No. 17-

IN THE

Supreme Court of the United States

MATTHEW WISE AND ZACHARY JONES,

Petitioners,

v.

WILLIAM HURT, DEADRA HURT,
AND ANDREA HURT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JASON BELL
Counsel of Record
BELL, HESS AND VAN ZANT, PLLC
2819 Ring Road, Suite 101
Elizabethtown, KY 42701
(270) 765-4196
jbell@bhvzlaw.com

Counsel for Petitioners

281257

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS OF LAW PRESENTED

(1) In June of 2012, was there a clearly established law in the Seventh Circuit stating that it was unlawful, during interrogations of non-juvenile murder suspects, for police to use psychological tactics such as leading questions, fact-feeding, good cop/bad cop, verbal threats, vague promises of leniency, bluffing, deception, and admonitions to tell the truth?

(2) Did the actions of these police officers violate the Fourth Amendment or the Fifth Amendment of the United States Constitution?

(3) Do the same constitutional restraints apply to police officers conducting interrogations of adult suspects as apply to juvenile suspects?

(4) Did these police officers have at least "arguable probable cause" to believe that the Respondents committed this murder, and therefore, did qualified immunity apply?

(5) Did the Seventh Circuit violate the mandate of the recent United States Supreme Court case of White v. Pauly, WL 269170 (2017), which urges federal courts to apply qualified immunity more liberally?

(6) Did the Seventh Circuit examine this qualified immunity issue from the perspective of the police officers based upon the information that they knew at the time?

(7) Does this Seventh Circuit decision create new law and cause confusion to police officers about how they are to do their job?

(8) Did the Seventh Circuit violate Scott v. Harris, 550 U.S. 372 (2007), by refusing to review or consider the videotapes of these interrogations during this de novo review?

TABLE OF CONTENTS

Page

QUESTIONS OF LAW PRESENTED i

TABLE OF CONTENTS. iii

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES vii

OPINIONS BELOW. 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Proceedings Below 11

REASONS FOR GRANTING THIS PETITION 12

I. The Seventh Circuit Fails To Cite A Clearly Established Law Stating That This Police Conduct Is Unconstitutional, So Qualified Immunity Must Apply 13

Table of Contents

Page

II. The Seventh Circuit Ignored The Newly-Minted Supreme Court Precedent Of *White v. Pauly* 19

III. The Seventh Circuit Failed To Analyze The Probable Cause Issue From The Officers' Perspective And Based Upon The Information They Knew At The Time 21

IV. The Seventh Circuit Failed To Show A Constitutional Violation And "Arguable Probable Cause" Existed, So Qualified Immunity Applies 23

A. Fourth Amendment. 23

B. Fifth Amendment.. 28

V. The Seventh Circuit Cannot Reconcile This Opinion With Its Holding In *Dassey v. Dittmann* 28

VI. The Seventh Circuit Erred By Saying It Lacked Jurisdiction To Review The Videotaped Interrogations De Novo, Which Violates *Scott v. Harris* 31

VII. The Seventh Circuit Improperly Relied Upon Evidence Outside The Record In Analyzing The Reliability Of These Confessions 33

Table of Contents

Page

VIII. The Seventh Circuit Wrongly States That Petitioners Did Not Appeal The Failure To Intervene Claim. 35

CONCLUSION 36

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JANUARY 23, 2018 . . . . . 1a

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION, FILED MARCH 16, 2017. . . . . 34a

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 7, 2018 . . . . . 109a

TABLE OF CITED AUTHORITIES

Page

CASES

Abbott v. Sangamon County, Ill.,,
705 F.3d 706 (7th Cir. 2013). 13, 22-23, 26, 27

Aleman v. Village of Hanover Park,
662 F.3d 897 (7th Cir. 2011). 5, 14, 17, 18

Bruce v. Guernsey,
777 F.3d 872 (7th Cir. 2015). 25

Burritt v. Ditlefsen,
807 F.3d 239 (7th Cir. 2015) 21-22

Cairel v. Alderden,
821 F.3d 823 (7th Cir. 2016). . . . . *passim*

Carmichael v. Vill. of Palatine, Ill.,
605 F.3d 451 (7th Cir. 2010). 24

Carter v. Thompson,
690 F.3d 837 (7th Cir. 2012). 16, 19, 36

City and County of San Francisco v. Sheehan,
575 U.S. ––––, 135 S.Ct. 1765,
191 L.Ed.2d 856 (2015) 20

