. 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 *Ger-

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 at 1035–36 (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 Arreestees 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.”).

82. See *Goldberg*, *supra* note 30, at 106 (“[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.” (footnotes omitted)).
stein hearing for an administratively unnecessary reason continues to violate the Fourth Amendment. 83

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 . . . . 84

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 “combined proceedings,” no member of the McLaughlin Court endorsed the view that intentionally delaying a defendant’s Gerstein hearing for a wholly non-administrative reason suddenly became permissible after McLaughlin. 85 There is simply no language in McLaughlin that supports this view, and given that Gerstein had

83. See, e.g., Smith v. Davidson, No. 11–00498 LEK–RLP, 2013 WL 2420894, at *8 (D. Haw. May 31, 2013) (“[T]he Fourth [A]mendment does not permit the police to detain a suspect merely to investigate. Such conduct does not constitute ‘administrative steps incident to arrest.’” (quoting Kanekoa v. City of Honolulu, 879 F.2d 607, 612 (9th Cir. 1989)); United States v. Davis, 21 F. Supp. 2d 979, 982 (D. Minn. 1998) (“[D]efendant’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).

84. McLaughlin, 500 U.S. at 66–67 (Scalia, J., dissenting).

85. Id. at 58 (majority opinion); see also 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.”).
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. 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. 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.

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. Even so, however, it does not follow that the police must immediately cease investigating a warrantless arrestee


87. See United States v. Davis, 174 F.3d 941, 945 n.7 (8th Cir. 1999) (“[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, 879 F.2d at 612 (“The [F]ourth [A]mendment does not prohibit the police from investigating a suspect while the suspect is legally detained.”).

88. See supra Part III.B.
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.

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 defendant, 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 defendant 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.

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.”

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

89. See McLaughlin, 500 U.S. at 56.
90. Kanekoa, 879 F.2d at 612.
91. 174 F.3d at 945 n.7.
steps incident to a defendant’s arrest are simultaneously being completed. Interestingly, the State of Tennessee—the nation’s most frequent Gerstein violator\(^92\)—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.\(^93\) 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”\(^94\) because police had already developed probable cause to arrest the defendant.\(^95\) 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.”\(^96\) In the author’s view, this interpretation of McLaughlin is correct.

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

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”\(^97\) 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;

\(^92\) See Mulroy, supra note 2, at 822 (“[I]n Tennessee, [investigative detentions] seem[] to be used most frequently, broadly, and recently.”).

\(^93\) Norris v. Lester, 545 F. App’x 320, 327 (6th Cir. 2013).


\(^95\) See Brief of Respondent-Appellee Jerry Lester, Warden at 22, Norris, 545 F. App’x 320 (No. 10-5842).

\(^96\) Id. at 33 (emphasis added).

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.

Table 1: Six Scenarios for Arrests without Warrants

<table>
<thead>
<tr>
<th>Had Probable Cause</th>
<th>Did Not Have Probable Cause</th>
</tr>
</thead>
<tbody>
<tr>
<td>Believed Had Probable Cause</td>
<td>1</td>
</tr>
<tr>
<td>Did Not Believe Had Probable Cause</td>
<td>3</td>
</tr>
<tr>
<td>Unsure Whether Had Probable Cause</td>
<td>5</td>
</tr>
</tbody>
</table>

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” is merely superfluous, and it actually prohibits nothing. This is necessarily the case because arresting a defendant without probable cause already violates the

98. Id.
Fourth Amendment, and consequently, Scenarios 2, 4, and 6 are already unlawful. Similarly, Scenario 1—in which police correctly believe that they have probable cause to make an arrest—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. However, even these two situations would avoid McLaughlin’s prohibition on “delays for the purpose of gathering additional evidence to justify [an] arrest” 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.” According to the 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. Put simply, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.” 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

99. 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.”).
100. See supra Table 1.
101. See supra Table 1.
102. See supra Table 1.
103. McLaughlin, 500 U.S. at 56.
106. Id. at 813.
“for the purpose of gathering additional evidence to justify the arrest.” 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.” During this “hold,” the defendant was deliberately denied a Gerstein hearing—even though a magistrate was immediately available to conduct one—
and the arresting officers used the time afforded by their “forty-eight-hour hold” to interrogate the defendant multiple times and to gather additional evidence against him in connection with a murder investigation. As soon as the police obtained a confession from the defendant, however, they immediately brought their evidence before a magistrate to conduct the defendant’s Gerstein hearing, after which the magistrate determined that the defendant’s arrest had been supported by probable cause at the time he was arrested.

