No. _____

In the Supreme Court of the United States

EUGENE BAILEY, PETITIONER,
v.
CITY OF CHICAGO, WILLIAM SULLIVAN, AND MICHELLE MOORE-GROSSE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment permits a "brief period of detention to take the administrative steps incident to arrest" following a warrantless arrest. *Id.* at 114. In *City of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court established a 48-hour presumptive deadline for the completion of these administrative steps. *Id.* at 56. There is a split of authority on whether *City of Riverside* is an "authorization for 48-hour detention." *Id.* at 66 (Scalia, J., dissenting). The questions presented in this case are:

1. Does the 48-hour period the Court established in *City of Riverside v. McLaughlin* authorize the police to detain an arrestee for 48 hours while they gather additional evidence to persuade a prosecutor to file charges?

2. Should the Court revisit the 48 hour time limit it established nearly 25 years ago in *County of Riverside* in light of technological advances in computer networks and automatic fingerprint identification systems?

PARTIES TO THE PROCEEDING

Petitioner Eugene Bailey was the plaintiffs in the district court and the appellant in the court of appeals.

Respondents City of Chicago, William Sullivan, and Michelle Moore-Grosse were defendants in the district court and the appellees in the court of appeals.

Dorothy Massey and Charles McDonald were defendants in the district court but were not involved in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eugene Bailey respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 779 F.3d 689 (7th Cir. 2015). The order of the district court (App., *infra*, 14a-31a), is available at 2013 WL 5835851 (N.D.Ill. 2013).

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2014. A petition for rehearing and a suggestion for rehearing en banc was denied on April 16, 2015 (App., *infra*, 32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The City of Chicago requires that every arrest in a case involving a violent felony must be reviewed by the prosecutor before charges may be filed. (App., *infra*, 10a.) This municipal policy was applied to petitioner, who was held in police custody for nearly 47 hours (App., *infra*, 5a) while the police sought to interrogate petitioner and gather additional evidence to persuade the prosecutor to approve filing charges. (App., *infra*, 4a.) The officers abandoned these efforts when petitioner requested an attorney. *Id.* The officers filed charges and a judge made the finding of probable cause required by *Gerstein v. Pugh*, 420 U.S. 103 (1975) after petitioner had been in custody for nearly 47 hours. (App., *infra*, 5a.) The prosecution dropped the charges against petitioner three weeks later, after the investigation revealed that petitioner had been arrested in error. (App., *infra*, 1a.)

1. On September 24, 2009, a high school student named Derrion Albert was killed during an after-school fight near Fenger High School in Chicago. (App., *infra*,

1a.) The incident was captured on video, which was made available to the police.[1]

2. The case was assigned to respondents, Chicago Police Detectives William Sullivan and Michele Moore-Grose. (App., *infra*, 2a.) Respondents displayed the video to Officer Dorothy Massey, a police officer assigned to Fenger High School, who had not witnessed the fight. Massey told the detectives that she recognized petitioner as one of the persons depicted on the video. The detectives then displayed the video to Derrell Bramlett, a Fenger High school student whom the officers suspected of involvement in the fight. Bramlett told the detectives that petitioner had fought with the student injured in the incident earlier that day and that he recognized petitioner in the video.[2] Based on these identifications, the detectives arrested petitioner at about 9:00 p.m. on September 26, 2009.

3. All of petitioner's interactions with the police following his arrival at the police station were video recorded and the videos are part of the record on appeal.[3] Police officers placed petitioner into an interrogation room at 9:22 p.m. on September 26, 2009. An officer handcuffed petitioner to the wall by his left hand.

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[1] The video was included in the record on appeal as Defendants' Exhibit D.

[2] There is no evidence of record that Bramlett told the detectives that he had observed plaintiff at the scene of the fight.

[3] Respondents submitted three DVD's as Exhibits J1, J2, and J3, filed in the district court as ECF No. 82-5; plaintiff submitted excerpts of the interrogation as Exhibits 3-5, 8-10, 12-13 on a DVD, filed as ECF No. 87.

4. Respondents Moore-Grose and Sullivan began interrogating petitioner at 10:46 p.m. on September 26, 2009. (App., *infra*, 15a.) At 10:48 p.m., petitioner denied involvement in the homicide and provided an alibi.[4] At 10:52 p.m., petitioner told the officers that he was not the person depicted on the video and explained that he had not been wearing shorts and a T-shirt (as had the person shown on the video) on September 24, 2009.

5. Respondents resumed interrogating petitioner shortly after midnight on September 27, 2009.[5] The officers asked petitioner for the name of his brother's girlfriend, one of the alibi witnesses petitioner had referred to in the earlier interrogation. Respondents told petitioner (at two minutes and thirty seconds after midnight) that he had a "pretty weak alibi" and assured him that the "video footage is excellent." The officers continued to interrogate petitioner, telling him (at five minutes and ten seconds after midnight) that he was lying, and (at six minutes after midnight) offering to bring petitioner's mother to the police station to view the video. ("Do you want us to bring her in and let her see the video?") *Id.* The interrogation ended at ten minutes and forty-two seconds after midnight.

6. After concluding their interrogation, the officers placed a "detective hold" on petitioner. App., *infra*, 4a, 15a.

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4 The interrogation appears on "Plaintiff's Video Exhibit 5," filed as part of Item 14 of the Record on Appeal.

5 This interrogation is recorded in "Plaintiff's Video Exhibit 8," filed as part of Item 14 of the Record on Appeal.

7. Petitioner remained alone in the interrogation room, handcuffed to the wall, on September 27, 2009.[6] Shortly after 12:45 a.m., petitioner began to bang on a desk. Respondent Moore-Grose entered the room at 12:52 a.m. and told petitioner that he was "not going to be going anywhere for a while."[7] Respondent Sullivan entered the room a few minutes later and told petitioner that he was under arrest for participating in the murder of Derrion Albert, but that he would be held in the interrogation room because "We've got a lot of investigation to do." Petitioner again denied involvement in the offense and was permitted to leave the interrogation room to use a washroom.

8. In the afternoon of September 28, 2009, an officer told petitioner (who was still in an interrogation room) that the "detectives are still working on the case."[8]

9. Respondents Moore-Grose and Sullivan returned to the interrogation room at 5:06 p.m.[9] The officers advised petitioner of his *Miranda* rights. At 5:08 p.m. petitioner asked for a lawyer and respondents ended the interrogation.

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[6] The detention was captured on video and is contained in "Plaintiff's Video Exhibits 9 and 10," filed as part of Item 14 in the Record on Appeal.

[7] This interrogation appears in "Plaintiff's Video Exhibit 9," filed as part of Item 14 in the Record on Appeal.

[8] This exchange appears at 4:08 p.m. in "Plaintiff's Video Exhibit 12," filed as part of Item 14 in the Record on Appeal.

[9] This interrogation was captured on video and is contained in "Plaintiff's Video Exhibit 13," filed as part of Item 14 in the Record on Appeal

10. A state court judge found that there was probable cause to detain petitioner at about 7:40 p.m. on September 28, 2009. (App., *infra*, 4a.)