D.Z. v. Buell,
796 F.3d 749 (7th Cir. 2015). 23

Page

Dassey v. Dittmann,
877 F.3d 297 (7th Cir. 2017). . . . . *passim*

Etherly v. Davis,
619 F.3d 654 (7th Cir. 2010). 15, 16, 19, 36

Fare v. Michael C.,
442 U.S. 707 (1979). 14, 19, 36

Gill v. City of Milwaukee,
850 F.3d 335 (7th Cir. 2017). 17, 19, 28, 36

Gutierrez v. Kermon,
722 F.3d 1003 (7th Cir. 2013). 25

Hanson v. Dane County,
608 F.3d 335 (7th Cir. 2010). 23-24

Harlow v. Fitzgerald,
457 U.S. 800 (1982). 13

Jones v. Clark,
630 F.3d 677 (7th Cir 2011) 13

Latta v. Chapala,
221 Fed. Appx. 443 (7th Cir. 2007). . . . . *passim*

Malley v. Briggs,
475 U.S. 335 (1986). 13

Page

Mitchell v. JCG Indus., Inc.,
753 F.3d 695 (7th Cir. 2014) 36

Mullenix v. Luna,
136 S.Ct. 305 (2015) 23

Oliverio v. Butler University,
WL 1650501 (S.D. Ind. 2017) 25

Oregon v. Mathiason,
429 U.S. 492 (1977). 28

Pearson v. Callahan,
555 U.S. 223, 129 S. Ct. 808,
172 L. Ed. 2d 565 (2009) 20

Scott v. Harris,
550 U.S. 372 (2007) . . . . . *passim*

U.S. v. Lee,
618 F.3d 667 (7th Cir. 2010). 15, 19, 36

Wheeler v. Lawson,
539 F.3d 629 (7th Cir. 2008) 25

White v. Pauly,
WL 269170 (2017) . . . . . *passim*

Page

STATUTES

28 U.S.C. § 1254 1

28 U.S.C. § 1291 . . . . . .1, 11

28 U.S.C. § 2101 1

42 U.S.C. § 1983 . . . . . .1, 28, 32

RULES

Supreme Court Rule 13.1 1

Supreme Court Rule 14 . . . . . .4, 7, 13

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend IV 1, 23, 32, 33

U.S. Const. Amend V 1, 28

OPINIONS BELOW

On March 16, 2017, the Southern District entered an Order on Motions for Summary Judgment, [App. B] denying the motions of the KSP Defendants/Appellants, Wise and Jones, and denying that qualified immunity applied. That Order is reported at WL 1021396 (2017).

On January 23, 2018, the United States Court of Appeals for the Seventh Circuit was entered a Memorandum Opinion affirming the Southern District Court [App. A].

On March 7, 2018, the Seventh Circuit denied Petitioners' petition for rehearing *en banc* [App. C].

JURISDICTION

The Order denying Petitioner's petition for rehearing *en banc* was entered by the Seventh Circuit on March 7, 2018. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of that order. This court has jurisdiction to review the orders of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions involved are the Fourth and Fifth Amendments to the United States Constitution. The relevant statutory provisions involved are 42 U.S.C. § 1983 and 28 U.S.C. §1291.

STATEMENT OF THE CASE

A. Factual Background

On June 17, 2012, the body of Marcus Golike washed onto the shore of the Ohio River near Evansville, Indiana. Kentucky Medical Examiner, Dr. Amy Burrows-Beckham, a pathologist, performed an autopsy and found that Golike had a broken hyoid bone in his neck and a fractured rib. She noted hemorrhages near the hyoid bone, meaning it was fractured while he was alive - evidence of manual strangulation. The body was too decomposed to show any external skin bruises.

Dr. Burrows-Beckham told the Petitioner police officers that a broken hyoid bone is a tell-tale sign of strangulation. Due to its protected location inside the body, a hyoid bone is not typically fractured by trauma unless other fractures occur, such as a jaw bone, of which there was none. She also considered, and ruled out, that this was a suicide. She told the police: "He has a fractured hyoid bone. This is not going to happen with a jump off a bridge. I think he's been strangled." Her opinions never changed, as subsequent toxicology and lab reports confirmed her them. Petitioners relied heavily upon her expert medical opinion.

KSP officers Wise and Jones soon learned this was an Indiana crime and thus turned over the investigation to the Evansville Police Department ["EPD"]. The EPD took the lead in the investigation and Detective Jeff Vantlin was the "spearhead" or lead detective on the case.

Vantlin soon interviewed Respondent William Hurt, a relative of Golike and one of the last persons known to be with him. William's right "hand was swollen and freshly scratched." [App. A, p.3a] William offered multiple excuses for its condition: hitting a tree a year ago; scraping them at work; and hurting them grating soap. [App. A, pp.3a-4a] Vantlin found these multiple excuses suspicious.

Vantlin also spoke with William's father, Ron Hurt, who initially said he was not at the Hurt residence on the evening in question, but later changed his story to say he was present. Vantlin also spoke with other members of Golike's family and persons at homeless shelters where Golike had stayed.

Debbie Hurt, Respondents' mother, called Vantlin with "very important" information. She felt "uneasy" about something. Recently, Harley Wade had twice choked her using his hands and asked what it would be like to choke someone until they died. Debbie wanted Vantlin to know about this thinking these incidents might be connected "in some way." She saw a possible link between Harley's choking and the death of Golike and thought it important enough to report to Vantlin.

Vantlin decided to interrogate William, and his sisters, Deadra and Andrea Hurt. He obtained parental consent, and each of the Respondents voluntarily came to the EPD station for questioning. KSP Petitioners Jones and Wise were invited by Vantlin and went as well, but they did not decide who, when or where to question anyone. Once there, the EPD read *Miranda* warnings to all of the Respondents. All of them voluntarily signed rights waivers. No one ever asked to exercise *Miranda* rights, to leave, or speak with an attorney.