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. 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.”

impermissible under [McLaughlin].”); see also Dyer, supra note 79, 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.” State v. Bishop, 431 S.W.3d 22, 45 (Tenn. 2014), cert. denied, 135 S. Ct. 120 (2014).


11. The record reflects that only twenty-seven minutes elapsed between the time that the defendant signed a confession and the time that his Gerstein hearing was completed. According to the trial record, the defendant signed a confession at 5:00 PM, and his Gerstein hearing was completed by 5:27 PM. See Transcript of Motion to Suppress, supra note 109, at 23; Affidavit of Complaint, State v. Bishop, 431 S.W.3d 22 (Tenn. 2014) (No. 08-07886) (Shelby Cty. Ct. Gen. Sess., Aug. 23, 2008).

12. 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’”).

13. Transcript of Continuation of the Motion to Suppress at 62, Bishop, 431 S.W.3d 22 (No. 08-07886) (Shelby Cty. Crim. Ct., Nov. 10, 2009).
(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.”

(3) “[W]e fill[ed] out a forty-eight-hour affidav[it] . . . 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.”

(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.”

(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.”

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. Second, law enforcement intentionally delayed the defendant’s Gerstein hearing in order to

testimony and the testimony that follows—all of which appear in the original trial record—was neither included nor referenced in the opinion of the Tennessee Supreme Court.

114. Transcript of Motion to Suppress, supra note 109, at 51; see also Bishop, 2012 WL 938969, at *4.

115. Transcript of Motion to Suppress, supra note 109, at 61; see also Bishop, 2012 WL 938969, at *5.

116. Transcript of Motion to Suppress, supra note 109, at 65–66; see also Bishop, 2012 WL 938969, at *5.

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

118. See Transcript of Continuation of the Motion to Suppress, supra note 113, 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’”).
gather additional evidence that it believed was necessary to justify the defendant’s arrest.\textsuperscript{119} Given these facts, this would appear to be \textit{precisely} the situation prohibited by \textit{McLaughlin’s} proscription on “delays for the purpose of gathering additional evidence to justify [an] arrest.”\textsuperscript{120}

Upon review, however, the Tennessee Supreme Court explained: “It matters not whether the arresting officers themselves believed that probable cause existed.”\textsuperscript{121} Accordingly, the \textit{Bishop} court dismissed as irrelevant the officers’ repeated admissions that they had intentionally delayed the defendant’s \textit{Gerstein} hearing for the purpose of gathering additional evidence to justify the defendant’s arrest.\textsuperscript{122} Next, the court overruled the lower court’s holding that the police had violated \textit{Gerstein} and \textit{McLaughlin} on the basis that “[the defendant] was arrested with probable cause.”\textsuperscript{123} Accordingly—the officers’ remarkably candid admissions on the matter notwithstanding—the \textit{Bishop} court found no \textit{Gerstein} violation.

As illustrated by the reasoning of decisions like \textit{Bishop} and others,\textsuperscript{124} if the only consideration relevant to a \textit{Gerstein} claim is

---

\textsuperscript{119} Transcript of Motion to Suppress, \textit{supra} note 109, at 61, 65–66; \textit{see also \textit{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.”).


\textsuperscript{121} \textit{State v. Bishop}, 431 S.W.3d 22, 36 (Tenn. 2014).

\textsuperscript{122} \textit{See id.} at 36–37. The court subsequently discussed the issue via the “plain error doctrine.” \textit{Id.} at 43–45.

\textsuperscript{123} \textit{Id.} at 45.

\textsuperscript{124} \textit{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 \textit{McLaughlin} [C]ourt condemned as unreasonable a search for additional evidence only when the evidence is being sought in order to \textit{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 . . . .”); \textit{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); \textit{State v. Brown}, No. W2013-00182-CCA-R3-CD, 2014 WL 4384954, at *16 (Tenn. Crim. App. Sept. 5, 2014) (“[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
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”¹²⁵ 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.”¹²⁶ 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.