11. The case against petitioner promptly fell apart. As summarized by the district judge (App., *infra*, 16a-17a):

> In the day or two following Bailey's probable cause hearing, numerous individuals left messages for the Detectives either claiming that it was not Bailey in the video or stating that the person wearing red and black shorts was another person, specifically a juvenile whose identity has been protected by using the initials "D.J." R. 86 ¶ 64. Sometime during the week of September 28, Ento-Nichols and Broadway, the Fenger security guards who had previously identified Bailey from the video, concluded that they were mistaken in identifying Bailey. R. 90 ¶ 17. Broadway went to the police station and shared this information with an unidentified police officer. *Id.* On September 30, Jamal Harding, an eyewitness to the fight, told the Detectives and ASA Jodi Peterson that the person in red and black shorts who punched Albert was "D.J." R. 86 ¶¶ 65-66. That same day, Young, who had previously identified Bailey from the video, recanted this identification in a meeting with the Detectives and ASA Peterson. R. 86 ¶¶ 65, 67. On October 1, Bramlett reaffirmed his identification of Bailey. R. 86 ¶ 69. On October 1, the Detectives told ASA Fabio Valentini that several individuals had come forward and stated that the person in the red

> and black shorts was not Bailey, but "D.J." R. 89 ¶70.
>
> On October 16, two more people who knew Bailey, Markese Keefer and Dantrell Myles, told the Detectives and ASA Peterson that Bailey was not the person in red and black shorts in the video. R. 86 ¶ 73. Myles, who said he had been present during the fight, identified the person in the red and black shorts as D.J. from a Fenger school photo of D.J. *Id.* ¶ 74. On October 19, another person who knew Bailey, Miesha Walker, told ASA Peterson that Bailey was not the person in red and black shorts in the video. *Id.* ¶ 75. That same day, another person who was present at the fight, Dion Blandon, told ASA Peterson that "D.J." was the person in the red and black shorts who had punched Albert. *Id.* ¶ 76.

12. The prosecution dismissed the case against petitioner on October 19, 2009 and he was released from custody after 23 days of incarceration. (App., *infra*, 6a.)

13. Petitioner thereafter filed suit in the district court, raising claims under 42 U.S.C. § 1983 and supplemental state law claims. Petitioner focused his federal claims in his fourth amended complaint, asserting that respondent officers had caused his arrest without probable cause (App., *infra*, 18a-20a), and had detained him for an unreasonable amount of time before obtaining a judicial determination of probable cause. (App., *infra*, 20a-22a.)

14. The district court held that the officers had acted on probable cause to arrest and rejected petitioner's unreasonable detention claim. (App., *infra*, 21a.) The

district court followed the Seventh Circuit's decision in *United States v. Daniels*, 64 F.3d 311 (7th Cir. 1995), rejecting as "ludicrous" the argument that this Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) prohibits police from delaying arrestee's probable cause hearing to allow the police time to "bolster" their case. (App., *infra*, 21a.)

15. Petitioner challenged the district court's resolution of his Fourth Amendment claims on appeal. The Seventh Circuit agreed that there had been probable cause to arrest. (App., *infra*, 7A-9A.) Turning to petitioner's *Gerstein* claim, the Court of Appeals rejected petitioner's argument "that developments in technology 'cry out for a reconsideration of the 48 hour period.'" (App., *infra*, 9a.) The Seventh Circuit then turned to the reasonableness of the post-arrest detention, finding that

> The principle cause of the delay in conducting a probable cause hearing was the City's policy that required all violent felonies to be reviewed by the SAO [State's Attorney's Office] before charges were approved.

App., *infra*, 10a. The Court of Appeals rejected petitioner's unreasonable detention claim because "there is no evidence that the delay was imposed by defendants for improper motivations such as punishing Bailey or drumming up evidence merely to justify his arrest." *Id.*

REASONS FOR GRANTING THE PETITION

Many municipalities, including respondent City of Chicago, have disregarded Justice Scalia's warning in his dissent in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) and read that case as an "authorization

for 48-hour detention." *Id.* at 66 (Scalia, J., dissenting). This practice has been roundly criticized,[10] but was unhesitatingly approved by the Seventh Circuit in this case.

Quantum leaps in technology in the almost 25 years since the Court decided *County of Riverside* warrant revisiting that 48-hour period. Moreover, this case provides the Court with the opportunity to resolve the split between those jurisdictions that bar the use of warrantless detention for investigative purposes and those that read *County of Riverside* as an authorization for 48 hours of post-arrest detention.

1. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Court held that the Fourth Amendment permits a "brief period of detention to take the administrative steps incident to arrest" following a warrantless arrest. *Id.* at 114. In *City of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court established a 48-hour presumptive deadline for the completion of these administrative steps. *Id.* at 56. The Court also provided three examples of "unreasonable delay" that would violate the Fourth Amendment. *Id.*

2. The courts of appeals and the states are divided as to whether this 48-hour period permits the police to detain an arrestee while they gather additional evi-

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[10] See, e.g., Steven J. Mulroy, "Hold" On: The Remarkably Resilient, Constitutionally Dubious 48–Hour Hold, 63 CASE W. RES. L. REV. 815 (2013); Daniel A. Horwitz, The First 48: Ending the Use of Categorically Unconstitutional Investigative Holds in Violation of County of Riverside v. McLaughlin, 45 U. MEM. L. REV. 519 (2015).

dence to justify the filing of charges. In this case, the Seventh Circuit upheld a municipal policy that authorizes police officers to place a "detective hold" (Appendix, *infra*, 4a) on an arrestee while they gather additional evidence to persuade a prosecutor to file criminal charges. (Appendix, *infra*, 10a.) While detained on the "detective hold," petitioner was handcuffed to a wall in an interrogation room to await further questioning by the arresting officers.

3. Making a warrantless arrest to detain a suspect while the police seek additional evidence to persuade a prosecutor to file criminal charges was unknown to the Framers. As Justice Thomas explained in his dissenting opinion in *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008), the Framers understood "that a person could not be arrested and detained without a 'charge' or 'accusation' *i.e.*, an allegation, supported by probable cause, that the person had committed a crime." *Id.* at 220 (Thomas, J., dissenting).

4. The Court rejected using a warrantless arrest as a device to secure enough evidence to file a charge in *Gerstein v. Pugh*, 420 U.S. 103 (1975) when it stated that "[t]he standard [to file a charge] is the same as that for arrest," *id.* at 120, explaining that "[b]ecause the standards are identical, ordinarily there is no need for further investigation before the probable cause determination can be made." *Id.*, n. 21.

5. The Court in *County of Riverside* did not adopt a contrary rule, making plain that "delays for the purpose of gathering additional evidence to justify the arrest" were unreasonable. 500 U.S. at 56. In the view of the Seventh Circuit, however, a delay to gather additional evidence is permissible as "long as [the police] have

sufficient evidence to justify holding the individual in custody in the first place." *United States v. Sholola*, 124 F.3d 803, 820 (7th Cir. 1997). This is the rule the Court of Appeals applied in this case, when it upheld a "detective hold" to maintain petitioner in custody because the prosecutor wanted the officers "to continue to investigate [petitioner's] role in the attack." Appendix, *infra*, 4a.