The EPD interrogation rooms were normal in size, furnishings, and temperature. Food and drink were offered to Respondents. No prosecutor was ever present. The interrogations were videotaped in full. [App. A, pp. 43a-44a] Both parents, Ron and Debbie Hurt, were not only consulted, but were physically present at the station.

William, Deadra and Andrea had all been questioned before by adult social workers or persons in authority. None of them have any mental impairments. They all understand and answer questions well.

William was an adult, age eighteen (18), was a high school graduate with a 3.0 GPA, was accepted to college, and he had a job. During his interrogation, he initially denied any involvement, but later confessed to the crime in detail, stating that he and Harley Wade, another foster brother, had murdered Golike and that Deadra and Andrea were complicit. [William Interrogation Videos][1] William volunteered the following facts on his own without any suggestion by the police:

(1) Harley woke him up after midnight saying they were "going out and doing something."

(2) All four were in the van and saw Golike walking.

(3) They stopped the van and words were exchanged.

(4) Golike "said something and Harley got mad."

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1. Pursuant to Rule 14, the Interrogation Video of William Hurt is available upon request of counsel. It is also in the record on appeal at the Seventh Circuit.

(5) Harley exited the van.

(6) Harley struck Golike in the face twice with "his fist."

(7) William hit Golike "more than five times."

(8) Harley strangled Golike from the front with his hands pressing on the throat.

(9) Harley kicked Golike in the ribs.

(10) Harley "did do it [kill Golike]"

(11) Golike "got beat to an inch of his life and was left for dead in the river"

(12) Harley "took the hat, folded it up" and put it in his "right one [pocket]."

(13) They put Golike in back of the van.

(14) They tied his hands and feet with a sheet

(15) Deadra drove them.

(16) Deadra, Harley, and William carried the body to the river.

(17) Andrea stayed in the van.

(18) Harley "threw him in the river"

(19) Afterwards, they "stopped at a gas station and used the vacuum" at "the Kangaroo way down Riverside Highway."

(20) At home, once in the garage, they synchronized their stories.

(21) They decided that "we don't tell anybody what happened"

In addition to confessing, the videotape shows William physically demonstrating to the officers how Harley put his hands around Golike's neck with thumbs under his chin, strangled him, and he shows how they kicked Golike in the ribs.

The videotape also reveals that William was not a "yes-man." He answered both affirmatively and negatively, and often contradicted the officers, indicating that his will was never overcome. Petitioners made many adjurations to tell the truth, and, in fact, the word "truth" was mentioned 23 times during his interrogation. William has no personal criticism of the Petitioners, as he testified as follows:

Q … but you're not aware of any one specific thing that Jones said that you can recall here today that was particularly offensive to you, is that true?[2]

A Right.

Q And the same is true for Detective Vantlin, right?

---

2. Wise did not participate in William's interrogation, so this statement is true for both KSP Defendants.

A Yes.

William never asked to stop questioning. No one raised their voices. The officers asked if William wanted anything to eat or drink, he refused, but they left trail mix on the table for him.

Deadra Hurt was an adult, age nineteen (19). She was a high school graduate, made good grades, was accepted to college, and aspires to be an RN. The EPD read Deadra her *Miranda* rights. She understood them and voluntarily signed a rights waiver. During her interrogation, she twice re-affirmed that she was read and understood her rights. [Deadra Interrogation Videos][3]

Like William, at first, Deadra denied involvement. However, only thirty-six (36) minutes into her interrogation, Deadra admits she drove the van stating, "I guess I did." Seconds later, she again says, "I guess I did." Deadra then comes clean again saying, "Okay, I did it."

Her details of the crime were consistent with William's independently-obtained story, revealing that Harley, William, and Andrea were in the van. She was driving. They saw Golike walking on the road. Deadra did not get out. William and Harley beat and kicked Golike as he was lying on the ground. Harley put his hands on Golike's neck and strangled him. William and Harley put the body in the van and tied it up. After dumping the body in the river, they went to a Kangaroo Food Mart and used Golike's

3. Pursuant to Rule 14, the Interrogation Video of Deadra Hurt is available upon request of counsel. It is also in the record on appeal at the Seventh Circuit.

debit card to purchase items. Then they went home. The word "truth" is mentioned 42 times during Deadra's interrogation.

Andrea Hurt was a juvenile, age sixteen (16), at the time of her interrogation. Her parent, Ron Hurt, was present in the interrogation room. Vantlin read Andrea and Ron a juvenile *Miranda* waiver and let them talk alone. Both agreed to talk to them and signed rights waivers. Andrea knew her participation was voluntary as no officer told her she could not leave. She was not threatened, or denied food, water, or bathroom usage and was not coerced.

Initially, she too denied being involved. However, Andrea changed her tune, admitted that she was in the van and that they picked Golike up close to their house. Vantlin asked where they picked him up, and she volunteered that it was at Kentucky Avenue near the Kangaroo Express. Wise asked what happened to him, and Andrea said she guessed that he had been dumped in the river. Despite these incriminating statements, the detectives did not deem this a confession. They allowed her to recant. The word "truth" was mentioned 76 times during Andrea's interrogation.