In the words of Justice Scalia, this result “taxes the credulity of the credulous.”¹²⁷ Such reasoning plainly and erroneously conflates the *Gerstein* inquiry and the probable cause requirement, which are not identical.¹²⁸ 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”¹²⁹ violate the Fourth Amendment. Consequently, to borrow a phrase coined by Chief Justice Marshall, such a holding “is too extravagant to be maintained,”¹³⁰ 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 gathering additional evidence to justify the arrest’ . . . . The officers were simply trying to verify [the d]efendant’s alibi.” (citation omitted)).

125. *McLaughlin*, 500 U.S. at 56.
126. *Id.; see also* United States v. Daniels, 64 F.3d 311, 314 (7th Cir. 1995).
128. *See supra* note 58.
129. *McLaughlin*, 500 U.S. at 56.
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.

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.”\(^\text{131}\) 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.\(^\text{132}\) 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.\(^\text{133}\)

---

132. See 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 Magistrate. On the contrary, the Magistrate 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.”).
133. 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
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.\textsuperscript{134} 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.”\textsuperscript{135} For example, research indicates that even in an experimental setting—which carries none of the public pressure that judges (and popularly elected judges in particular)\textsuperscript{136} face in practice—approximately twenty-four percent of judges exhibit measurable hindsight bias.\textsuperscript{137}

Even more troubling, research also indicates that instructing a person to suppress specific thoughts actually has the anomalous effect of motivating enhanced consideration of those very thoughts.\textsuperscript{138} Assuming that judges are not immune from this phenomenon either, it follows that judges may be especially likely to

\textit{Powell}, 511 U.S. at 85 n.* (“Whether a suppression remedy applies [to \textit{Gerstein} violations] remains an unresolved question.”).


137. \textit{See} Guthrie et al., \textit{supra} note 134, at 818.

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.”139 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.140 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.

Conversely, however, in those jurisdictions that permit investigative delays for up to forty-eight hours following a defendant’s arrest, 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 defendant141—meaning that law enforcement will evade


140. 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 (quoting Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991))).

141. 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, 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.
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.142 During this “hold” hearing, the affidavit submitted by law enforcement offered only the following evidence to support the defendant’s arrest: “On August 19, 2008 Maurice Taylor was shot and killed at 1548 Cell. The Shelby County Medical Examiners 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.”143

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, at approximately 11:00 p.m., the victim, Maurice Taylor, was shot in front of his home at 1548 Cell 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.

142. *Bishop*, 2012 WL 938969, at *4–5. There is, of course, actually no such thing as a “forty-eight-hour hold.” *Id.* 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.

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.  

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 “picked up” for questioning.  

Initially, this finding was unanimously reversed by a skeptical panel of the Tennessee Court of Criminal Appeals, but it was ultimately affirmed by the Tennessee Su-

---

144.  Affidavit of Complaint, supra note 111.
145.  Order Granting 48 Hour Detention for Probable Cause, supra note 109. 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. See Transcript of Motion to Suppress, supra note 109, at 65–66. 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.” Id. 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 113, at 16.
146.  Bishop, 2012 WL 938969, at *10 (“[T]he State . . . failed to establish that there was probable cause for the defendant’s arrest.”), rev’d, 431 S.W.3d 22 (Tenn. 2014).
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.” 148

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.” 149 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, 150 conflicts with the U.S. Supreme Court’s decisions in Gerstein and McLaughlin, 151 and invites the rampant abuse of investigative detentions that many jurisdictions have permitted to metastasize. 152

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, 153 it is important to keep in mind that such protection is actually comparatively minimal. For example, as the concurring Justices in Ger-

---

148. Transcript of Continuation of the Motion to Suppress, supra note 113, at 62.
150. See supra Part III.A.
151. See supra Parts III.B, III.E.
152. See Bishop, 2012 WL 938969, at *4–5; see also supra Part III.D.
153. Gerstein, 420 U.S. at 118.
stein 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.” Accord-

ingly, 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 enforcement may never delay a warrantless arrestee’s Gerstein hearing for investigative reasons under any circumstances.

154. Id. at 127 (Stewart, J., concurring) (citations omitted).