6. The Seventh Circuit's view that, as long as there was probable cause to arrest, law enforcement may deliberately delay the judicial determination of probable cause to continue their investigation is shared by other jurisdictions. *See, e.g.*, *Riney v. State*, 935 P.2d 828, 835 (Alaska Ct. App. 1997); *Otis v. State*, 217 S.W.3d 839, 847 (Ark. 2005); *Peterson v. State*, 653 N.E.2d 1022, 1025 (Ind. Ct. App. 1995); *State v. Bishop*, 431 S.W.3d 22, 43 n.9 (Tenn. 2014). This rule has been rejected by Eighth Circuit, *United States v. Davis*, 174 F.3d 941, 944-45 (8th Cir.1999), the Sixth Circuit, *United States v. Fullerton*, 187 F.3d 587, 592 (6th Cir. 1999) and the State of Connecticut, *State v. Heredia*, 310 Conn. 742, 767-68, 81 A.3d 1163, 1177-78 (2013).

7. The Court has long condemned the practice of using an arrest to allow "an interrogating process at police headquarters … to determine whom they should charge before a committing magistrate on 'probable cause.'" *Mallory v. United States*, 354 U.S. 449, 456 (1957). The Court reaffirmed this rule in *Gerstein*, 420 U.S. at 866 n.21. Nonetheless, "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…*" Daniel A. Horwitz, *The First 48: Ending the Use of Categorically Unconstitutional*

Investigative Holds in Violation of County of Riverside v. McLaughlin, 45 U.Mem.L.Rev. 519, 559 (2015).

8. The 24 years that have elapsed since the Court established the 48-hour rule in *County of Riverside v. McLaughlin* have witnessed quantum leaps in technology that render the 48-hour rule a relic of a horse and buggy era. Police departments are now linked to law enforcement databases by high-speed computer networks; fingerprints can be compared with lightning speed by automatic fingerprint identification systems ("AFIS"), police reports are prepared by direct input into a computer workstation, and police officers have access to all of this technology through in-car computer systems. A 48-hour period may have been appropriate in 1991, but it can hardly be justified in 2015. The Court established that time-period without briefing or argument, 500 U.S. at 69 (Scalia, J., dissenting). The time has come to revisit and revise the 48-hour rule, especially when it has become an engine of investigative detention.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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July, 2015

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13-3670

EUGENE BAILEY,
Plaintiff-Appellant
v.
CITY OF CHICAGO, *et al.*,
Defendants-Appellees

Filed: March 6, 2015

Before EASTERBROOK, MANION, and SYKES, *Circuit Judges*.

MANION, Circuit Judge. Eugene Bailey was detained for 23 days while police investigated his role in a schoolyard brawl that resulted in the death of another student. The charges against him were ultimately dropped after the investigation revealed that five other persons, but not Bailey, were involved in the fight. Following his release, Bailey sued the City of Chicago and two police officers for malicious prosecution, intentional infliction of emotional distress (IIED), and violations of his civil rights under 42 U.S.C. § 1983. The district court granted summary judgment for the defendants on each of the claims, and Bailey appealed. We affirm.

I. Background

On September 24, 2009, a fight broke out among rival groups of students at Fenger High School (Fenger) in Chicago that resulted in the death of Derrion Albert and injuries to another student, Vashion Bullock.

Chicago detectives William Sullivan and Michele Moore-Grose (who, along with the City, have been named as co-defendants) were assigned to the case. The question before us is whether their investigation of Eugene Bailey (the plaintiff here) was properly conducted, or if his detention was unreasonable or excessive.

The major break in the investigation happened within hours of the fight when the investigators obtained video footage showing a number of individuals kicking, punching, and stomping Albert—who would die shortly afterward from the resulting injuries. Relevant to this case is footage from that video of an attacker in red and black shorts and a black polo shirt who punched Albert as he tried to stand up. The detectives showed the video to Chicago police officer Dorothy Massey, who was assigned to Fenger and worked there for several years. Massey identified Bailey and another student as assailants in the video. She claimed that she had known Bailey for eighteen months, and recognized his face in the video. They also showed the video to Derrell Bramlett, a Fenger student (and suspect at the time) who witnessed the fight. Bramlett identified Bailey as one of the attackers and told detectives that he knew him from school. Additionally, he told the detectives that, earlier in the day, Bailey had been involved in a fight with Bullock, who was the student injured in the brawl.

Based on these identifications, the detectives arrested Bailey and brought him in for questioning at approximately 9 p.m. on September 26. He denied involvement and claimed that he was at his brother's house at the time of the brawl. Pressed for the names of people who could corroborate this, Bailey stated that the only person who saw him at the house was the nine-year-old son

of his brother's girlfriend, as the brother and girlfriend were both asleep at the time.

The interview was interrupted when six members of Fenger's staff arrived at the police station. The detectives handcuffed Bailey's left hand to the wall before leaving him in the room. After watching the video, two Fenger staffers, assistant principal Ali Muhammad and security officer Tyrone Ento-Nichols, identified Bailey in the video. The other four staffers did not recognize the individual with the red and black shorts in the video.

Shortly after midnight on September 27, the detectives resumed questioning Bailey. They informed him that he had "a pretty weak alibi" and asked him for the name of his brother's girlfriend. They also told him that staff members identified him as the person wearing red shorts and punching the victim. Bailey once again denied that it was him in the video. After ten minutes, they finished questioning him and handcuffed him to the wall once again.

Three other suspects were arrested during the early morning of September 27. Later that morning, the detectives sent the video to the U.S. Secret Service to enhance the footage and to obtain still photographs of the individuals involved in the fight.

That afternoon, the detectives spoke with Derrick Young, who informed them that, on the day of the fight, he left school and walked with Bailey to 114th Street and Stewart Avenue, but the two separated afterwards and he did not know where Bailey went. Contrary to Bailey's assertion, Young told the detectives that he and Bailey were friends. The police questioned Young a second time later that day, and showed him still-

shots of the video footage. Young identified Bailey as the person wearing red and black shorts who punched the victim in the face. Young also stated that he remembered Bailey wearing those shorts at school that day.

That evening the detectives spoke for a second time to Assistant Principal Ali Muhammad, who had previously identified Bailey in the video but now harbored doubts. Muhammad stated that he believed Bailey to be the person who punched the victim, but that he was "not 100 percent sure." R. at 256. Nor was he certain that Bailey was the person in the red and black shorts in the video.

In the early morning of September 28, the detectives met with Kathryn Morrissey, a supervisor in the Felony Review unit of the Cook County State's Attorney's Office (SAO), which, according to an SAO policy, reviews every violent crime before felony charges are approved. Morrissey approved first-degree murder charges against three suspects but did not approve charges against Bailey because she wanted to continue to investigate his role in the attack. Specifically, she wanted the detectives to speak with Bailey again and to obtain clearer video footage and still photos of the incident. The detectives placed a "detective hold" on Bailey until the following afternoon to comply with this request and to ensure that he was not released in error before charges could be filed against him.

At 5 pm, the detectives sought once again to speak to Bailey but he requested an attorney and the interview was terminated. The SAO approved first-degree murder and felony murder charges against Bailey at 5:40 pm on September 28. That evening, at 7:40 pm, a state judge held a hearing at the station where the

judge entered a probable cause finding against Bailey. He had been in custody for almost 47 hours at the time of the probable cause hearing. On September 29, a different state judge denied Bailey bail pending his trial.