The EPD then made the decisions to arrest the Respondents. Plaintiffs were charged under Indiana law and were jailed in Indiana. Petitioners had no authority to arrest as Kentucky officers.

On June 30, 2012, the local judge found that probable cause existed to support charges against and against William and Deadra for Murder, Attempted Robbery

Resulting in Serious Bodily Injury, and Criminal Confinement, and against Andrea for Murder, Robbery Resulting in Serious Bodily Injury, and Criminal Confinement.

After his arrest, EPD officers William Arbaugh and Jason Pagett transported William to jail. William asked, "Do you think I'll get a year for this? Well, I've got to pay for what I've done." This subsequent, spontaneous admission of guilt was voluntary, uncoerced, and was not in response to any question by any officer. Arbaugh and Pagett both understood this statement by William as a statement of guilt.

On June 29, 2012, William left jail and took some EPD officers to the location where they had dumped Golike's body in the Ohio River. William had told them there was a large log present there, and took them to a place near a large log.

Post-arrest, Vantlin learned from Dr. Burrows-Beckham that William's demonstration on the videotape of how Harley had choked Golike from the front, with thumbs under chin, was consistent with a hyoid bone fracture. She also said and that their kicks to his side could have fractured Golike's rib. Vantlin considered this corroborating medical opinion.

On July 2, 2012, Debbie Hurt informed Vantlin that Harley's bed sheets were missing from his room around the time of Golike's death.

On July 3, 2012, Debbie Hurt met with Vantlin and conceded that one of Deadra's potential alibi witnesses was

incorrect. Debbie also recounted one of the times Harley strangled her, and stated that Andrea was "laughing during the strangulation."

On July 3, 2012, Vantlin took William from custody, *Mirandized* him, and William showed them the location of the murder, as in showed them where the body was dumped, and showed them where the debit card was used. Vantlin asked William if he committed the murder, and William again confessed that he did it - a third confession.

On July 6, 2012, Vantlin met with Sarah Richter, a clerk at the Kangaroo Food Mart who worked the night in question. She remembered four young people coming in between 2:00-4:00 a.m., and spending about $30 on snacks with a debit card. Vantlin requested the surveillance video from Kangaroo, but it had been recorded over. A warrant was requested for William and Deadra's cell phones, which was signed by a judge, however the EPD's forensic team was unable to access their phones.

On July 26, 2012, EPD detectives followed up with Ms. Richter. She looked at multiple photo lineups prepared by the EPD. In one lineup, she stated that Harley Wade looked familiar and pointed to him. In another prepared lineup, she pointed to Andrea and said, "100%, I recognize that face." In a third lineup, she pointed to Deadra and was "80%" sure she recognized her. Ms. Richter signed and initialed each lineup.

The EPD then turned this case over to prosecutors, who reviewed the investigation, "screened" this case, and found that probable cause existed. The prosecutors decided what charges to file without police input. The lead

prosecutor, Mike Perry, who has reviewed police action for over 20 years, screened this case himself and found that probable cause existed. He watched these interrogations on videotape and saw no constitutional violations. If he had even found probable cause lacking, he would have had a duty to dismiss the case.

In February of 2013, William's criminal case went to trial. At trial, the judge found that probable cause existed. The jury acquitted William of murder, but "hung" on the charge of obstruction of justice, which involved moving the body, meaning at least one juror thought he was involved in some way.

B. Proceedings Below

On October 1, 2016, Petitioners filed a Motion for Summary Judgment on the basis of, among other grounds, qualified immunity.

On January 27, 2017, Petitioners moved for leave to supplement their summary judgment motion with *White v. Pauly*, WL269170 (2017). The Southern District denied the motion.

On March 16, 2017, the Southern District entered a Memorandum Opinion and Order denying Petitioners' Motion for Summary Judgment.

On April 13, 2017, Petitioners filed their notice of interlocutory appeal pursuant to 28 U.S.C. § 1291 with the Seventh Circuit Court of Appeals.

On January 23, 2018, the Seventh Circuit issued its Memorandum Opinion and Order affirming the Southern District›s denial of the Petitioners› motion for summary judgment.

On February 6, 2018, Petitioners filed their Petition for Rehearing *En Banc*.

On March 7, 2018, the Seventh Circuit denied the Petition for Rehearing *En Banc*.

REASONS FOR GRANTING THIS PETITION

This case presents important constitutional issues concerning "arguable probable cause" and qualified immunity that have been grossly misconstrued and misapplied by the Seventh Circuit. Judge Wood's opinion is an outlier that runs contrary to a long line of cases that together comprise the clearly established law of the Seventh Circuit.

Her opinion contradicts two important United States Supreme Court decisions, *White v. Pauly* and *Scott v. Harris*. Judge Wood's opinion creates much confusion and uncertainty for law enforcement personnel who now do not know the proper parameters of conduct during the interrogation of adult [non-juvenile] suspects.