Over the next few days, the detectives received several communications that called into question Bailey's involvement in the incident. After hearing from several anonymous callers who disputed that Bailey was the person in the red and black shorts in the video, the detectives received a call from Bailey's brother, Lavar Johnson, informing them that the person in the video was an adolescent named "DJ." Other witnesses, including LaDonna Jones and Tiffany King, also maintained that Bailey was not the person in the video, however they disagreed about the identity of the person in the red and black shorts: Jones claimed that it was "DJ," while King believed that the assailant was named "Tito."

The most significant interviews took place on September 30 and October 1 when the detectives spoke with Jamal Harding and had a follow-up interview with Young. Harding stated that he had witnessed the fight and remembered seeing a student in red and black shorts punch the victim. Harding claimed that he had recently learned that the person in the shorts was named "DJ." Most significantly, Young stated that he had made up the story about having seen Bailey with red and black shorts. He also stated that the student in the video was not Bailey, who, in fact, had been with him at 114th Street and Stewart Avenue when the fight broke out.

On October 14, the detectives obtained still images from the video from a forensic laboratory. Over the

next few days, the detectives interviewed and showed the still-photos to witnesses, several of whom stated that Bailey was not the person in red and black shorts. Although their assessments were not uniform, the witnesses were consistent in maintaining Bailey was not one of the assailants in the video. Some identified the attacker in red and black shorts as "DJ," while others said they could not identify the individual.

On October 19, the SAO dismissed all charges *nolle prosequi* against Bailey. After further investigation, the SAO charged DJ with first degree murder on November 5. Ultimately, DJ and four other persons were convicted of murder based on the testimony of persons who had identified them in the video.

Bailey filed suit against the detectives and the city alleging violation of 42 U.S.C. § 1983 as well as state law claims (intentional infliction of emotional distress and malicious prosecution) arising from his arrest and detention. On October 30, 2013, the district court granted summary judgment for the defendants on each of Bailey's claims.

II. Analysis

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Hawkins v. Mitchell*, 756 F.3d 990–91 (7th Cir. 2013). We review a grant of summary judgment *de novo* with all reasonable inferences of fact viewed in Bailey's favor as he is the party against whom summary judgment was granted. *Id.* at 991. Bailey's state law claims contain an additional layer as we review a district court's decision to exercise supplemental jurisdiction under 28 § 1367 for an abuse of discretion.

Hansen v. Bd. of Trustees of Hamilton SE School Corp., 551 F.3d 599, 606 (7th Cir. 2008).

A. 1983 Claim

Probable Cause to Arrest

Probable cause is an absolute defense to any claim under § 1983 for wrongful arrest or false imprisonment. *Holmes v. Village of Hoffman Estates*, 511 F.3d 673, 679–80 (7th Cir. 2007). Here, Bailey alleges that the officers arrested him without probable cause in violation of his Fourth Amendment rights. He does not dispute that Massey and Bramlett identified him in the video or that the officers based their decision to arrest him on this information. Instead, he contends that the video, in terms of both content and image-quality, was not sufficiently clear to provide a proper basis for his identification; consequently, it was unreasonable for the officers—who had seen the video and were aware of its quality—to believe that a witness could make a credible identification based solely on its contents.

While it is true that the testimony of a single, impartial eyewitness is sufficient to support probable cause, *Phillips v. Allen*, 668 F.3d 912, 915 (7th Cir. 2012), there is no corresponding rule to account for identifications obtained from persons who were not eyewitnesses to an event but viewed video footage afterwards. We need not, however, carve out a special rule when the operative question is a simple one: were the statements of the witnesses sufficiently credible for the officers to have good reason to rely on them? This is merely another way of stating the well-worn standard for probable cause—whether the facts were sufficient in warranting a prudent person to believe that the suspect had committed an offense. *Fleming v. Livingston County, Ill.*, 674 F.3d 874, 878–79 (7th Cir.

2012). This standard does not require that the officer's belief turn out to be correct; it need only be reasonable. *Texas v. Brown*, 460 U.S. 730, 742 (1983).

At varying points during the investigation, six individuals identified Bailey as the assailant wearing red and black shorts in the video. Although the identifications were later shown to be false, these statements were sufficiently credible at the time that it was reasonable for the officers to rely on them. The individuals came from different backgrounds but every one of them knew Bailey in some capacity. Officer Massey, who claimed to recognize Bailey's face, worked at Fenger and had known him for approximately eighteen months. Bramlett (Fenger student), Muhammad (assistant principal), and Ento-Nichols (security officer) each claimed to know Bailey from school. The most significant identification came from Young, who claimed to be with Bailey that afternoon but separated from him before the fight broke out.

The familiarity between the witnesses and Bailey gave credibility to their identifications and countered concerns about the quality of the video. Other facts supported the belief that Bailey was involved. Bramlett told police that Bailey had been involved in a fight with Bullock (who was injured in the brawl) earlier that day. Young not only identified Bailey, but told the defendants that he remembered Bailey wearing the red and black shorts at school that day.

Although there was evidence suggesting that Bailey was not involved, it was weak and inconsistent. After originally identifying Bailey on the video, Ali Muhammad told the detectives that he still believed it was Bailey on the video but that he was "not 100 percent sure." R. at 256. Speaking with the detectives, Bailey offered a

vague account of his whereabouts, claiming that he was at his brother's house at the time of the fight, but that his brother and his brother's girlfriend were asleep and did not see him. His sole alibi witness was the nine-year-old son of his brother's girlfriend. Later, he stated that there were some elderly women on his brother's block who had seen him that day. On balance, the evidence supporting Bailey's involvement in the brawl was stronger than evidence for his non-involvement; in other words, probable cause to arrest Bailey existed because the statements from Massey and Bramlett were both credible and consistent with each other. The later identifications merely confirmed the existence of probable cause.

That the identifications were later shown to be wrong is of no moment: probable cause "does not require that the officer's belief be correct or even more likely true than false, so long as it is reasonable." *Fleming*, 674 F.3d at 879. "[T]his is an *ex ante* test: the fact that the officer later discovers additional evidence unknown to her at the time of the arrest is irrelevant to whether probable cause existed at the crucial time." *Qian v. Kautz*, 168 F.3d 949, 953–54 (7th Cir. 1999).

Length of Detention

Because Bailey was detained for fewer than forty-eight hours prior to his probable cause hearing, his detention is presumed to be reasonable, *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), and he bears the burden of demonstrating that the detention was excessive or unreasonable. *Portis v. City of Chicago*, 613 F.3d 702, 705 (7th Cir. 2010).

Bailey argues that developments in technology "cry out for a reconsideration of the 48 hour period," App. Br.

at 18, but we see no reason to do so here. Bailey, after all, was merely one among several suspects in a murder investigation that contained many moving parts. The balance of the detectives' efforts were spent interviewing suspects and witnesses—activities that technology has yet to render appreciably more efficient. The principal cause of the delay in conducting a probable cause hearing was the City's policy that required all violent felonies to be reviewed by the SAO before charges are approved. Here, there is no evidence that the delay was imposed by defendants for improper motivations such as punishing Bailey or drumming up evidence merely to justify his arrest. *Riverside*, 500 U.S. at 56. Accordingly, we hold that the detention was not excessive or unreasonable.