I. The Seventh Circuit Fails To Cite A Clearly Established Law Stating That This Police Conduct Is Unconstitutional, So Qualified Immunity Must Apply.

Qualified immunity is an entitlement to avoid trial. *Jones v. Clark*, 630 F.3d 677, 679 (7th Cir. 2011). Executive branch officials have long been safeguarded from liability so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). As the qualified immunity defense has evolved, it provides ample protection to "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity gives public officials "breathing room" to make reasonable but perhaps mistaken judgments. *Abbott v. Sangamon County, Ill.*, 705 F.3d at 706, 713 (7th Cir. 2013).

At oral argument, counsel tried to explain that the Southern District's opinion left the police confused and in the dark, when Judge Wood interrupted with, "So here's what you tell your officers, if you're trying to get a confession, don't feed 100 percent of the relevant facts." [Oral Argument at 18:08-18:18][4]. Her impassioned argument is inaccurate, as the police officers' goal was not to get a confession, and they did not feed anyone 100% of the facts.

In the real world of police interrogations, murderers are often less than forthcoming. Thus, police often must

4. Pursuant to Rule 14, the Audio of Oral Arguments is available upon request of counsel.

apply pressure to ascertain the truth. Interrogation methods such as asking leading questions, making verbal threats, bluffing, and other psychological tactics have long been deemed constitutionally permissible police tactics.

The following seven (7) cases, all of which were cited by the Petitioners, affirm the constitutionality of Petitioners' interrogation tactics and police conduct. Judge Wood not only did not cite these cases, but she also failed to distinguish them. Furthermore, she failed to cite any case stating that these specific police tactics were unconstitutional or that qualified immunity does not apply, and she failed to do so for a simple reason - no such case exists.[5]

In *Fare v. Michael C.*, 442 U.S. 707 (1979), a 16 year-old murder suspect was interrogated without a parent present and police denied his request to speak with his probation officer. *Id.* at 707. The juvenile repeatedly asked officers to stop questioning but they refused. *Id.* at 727. The police made threats and promises of leniency. *Id.* The juvenile was afraid, emotionally upset, and wept during questioning. *Id.* Despite the juvenile context, the Supreme Court nevertheless characterized this police conduct as "far from threatening or coercive" since the officers read his *Miranda* rights, he understood questions, and since there was no physical coercion. *Id.* at 727-728.

In *Latta v. Chapala*, 221 Fed. Appx. 443 (7th Cir. 2007), an adult arson suspect was interrogated while under the influence of drugs less than 48 hours after her

5. The Seventh Circuit cites *Aleman* [*Miranda* case] and *Dassey* [juvenile case], neither of which are applicable.

son's death. *Id.* at 446. Despite her state of emotional vulnerability, The Seventh Circuit found her interrogation constitutional stating, "No case of which we are aware establishes a constitutional principle that suspects in serious crimes are entitled to be free of interrogation until their minds are calm." *Id.* In a unanimous decision, they called this "good investigative practice" since a "high strung emotional state may lead the suspect to tell the truth to put her conscience at rest." *Id.*

In *U.S. v. Lee*, 618 F.3d 667 (7th Cir. 2010), a young murder suspect, Jermaine Lee, was brought to the police station, placed in a jail cell, and abandoned for six hours. *Id.* at 669-671. He then was *Mirandized*, signed a rights waiver, and voluntarily answered questions. *Id.* at 676-677. Officers repeatedly accused Lee of lying. *Id.* They threatened him with state and federal jail terms of many years. *Id.* at 672. They verbally threatened him saying "he had two children and needed to think about his future." *Id.* at 671. Lee agreed to cooperate "cause of my kids." *Id.* at 672. Lee confessed, but later moved to suppress his confession. *Id.* The Seventh Circuit unanimously found that these threats were constitutional, that he was not "browbeaten," and that he repeatedly disagreed with officers indicating that his free will was not overtaken. *Id.* at 677.

In *Etherly v. Davis*, 619 F.3d 654 (7th Cir. 2010), police made a 15 year-old murder suspect named Etherly sit for two hours before interrogating him. *Id.* at 657. A prosecutor was present. *Id.* at 658. Etherly was illiterate, had depression, was a special education student, and borderline mental functioning. *Id.* at 658; 662-664. Police made promises of leniency that he "had a moral obligation"

to cooperate and "it would go better for him in court" if he helped them. *Id.* at 661. The Seventh Circuit deemed these statements to a juvenile "inadvisable," yet constitutional and non-coercive since he was *Mirandized*, understood his rights, and agreed to freely talked to police. *Id.*

In *Carter v. Thompson*, 690 F.3d 837 (7th Cir. 2012), a 16 year-old murder suspect confessed after "enduring 55 hours of interrogation" at the police station. *Id.* at 839. She was never *Mirandized* and never told she could leave or refuse to answer questions. *Id.* at 839. No adult was present during her questioning. *Id.* at 840. The Seventh Circuit found this police action "unsettling," but constitutional because the juvenile spoke with police voluntarily. *Id.* at 844.

In *Cairel v. Alderden*, 821 F.3d 823 (7th Cir. 2016), police interrogated an adult robbery suspect named Cairel using psychological tactics despite knowing that he was mentally impaired and had a low IQ. *Id.* at 828-829. Cairel became visibly upset during questioning and repeatedly protested his innocence before confessing. *Id.* at 828. Cairel challenged his confession alleging he was emotionally susceptible. *Id.* at 836. The Seventh Circuit found that lies, verbal threats, and insults, even to a suspect with known mental impairments, were constitutional. *Id.* at 833. They emphasized that Cairel had agreed to be interrogated, corrected errors in his confession, and had no personal criticism of police. *Id.* at 834. While the police were "particularly insistent," and falsely promised relief if he cooperated, these were deemed constitutionally permissible "ordinary interrogation tactics." *Id.* at 833. The Seventh Circuit emphasized that police "are entitled to perform their law

enforcement responsibilities assertively" and were acting pursuant to a legitimate governmental purpose of trying to solve crime. *Id.* at 836.

In *Gill v. City of Milwaukee,* 850 F.3d 335 (7th Cir. 2017), police interrogated an adult homicide suspect with a mental impairment named Gill. *Id.* at 338. Gill made statements they knew were not true, casting doubt on their reliability. *Id.* He asked for a lawyer, but police convinced him to proceed without one. *Id.* They questioned him for eleven hours, using tactics of social isolation, confrontation, theme development, and minimization. *Id.* 339. They supplied facts of the crime via leading questions, and lied about his failing a polygraph and eyewitness testimony. *Id.* at 338-39. Gill professed innocence 140 times before confessing. *Id.* at 339. During his criminal case, his confession was suppressed and found involuntary. *Id.* On appeal, the Seventh Circuit found "the right to be free from coercive interrogation" was vague and "precisely the type of 'high level of generality' the Supreme Court has rejected in the qualified immunity context." *Id.* at 341. Significantly, the Court stated, in 2017, that "Gill has not cited, and we have not identified, any precedent from the Supreme Court or this Circuit that puts the unconstitutionality of the officers' conduct here 'beyond debate.'" *Id.*

Judge Wood ignores all of these cases, some of which involve juveniles, and many of which have facts far worse than this case. She does cite *Aleman v. Village of Hanover Park*, 662 F.3d 897 (7th Cir. 2011), which is an inapplicable *Miranda* violation case. [App. A, p. 17a] In *Aleman*, a day care worker named Aleman confessed to killing an infant after being interrogated for nine (9) hours. *Id.* at 902.

Police refused his request to leave, saying "If I don't get to talk to you, you're not going home," and questioned him outside the presence of his attorney. *Id*. The police lied about three doctors telling them that Aleman's shaking the baby was the cause of death, and these lies directly induced the confession, as promptly upon hearing them, Aleman confessed. *Id*. at 902. This police conduct was held to violate *Miranda* and qualified immunity was denied to the officers. *Id*. at 904-905.

Aleman is good law, and admittedly involves a clear *Miranda* violation. However, that is not the issue here. In fact, Respondents were fully Mirandized and signed rights waivers, they had no attorney, never asked for one, never asked to stop questioning, and never asked to leave. Respondents do not even allege a *Miranda* violation. Also, Petitioners did not lie to Respondents and thereby induce a confession. Thus, on all fronts *Aleman* is clearly inapplicable.

Judge Wood's opinion has enormous constitutional implications. The parameters of non-juvenile police interrogations are now vague and blurry. Her opinion creates confusion and uncertainty. Police work has now become guesswork. How are police to interrogate adult suspects? Can they make verbal threats? Can they ask leading questions? Are vague promises of leniency allowed? Can they bluff or use misdirection? What the Seventh Circuit once called "good investigative practice" is now out the window. *Latta*, 221 Fed. Appx. at 446. What the Seventh Circuit for years deemed to be "ordinary interrogation tactics" have now been nullified with a stroke of the judicial pen. *Cairel,* 821 F.3d 836.

In summary, *Lee*, *Etherly*, *Latta*, and *Fare* were all on the books in June of 2012. *Gill, Carter* and *Cairel* were decided shortly thereafter. Together, these cases are cohesive and define the proper parameters of police conduct. In contrast, the Seventh Circuit opinion here is an outlier. In June of 2012, the clearly established law in the Seventh Circuit was that during police interrogations of competent adult suspects, psychological tactics such as the ones employed by these officers were not only constitutional, but were deemed to be "good investigative practice."

II. The Seventh Circuit Ignored The Newly-Minted Supreme Court Precedent Of *White v. Pauly*.

The Seventh Circuit ignored, failed to cite, failed to follow, and failed to distinguish a newly-rendered Supreme Court opinion that is right on point. On January 9, 2017, the United States Supreme Court rendered *White v. Pauly*, WL269170 (2017), while Petitioners motion for summary judgment was pending before the Southern District.

On January 27, 2017, Petitioners filed a motion seeking leave from the Southern District Court to tender *White* to the court.