B. State Law Claims

Bailey argues that the district court, upon dismissing his federal claim, should have declined to exercise supplemental jurisdiction over the state law claims. We review a district court's decision to exercise supplemental jurisdiction under 28 U.S.C. § 1367 for abuse of discretion. *Hansen*, 551 F.3d at 606.

Section 1367 lays out a framework by which courts may exercise supplemental jurisdiction over state law claims that share "a common nucleus of operative facts" with a federal claim properly brought before the court. *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 500 (7th Cir. 1999). Here, Bailey's state law claims for malicious prosecution and IIED were based on the same set of facts as his federal claim. Both focused on the circumstances surrounding his arrest, detention, and the investigation by police of the crime for which he was a suspect. In retaining jurisdiction, the judge relied on the fact that

extensive discovery was conducted in this case, all of it focusing on the police investigation.

Bailey contends that the judge should have relinquished jurisdiction because the state law claims involved novel questions under Illinois law. He argues, for example, that the Illinois courts have not had the opportunity to address whether actions by police towards persons in custody can form the basis of a claim for IIED. This may well be the case, but § 1367(c)(1) states that a district court *may decline* to exercise supplemental jurisdiction where a state law claim raises a novel or complex issue of state law; it does not require a district court to do so. (Emphasis added.) Once jurisdiction is established based on a properly brought federal claim, § 1367 contains no requirement that such jurisdiction be relinquished. The exercise of supplemental jurisdiction is purely discretionary. "Although a district court may relinquish supplemental jurisdiction following the dismissal of all federal claims, it is not required to do so, unless the federal claims are frivolous and so do not engage the jurisdiction of the federal courts." *CropLife Am., Inc. v. City of Madison*, 432 F.3d 732, 734 (7th Cir. 2005). Here, the district court did not abuse its discretion in exercising supplemental jurisdiction over Bailey's state law claims.

Intentional Infliction of Emotional Distress

To recover on a claim for IIED, Illinois law requires a plaintiff to prove: (1) that the conduct was extreme and outrageous, (2) that the actor intended that his conduct inflict severe emotional distress or knew that there was a high probability that his conduct would inflict such distress, and, (3) that the conduct in fact caused severe emotional distress. *E.g.*, *Schiller v. Mitchell*, 828 N.E.2d 323, 333 (Ill. App. 2005).

Here, the record is devoid of any evidence supporting a finding of extreme or outrageous conduct by defendants, still less any facts suggesting that defendants intended to inflict emotional distress on Bailey. Significantly, the conditions of Bailey's confinement were not covered extensively by the parties and the evidentiary record is largely silent on this issue. Bailey asserts that, with the exception of those periods in which he was questioned by the officers, he was left alone in the interview room and handcuffed to the wall. But this fact was never developed by testimony or other evidence.

The balance of what we know about the conditions of Bailey's confinement we learned at oral argument. There, the City maintained that it was standard procedure to handcuff a suspect to the wall of an interview room whenever personnel were not present. This was done for safety reasons and to prevent witnesses from contacting each other. Additionally, the City maintained that the restraint did not prevent Bailey from sleeping or otherwise moving about the room. Finally, the City noted that police personnel responded to Bailey whenever he requested them, including to use the rest room. Even while reading all inferences in Bailey's favor, the factual record is not sufficiently developed for us to find a question of material fact that the defendants intended to inflict extreme emotional distress on Bailey. For this reason, we lack a basis to overturn the district court's ruling.

Malicious Prosecution

Illinois law recognizes that the existence of probable cause serves as a complete defense to a malicious prosecution claim. *Johnson v. Target Stores, Inc.*, 791 N.E.2d 1206, 1219 (Ill. App. 2003) (listing the lack of probable

cause as a required element for a malicious prosecution claim under Illinois law). As discussed above, probable cause existed during all periods relevant to Bailey's claims and the district court did not err in granting summary judgment on his malicious prosecution claim.

III. Conclusion

The district court's order granting summary judgment in favor of the defendants is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 10-C-5735

EUGENE BAILEY,
Plaintiff
v.
CITY OF CHICAGO, *et al.*,
Defendants

MEMORANDUM OPINION AND ORDER

Eugene Bailey filed a complaint against Detectives Michelle Moore-Gross and William Sullivan (the "Detectives") and the City of Chicago, alleging that the Detectives arrested and detained him in violation of the Fourth and Fourteenth Amendments and claims under state law for malicious prosecution and intentional infliction of emotional distress. R. 74. Defendants have filed a motion for summary judgment. R. 80. For the following reasons, Defendants' motion is granted.

Background

On September 24, 2009, Derrion Albert was brutally beaten and killed during an after-school brawl among students from Fenger High School in Chicago. Albert's murder was caught on video. R. 82 Ex. D. During the course of the fight, Albert was punched by a person wearing red and black shorts. R. 86 ¶ 12.

The Detectives were assigned to investigate Albert's murder. *Id.* ¶ 5. The Detectives showed the

video of the fight to Officer Dorothy Massey, a police officer assigned to Fenger, and Derrell Bramlett, a Fenger student. Officer Massey had worked at Fenger since 2000, and Bramlett had known Bailey for a year or two as a schoolmate. *Id.* ¶¶ 13, 15, 17, 19. Both Officer Massey and Bramlett identified Bailey immediately and without hesitation, and without any suggestion from the Detectives, as the person wearing red and black shorts who punched Albert. *Id.* ¶¶ 14, 18-19.

Based on these two identifications, the Detectives had Bailey arrested and brought to the Area 2 Detective Headquarters at approximately 9:00 p.m. on September 26, 2009. *Id.* ¶¶ 21, 25. The Detectives questioned Bailey from approximately 10:43 p.m. until 10:53 p.m. on September 26, and from approximately 12 midnight until 12:11 a.m. the next day. R. 82 Ex. J-1. The Detectives then placed a "detective hold" on Bailey so he would not be released. R. 90 ¶ 14.

At about 12:45 a.m. on September 27, Bailey was in the interview room alone and he knocked on the table repeatedly. R. 82 Ex. J; R. 86 Ex. 9. About four minutes later, an officer checked on him and asked what he needed. R. 82 Ex. J; R. 86 Ex. 9.

The Detectives did not attempt to question Bailey again until just after 5:00 p.m. on September 28, at which point Bailey asked for a lawyer and the Detectives immediately ceased questioning him and left the room. R. 86 ¶¶ 59-60. All of Bailey's interactions with the Detectives and other police officers in the interview rooms were recorded. R. 82 Ex. J; R. 86 Exs. 3-5, 8-10, 12-13. Bailey consistently maintained that he was not present during the fight and

would not have hit Albert because they were friends. *Id.*

Just after his arrest on September 26, Bailey was identified from the video by Ali Muhammad, the assistant principal at Fenger, and Tyrone Ento-Nichols and Bernard Broadway, security guards at Fenger. R. 86 ¶ 32; R. 90 ¶ 8. The next day, September 27, Bailey was identified from the video by Officer Charlie McDonald, who worked at Fenger, R. 86 ¶ 52, and Derrick Young, a Fenger student, who said he had left school with Bailey the day of the fight and saw Bailey wearing red and black shorts that day. *Id.* ¶¶ 50-51. Young reaffirmed this information in a written statement for Assistant State's Attorney ("ASA") Kathy Morrissey on September 28. *Id.* ¶ 56. On September 27, Muhammad, who had previously identified Bailey from the video, told Detective Sullivan that he was not 100% sure it was Bailey. Detective Sullivan gave this information to ASA Morrissey. *Id.* ¶ 55.