On January 30, 2017, the Southern District rejected and denied this motion as "unnecessary" stating, "The Court will research and apply all relevant caselaw in addressing the pending summary judgment motions." Yet, the Southern District failed to either cite or rely upon *White* anywhere in its 48-page opinion. [App. A] Astonishingly, after this issue was brought to their attention, and after the Southern District's error, the Seventh Circuit repeated it, as Judge Wood also failed to

cite or distinguish *White* anywhere in her entire 30-page opinion.

The *White* decision re-iterates important qualified immunity principles such as that the absence of a clearly established law is an "important indication" that the officers did not violate the Constitution. *White* emphasizes that a law must be "particularized" to the facts case, clear "beyond debate," and so well-settled that every officer would be on notice of it. *White* mandates that a court confine its qualified immunity analysis to the facts known to the officer at the time.

Furthermore, the Supreme Court in *White*, per curiam, noted their own recent trend to expand the application of qualified immunity, stating as follows:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. See, *e.g., City and County of San Francisco v. Sheehan,* 575 U.S. ––––, ––––, n. 3, 135 S.Ct. 1765, 1774, n. 3, 191 L.Ed.2d 856 (2015) (collecting cases). The Court has found this necessary both because qualified immunity is important to " 'society as a whole,' " *ibid.,* and because as " 'an immunity from suit,' " qualified immunity " 'is effectively lost if a case is erroneously permitted to go to trial,' " *Pearson v. Callahan,* 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

White, 137 S.Ct. at 551-552. The *White* Court reversed a circuit court's wrongful denial of summary judgment on the basis of qualified immunity. *Id.* at 553. In the process,

the Supreme Court took the opportunity to chastise all federal circuit courts, letting them know the Supreme Court is tired of seeing qualified immunity appeals by police officers, noting that in the past five years, they have reversed numerous improper denials of qualified immunity. *Id*. at 551.

During the pendency of this action, the Supreme Court decided *White*. Petitioners tried to tender it to the Southern District and were rebuffed. Then, inexcusably neither the Southern District nor the Seventh Circuit ever cited or distinguished it. *White* issued a mandate to circuit courts - quit denying qualified immunity in close cases. They mandated that qualified immunity be applied more liberally, and both the Southern District and the Seventh Circuit ignored this crucially important precedent, which is reason alone to grant certiorari.

III. The Seventh Circuit Failed To Analyze The Probable Cause Issue From The Officers' Perspective And Based Upon The Information They Knew At The Time.

Judge Wood flatly refuses to look at this issue from the officers' perspective, stating, "The present case, a civil one under 42 U.S.C. § 1983, involves no deference to the state defendants' position; to the contrary, at this stage we must give the plaintiffs the benefit of the doubt." [App. A, p.28a] Her analysis is flawed.

Qualified immunity requires a different, officer-centric analysis. Judge Wood did not discuss the information the officers possessed at the time, or whether their actions were reasonable in light of that information. In *Burritt v.*

Ditlefsen, 807 F.3d 239 (7th Cir. 2015), the investigating police officer knew the following at the time of arrest:

> Here, when Ditlefsen arrested Burritt she had the following pieces of information: SMH had repeated her detailed story to different individuals and there was no indication from her recitations that she was lying or suggestible; the information given by SMH's mother and stepfather tended to corroborate SMH's story; SMH was able to describe and draw a picture of the scene of the assault, which generally matched Burritt's property; SMH reported that Burritt had a number of dogs, which he actually did have; and the trip took roughly two hours when it should have taken forty minutes. Ditlefsen believed the routes she mapped on MapQuest supported SMH's story.

Id. at 250. The *Burritt* Court properly focused its inquiry on the information that the officer had at the time. The information he possessed is strikingly similar to what Petitioners possessed at the time - a story from suspects, no indication of lying, corroboration by a mother, vivid descriptions of the events, inconsistencies, etc. Despite the fact that a suspect later turned out to be innocent, the officer in *Burritt* still had "arguable probable cause" at that time and qualified immunity attached.

If the totality of the circumstances known to the officer, at the time of the arrest, would cause a reasonable person to believe that the arrestee had committed a crime, then probable cause exists, as the court's focus should be "to see what they saw and hear what they heard." *Abbott*,

705 F.3d at 714. In *White v. Pauly*, WL269170 (2017), the Supreme Court amplified this point:

> The District Court denied the officers' motion for summary judgment, and the facts are viewed in the light most favorable to the Paulys. *Mullenix v. Luna*, 136 S.Ct. 305 (2015)(per curium). Because the case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers.

Id. at 550. Judge Wood ignored *White* and admits that they did not analyze this qualified immunity issue from the perspective of these police officers based upon what they knew at the time - "to see what they saw and hear what they heard." That, too, is error and reason alone to grant this petition.

IV. The Seventh Circuit Failed To Show A Constitutional Violation And "Arguable Probable Cause" Existed, So Qualified Immunity Applies.