Bailey appeared before the Honorable Maria Kuriakos Ciesil for a probable cause hearing on September 28 at 7:40 p.m., and Judge Kuriakos Ciesil entered an order finding probable cause. *See* R. 100-1.

In the day or two following Bailey's probable cause hearing, numerous individuals left messages for the Detectives either claiming that it was not Bailey in the video or stating that the person wearing red and black shorts was another person, specifically a juvenile whose identity has been protected by using the initials "D.J." R. 86 ¶ 64. Sometime during the week of September 28, Ento-Nichols and Broadway, the Fenger security guards who had previously identified Bailey from the video, concluded that they were mistaken in identifying Bailey. R. 90 ¶ 17. Broadway

went to the police station and shared this information with an unidentified police officer. *Id.* On September 30, Jamal Harding, an eyewitness to the fight, told the Detectives and ASA Jodi Peterson that the person in red and black shorts who punched Albert was "D.J." R. 86 ¶¶ 65-66. That same day, Young, who had previously identified Bailey from the video, recanted this identification in a meeting with the Detectives and ASA Peterson. R. 86 ¶¶ 65, 67. On October 1, Bramlett reaffirmed his identification of Bailey. R. 86 ¶ 69. On October 1, the Detectives told ASA Fabio Valentini that several individuals had come forward and stated that the person in the red and black shorts was not Bailey, but "D.J." R. 89 ¶ 70.

On October 16, two more people who knew Bailey, Markese Keefer and Dantrell Myles, told the Detectives and ASA Peterson that Bailey was not the person in red and black shorts in the video. R. 86 ¶ 73. Myles, who said he had been present during the fight, identified the person in the red and black shorts as D.J. from a Fenger school photo of D.J. *Id.* ¶ 74. On October 19, another person who knew Bailey, Miesha Walker, told ASA Peterson that Bailey was not the person in red and black shorts in the video. *Id.* ¶ 75. That same day, another person who was present at the fight, Dion Blandon, told ASA Peterson that "D.J." was the person in the red and black shorts who had punched Albert. *Id.* ¶ 76.

Charges against Bailey were dropped on October 19, and he was released, *id.* ¶ 77, having spent 23 days in custody.

Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any ma-

terial fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court considers the entire evidentiary record and must view all of the evidence and draw all reasonable inferences from that evidence in the light most favorable to the nonmovant. *Ball v. Kotter*, 723 F.3d 813, 821 (7th Cir. 2013). To defeat summary judgment, a nonmovant must produce more than "a mere scintilla of evidence" and come forward with "specific facts showing that there is a genuine issue for trial." *Harris N.A. v. Hershey*, 711 F.3d 794, 798 (7th Cir. 2013). Ultimately, summary judgment is warranted only if a reasonable jury could not return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Analysis

A. Bailey's Federal Claims

Bailey makes the following claims under federal law: (1) the Detectives violated the Fourth Amendment because they did not have probable cause to arrest Bailey, R. 85 at 2-3; (2) the Detectives violated the Fourth Amendment because they detained Bailey for an unreasonably long period before bringing him before a judge for a probable cause hearing, and the probable cause hearing was deficient, *id.* at 3- 7; and (3) the Detectives violated the due process clause of the Fourteenth Amendment because they failed to inform prosecutors that Ento-Nichols and Broadway had recanted their identifications of Bailey. *Id.* at 7-10.

1. Probable Cause for Arrest

"Probable cause [to arrest] exists if at the time of the arrest, the facts and circumstances within the officer's knowledge . . . are sufficient to warrant a pru-

dent person . . . in believing . . . that the suspect has committed . . . an offense." *Ramos v. City of Chicago*, 716 F.3d 1013, 1018 (7th Cir. 2013) (internal quotation marks omitted). The Seventh Circuit has "repeatedly held that a . . . single witness is generally sufficient to establish probable cause." *Reynolds v. Jamison*, 488 F.3d 756, 765 (7th Cir. 2007). "[P]robable cause does not depend on the witness turning out to have been right; it's what the police know, not whether they know the truth, that matters." *Sow v. Fortville Police Dep't*, 636 F.3d 293, 302 (7th Cir. 2011) (internal quotation marks omitted).

Bailey does not dispute that two people identified him from the video and that the Detectives had him arrested on this basis. Rather, Bailey argues that the video is not clear enough for the Detectives to have reasonably relied on identifications made from the video. R. 85 at 2-3. Bailey submits two still images from the video showing the person in red and black shorts, R. 86 Exs. 1, 2, and characterizes the images as "blurred." R. 85 at 3.

The Court has repeatedly reviewed the video and the still images and concludes that it was reasonable for the Detectives to rely on identifications by people who know Bailey, as Officer Massey and Bramlett did, despite the fact that the video is somewhat blurred. If the Detectives themselves had attempted to match individuals in the video to photos of known individuals in police or Fenger records, the fact that the video is not crystal clear would have hampered their efforts. But that is not what the Detectives did. Instead, the Detectives asked Massey and Bramlett to identify anyone they might recognize from the video. Both Massey and Bramlett recognized Bailey immediately and without hesitation, and without any sugges-

tion from the Detectives. Indeed, it appears from the record that Massey's identification of Bailey was the first indication the Detectives had that Bailey might be a suspect. Further, Massey and Bramlett had the opportunity to rewind and pause the video as much as they wished to confirm their identifications. Finally, the Court notes that the video was not so blurry as to prevent numerous people from identifying the person wearing red and black shorts as "D.J." over the course of the three weeks Bailey was detained. Thus, it was reasonable for the Detectives to rely on the identifications made from the video by Massey and Bramlett to justify arresting Bailey.

2. Post-Arrest Detention and Probable Cause Hearing

Detentions of up to 48 hours prior to a judicial probable cause determination are presumptively reasonable. *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). Nevertheless, an arrested person can attempt to prove that his probable cause hearing was delayed unreasonably. *Id.* at 56. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.*

Bailey argues that the Detectives detained him for 46 hours and 45 minutes before seeking a probable cause ruling in order to gather additional evidence to "justify" his arrest. R. 85 at 6. But that is of course not what happened here, since, as the Court just noted, the Detectives already had probable cause to "justify" Bailey's arrest in the first place. All the Detectives can be accused of is taking time to "bolster" the case against Bailey, and the Seventh Circuit has

held that it is "ludicrous" to argue that the Supreme Court intended to prevent the police from detaining suspects for that reason. *U.S. v. Daniels*, 64 F.3d 311, 314 (7th Cir. 1995); *accord U.S. v. Sholola*, 124 F.3d 803, 820 (7th Cir. 1997).

The cases Bailey cites are not to the contrary. In *Ray v. City of Chicago*, 629 F.3d 660, 663 (7th Cir. 2011), the Seventh Circuit held that "detention times ranging from three to fourteen and one-half hours were not constitutionally unreasonable" in the context of an arrest after a traffic stop. But this holding does not mean that longer detentions are unreasonable in other contexts, such as the murder investigation the Detectives were conducting here.

Bailey also cites *Willis v. City of Chicago*, 999 F.2d 284, 288-89 (7th Cir. 1993), because in that case the Seventh Circuit held that although the police had probable cause to arrest and detain the suspect on an initial charge, the police violated the Fourth Amendment when they continued to detain the suspect to gather evidence against him on a separate charge. Unlike in *Willis*, the Detectives here only detained Bailey to gather evidence on the charge for which he was initially arrested based on probable cause. Thus, Bailey's post-arrest detention did not violate the Fourth Amendment.

Bailey also challenges the sufficiency of his probable cause hearing. *See* R. 97. In his opposition to summary judgment, Bailey initially questioned the authenticity of the documents Defendants submitted to prove that the probable cause hearing actually occurred. *Id.* The parties have since deposed Judge Kuriakos Ciesil, who conducted the hearing, R. 100-1, and Bailey's counsel conceded at oral argument that whether and

when the probable cause hearing occurred is no longer in dispute. R. 108 at 20:18-23.[1]

Bailey also argues that his probable cause hearing was deficient because Judge Kuriakos Ciesil relied on a conclusory complaint in making her finding. *See* R. 97. This is simply not so. Bailey's arrest report stated that he had been "positively identified." R. 102 at 12. Although Judge Kuriakos Ciesil remembered that she had conducted a probable cause hearing for one of the suspects in the Derrion Albert murder, she did not specifically remember Bailey's hearing. *See* R. 100-1 at 19. But she confirmed that it was her handwriting and signature on the probable cause order. *See id.* at 7. And Judge Kuriakos Ciesil stated that it is her practice to examine the complaint and complaining witnesses for all probable cause hearings, *id.* at 9, and she did not remember deviating from that procedure in Bailey's case. *Id.* at 26. In this case, the Detectives were the complaining witnesses and they knew that Massey and Bramlett had identified Bailey. Therefore, Bailey received a sufficient probable cause hearing.

3. Post-Charge Detention

Under *Brady v. Maryland*, the government can violate the due process clause of the Fourteenth Amendment by "fail[ing] to disclose evidence materially favorable to the accused." *Mosley v. City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010). This duty to disclose "extends to the police and requires that they similarly turn over exculpatory . . . evidence to the prosecu-

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[1] Were it still in dispute, the Court would find that the probable cause hearing occurred at the time and date indicated by the documents put forward by Defendants.

tor." *Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). The elements of a *Brady* violation are: "(1) the evidence at issue is favorable to the accused, either being exculpatory or impeaching; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) there is a reasonable probability that prejudice ensued—in other words, [the evidence was] material[]." *Id.* at 566-67. "[F]avorable evidence is material . . . if there is a 'reasonable probability' that, had the evidence been disclosed . . . the result of the proceeding would have been different." *Bielanski v. County of Kane*, 550 F.3d 632, 643-44 (7th Cir. 2008) (internal quotation marks omitted).

Bailey argues that the Detectives did not inform the prosecutors on the case that Ento-Nichols and Broadway recanted their identifications of Bailey on September 28, and that the State's Attorney would have dismissed the charges against Bailey earlier had the prosecutors known this information. R. 85 at 7. As an initial matter, under federal law, Bailey suffered no prejudice since he was never tried. Unlike some other federal circuits, the Seventh Circuit has held open the possibility that withholding of evidence may be material even if the defendant is acquitted at trial. *See Bielanski*, 550 F.3d at 644-45 (citing cases). Even then, a trial must occur. Courts in this District, however, have held that withholding of evidence cannot be material if the defendant is released without being tried. *See Padilla v. City of Chicago*, 2013 WL 1208567, at *15 (N.D. Ill. Mar. 26, 2013). Thus, Bailey has no claim under *Brady v. Maryland* because he was released before being indicted, let alone tried.

Even if Bailey did have a cognizable claim based on *Brady*, there is no evidence in the record that

these defendants—the Detectives—ever learned that Ento-Nichols and Broadway recanted. The record only shows that Broadway communicated with an unidentified "police officer." But even assuming that the Detectives had learned that Ento-Nichols and Broadway recanted their identifications, there is no reason to think that the Detectives would have failed to provide this information to the prosecutors, since the record reflects that the Detectives were working closely with the State's Attorney's Office throughout the investigation. And once the prosecutors had the information, it was within the State's Attorney's discretion, not that of the Detectives, to determine whether Bailey should continue to be detained.

Moreover, even if, contrary to the evidence in the record, the Detectives had this information and failed to disclose it to the prosecutors, there is no "reasonable probability," that "the result of the proceeding would have been different." *Bielanski*, 550 F.3d at 643-44. Within two days of Ento-Nichols and Broadway recanting their identifications of Bailey the prosecutors knew that Young had also recanted his identification of Bailey, that Muhammad had qualified his identification, and Harding and numerous other people had identified "D.J." as the person wearing red and black shorts in the video. Thus, assuming that a delayed release from custody constitutes prejudice under *Brady* (which, as the Court discussed earlier, it does not), there is no "reasonable probability" that at that early point in the investigation the additional knowledge that Ento-Nichols and Broadway had recanted would have altered the prosecutors' calculations of how long to detain Bailey. In any event, the record is insufficient to show that the Detectives knew that Ento-Nichols and Broadway had recanted their identi-

fications, so it was not possible for the Detectives to provide the prosecutors with information they themselves did not have.

4. Qualified Immunity

Even if the Detectives did violate any of Bailey's rights, they are entitled to qualified immunity, which attaches as long as the Detectives' actions can be described as "reasonable mistakes." *Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013); *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct."). A "plaintiff seeking to defeat a defense of qualified immunity must establish two things: first, that she has alleged a deprivation of a constitutional right; and second, that the right in question was 'clearly established.'" *Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)).

Even if the video was in fact insufficiently clear for the Detectives to rely on identifications made from the video such that the Detectives violated Bailey's Fourth Amendment rights, it was reasonable for the Detectives to believe that the video was sufficiently clear enough so as to allow individuals to identify Bailey. And even if it was unreasonable for the Detectives to detain Bailey for nearly 47 hours before providing him with a probable cause hearing, it was reasonable for the Detectives to believe they could use that time to confirm or further bolster the probable case they already had. And finally, as the Court discussed above, even if the Detectives knew that Ento-Nichols and Broadway had recanted their identifications, and the Detectives inadvertently failed to provide this in-

formation to the prosecutors, such a mistake was not unreasonable in light of the other evidence the prosecutors already had indicating Bailey's innocence.

B. Bailey's State Law Claims

1. Pendent Jurisdiction

Under 28 U.S.C. §§ 1367(c)(1) and (c)(3), "district courts may decline to exercise supplemental jurisdiction over a claim," if "the claim raises a novel or complex issue of State law," or "the district court has dismissed all claims over which it has original jurisdiction." District courts have "broad discretion in deciding whether to retain supplemental claims." *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 608 (7th Cir. 2008). "[T]he general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits." *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1251 (7th Cir. 1994). It is appropriate, however, for the Court to retain jurisdiction over pendent claims if it is in the interests of "judicial economy, convenience, fairness, and comity." *Hansen*, 551 F.3d at 608 (internal quotation marks omitted).

Bailey has not raised a "novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). Bailey contends that "Illinois courts have not confronted an intentional infliction of emotional distress claim arising out of an abusive interrogation." R. 105 at 1. This, however, is not a novel issue of law, but a question of applying settled law to the particular facts of this case. Bailey has not argued that the resolution of his claim will alter the scope of intentional infliction of emotional distress claims generally. Rather, he argues that Illinois courts have never applied the law of inten-

tional infliction of emotional distress to circumstances like his; but insofar as the facts of every case are unique, every plaintiff could make the argument Bailey makes here. This is not a reason for the Court to decline jurisdiction over Bailey's state law claims.

The only case Bailey cites in which a court ordered remand to decide a "novel issue of State law" under 28 U.S.C. § 1367(c) involved the scope of a statutory taking. In *Key Outdoors Inc. v. City of Galesburg*, 327 F.3d 549, 550 (7th Cir. 2003), the Seventh Circuit instructed the district court to remand the case because, "[n]o state court has addressed the question whether, under Illinois law, a municipality may ban signs and offer only 'amortization' rather than cash compensation. Nor has any state court addressed the question whether the sort of statute [at issue here] would be deemed a taking for purposes of state or federal law." Bailey's claim does not purport to alter Illinois law in an analogous manner.

Bailey cites several other cases to support his argument that the Court should remand his state law claims. *See* R. 105 at 2-3 (citing *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 607 (7th Cir. 2000) ("We also decline to certify to the Wisconsin Supreme Court the question of whether Wisconsin courts would recognize an intentional exposure to a hazardous substance claim. Certification may be appropriate where there are unresolved questions of existing state law but we simply cannot certify every creative but unlikely state cause of action that litigants devise from a blank slate."); *Myers v. County of Lake*, 30 F.3d 847, 852 (7th Cir. 1994) (declining to certify question to Indiana Supreme Court regarding whether "it [would] recognize intentional efforts to commit suicide as defenses to the tort of negligently failing to prevent suicide");

Afram Export Corp. v. Metallurgiki Halyps, S.A., 772 F.2d 1358, 1370 (7th Cir. 1985) (declining "to adopt an innovative rule of state law" regarding opportunity cost damages for breach of contract)). These cases, however, only stand for the rule that "innovative state law claims belong in state court," which Bailey contends applies to his case. R. 105 at 3. Bailey does not, and cannot, argue that the legal questions at issue in *Insolia*, *Myers* or *Afram* are remotely analogous to his contention that "Illinois courts have not confronted an intentional infliction of emotional distress claim arising out of an abusive interrogation." R. 105 at 1. Thus, these cases do not support remand here.

Furthermore, judicial economy is served by addressing Bailey's claims in one forum. *See Hansen*, 551 F.3d at 608. This case is three years old. The parties have completed discovery and are ready for trial. The state claims are based on the same conduct as the federal claims. Remanding Bailey's state law claims would only serve to force the state court to duplicate this Court's efforts and delay the ultimate adjudication of this case.

For these reasons, the Court will exercise supplemental jurisdiction and decide Bailey's claims for malicious prosecution and intentional infliction of emotional distress, even though the federal claims have been dismissed.

2. Malicious Prosecution

Under Illinois law, for a malicious prosecution claim to be successful the following five elements must be proven: "(1) the defendant commenced or continued a criminal proceeding against the plaintiff; (2) the proceeding was terminated in favor of the plaintiff; (3) there was no probable cause to commence or

continue the proceeding; (4) the defendant acted with malice; and (5) the plaintiff suffered damages as a proximate result of the defendant's conduct." *Thompson v. City of Chicago*, 722 F.3d 963, 978 (7th Cir. 2013) (citing *Swick v. Liataud*, 662 N.E.2d 1238, 1242 (Ill. 1996)).

As with his *Brady* claim, Bailey bases his malicious prosecution claim on his allegation that the Detectives did not inform the prosecutor that Ento-Nichols and Broadway recanted their identifications of Bailey on September 28, and that the State's Attorney would have dismissed the charges against Bailey earlier had the prosecutors known this information. R. 85 at 11. Even if Bailey could show that the Detectives knew that Ento-Nichols and Broadway recanted their identifications and maliciously withheld that information from the prosecutors, which he has not, Bailey cannot show that he suffered damages as a result of this conduct. Once Bailey was charged, the decision to continue to detain or release Bailey belonged to the State's Attorney, not the Detectives. And as the Court discussed earlier, by October 1, the prosecutors knew that Harding and others had identified the person in red and black shorts as "D.J.," and that Young had recanted his identification of Bailey. Despite this evidence, the State's Attorney still did not drop charges and release Bailey until October 19. Considering the evidence of Bailey's innocence the prosecutors acquired shortly after Ento-Nichols and Broadway's recanted their identifications, those additional recantations would not have changed the prosecutors' calculations regarding how long they should continue to detain Bailey. In any event, since the record does not show that the Detectives knew that Ento-Nichols and

Broadway recanted their identifications of Bailey, Bailey's malicious prosecution claim is dismissed.

3. Intentional Infliction of Emotional Distress

Under Illinois law, for an intentional infliction of emotional distress claim to be successful the following elements must be proven: "(1) the defendants' conduct was extreme and outrageous; (2) the defendants knew that there was a high probability that their conduct would cause severe emotional distress; and (3) the conduct in fact caused severe emotional distress." *Swearnigen-El v. Cook County Sheriff's Dep't*, 602 F.3d 852, 864 (7th Cir. 2010) (citing *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 211 (Ill. 1992)).

Bailey alleges that the Detectives are liable for intentional infliction of emotional distress because they "held him in custody in the interview room to try to coerce a false confession." R. 85 at 11. The Court has reviewed the video of the Detectives' interviews with Bailey, and there is nothing extreme or outrageous about them. The Detectives spoke with Bailey for a total of approximately 20 minutes, and questioned him about why a number of people had identified him from the video of Albert's murder. As soon as he asked for an attorney, questioning stopped. Rather than being extreme, this is what the Detectives were supposed to do. As courts in Illinois have noted, "'[t]here is nothing inherently extreme and outrageous about [the police] conducting investigations or inspecting or questioning or suspecting.'" *Swanigan v. Trotter*, 645 F. Supp. 2d 656, 685 (N.D. Ill. 2009) (quoting *Schiller v. Mitchell*, 828 N.E.2d 323, 334 (Ill. App. Ct. 2d Dist. 2005)). Thus, Bailey's claim for intentional infliction of emotional distress is dismissed.

Conclusion

For the foregoing reasons, Defendants' motion for summary judgment, R. 80, is granted, and Bailey's complaint is dismissed.

DATED: October 30, 2013

ENTERED:

/s/ Thomas M. Durkin
United States District Judge

APPENDIX C

United States Court of Appeals
For the Seventh Circuit

April 16, 2015

Frank H. Easterbrook, Circuit Judge
Daniel A. Manion, Circuit Judge
Diane S. Sykes, Circuit Judge

No. 13-3670

EUGENE BAILEY,

Plaintiff-Appellant,

v.

CITY OF CHICAGO, et al.,

Defendants-Appellees.

ORDER

On consideration of the petition for rehearing en banc filed by plaintiff-appellant, on March 20, 2015, no judge in active service has requested a vote on the petition and all judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.