A. Fourth Amendment.

The Fourth Amendment guarantees the right to be free from arrests without probable cause. *D.Z. v. Buell*, 796 F.3d 749, 755-756 (7th Cir. 2015). Probable cause to arrest exists if the totality of the circumstances known to the officer, at the time of the arrest, would cause a reasonable person to believe that the arrestee had committed a crime. *Abbott* 705 F.3d at 714. It is a practical, commonsense standard that inherently allows room for reasonable mistakes. *Hanson v. Dane County*, 608

F.3d 335, 338 (7th Cir. 2010). The officer's belief that the arrestee was committing a crime need only be reasonable. *Id*. The Seventh Circuit has described probable cause thusly:

> Cognizant that police officers operate in the real world, often in rapidly unfolding and even chaotic circumstances, we view the facts not 'as an omniscient observer would perceive them but … as they would have appeared to a reasonable person in the position of the arresting officer - seeing what he saw, hearing what he heard'.

Carmichael v. Vill. of Palatine, Ill., 605 F.3d 451, 457 (7th Cir. 2010). Looking at the probable cause issue in this case, the Petitioners knew the following facts prior to the EPD arresting anyone: (1) Respondents were the last ones with Golike; (2) Respondents and Harley Wade were physically capable of committing these crimes; (3) Golike had a broken hyoid bone, a broken rib, and soft tissue hemorrhages; (4) Dr. Burrows-Beckham said Golike was murdered and did not commit suicide; (5) William had skinned knuckles on his right and dominant hand consistent with hitting something; (6) William gave multiple excuses to Vantlin about his skinned knuckles; (7) William got days mixed up and said he could not pass a polygraph when interviewed later; (8) Respondents' father, Ron Hurt, changed his story about his whereabouts; (9) Harley Wade gave inconsistent statements to Wise; (10) Debbie Hurt reported a bed sheet was missing of their beds; (11) Debbie Hurt called Vantlin to say Harley had twice previously tried to choke her and she was thought he could be involved; (12) Harley had rage problems; (13) William self-reported anger issues; (14) William exhibited

"defeated mode" body language during his interrogation; (15) William fully confessed and implicated his siblings; and, (16) William physically demonstrated on videotape how he and Harley beat and kicked Golike and how Harley strangled him.

This evidence constitutes probable cause. All that is required for qualified immunity to apply is "arguable probable cause."

Qualified immunity provides shelter for officers who have "arguable probable cause," those officers that reasonably but mistakenly believe they have probable cause to arrest. *Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013). Even if an officer lacks probable cause, he/she is still entitled to qualified immunity, when a reasonable officer could have reasonably believed that probable cause existed in light of well-established law. *Bruce v. Guernsey*, 777 F.3d 872, 878-879 (7th Cir. 2015). Officers do not have to be correct. *Oliverio v. Butler University*, WL 1650501 at 7 (S.D. Ind. 2017)(qualified immunity applies even if the officer made a reasonable mistake in judgment). Even if evidence dries up, or witnesses recant, that does not diminish the fact that "arguable probable cause" existed for arrests at the time they were made. *See Wheeler v. Lawson*, 539 F.3d 629, 639 (7th Cir. 2008)(qualified immunity protects even those police officers who make a reasonable error in determining that there is probable cause to arrest). Nevertheless, the Seventh Circuit still failed to analyze the qualified immunity issue according to this lower legal standard of "arguable probable cause," as they stated as follows:

> Perhaps, as the officers argue in their briefs, a trier of fact might come to the opposite conclusion and think that they were pushing, but doing nothing that crossed a constitutional line.

[App. A, p. 33a] Inexplicably, the Seventh Circuit found that probable cause was arguable and a jury could find for them, yet failed to find that "arguable probable cause" existed.

In *Abbott v. Sangamon County, Ill.*, 705 F.3d 706 (7th Cir. 2013), despite the presence of genuine issues of fact, the District Court granted qualified immunity and the Seventh Circuit affirmed stating:

> The kerfuffle here falls somewhere in this middle ground. Cindy did not flee or physically clash with Sweeney, but along with arguing and yelling she did not comply with his order to stop approaching. **Reasonable minds could differ as to whether Cindy's conduct was more like that involved in cases like *Meyer* …or whether it was more akin to the conduct involved in cases like *Gonzalez*, …**
>
> **But we need not determine whether there was probable cause, for the simple fact that reasonable minds could differ as to the meaning of the law leads to the conclusion that Sweeney is shielded by qualified immunity.**

Id. at 723-724. [emphasis added] The "simple fact" that reasonable minds differ about whether probable cause existed is conclusive proof that "arguable probable cause" exists, and therefore the officer "is shielded by qualified immunity." *Id.* at 724. The Seventh Circuit misapplied this law.

Based upon the facts these officers knew at the time, at a minimum, they had "arguable probable cause" to think the Respondents committed this crime. Post-arrest facts corroborated these arrests, including Sarah Richter's positive identifications, William's subsequent admission of guilt to Arbaugh and Padgett during transport, and William's showing them where they put the body in the Ohio River. [App. A, pp. 9a-10a]

The Seventh Circuit dwells on the fact that Golike's body was found upstream and say that one fact makes William's confession unreliable. [App. A, pp.16a-17a] One exculpatory fact is not dispositive. Perhaps William was confused. Bodies can move upstream, and in fact, while this investigation was pending, Vantlin received a police report of a drowning accident where a jet-skier's body was dragged upstream after being caught on a river barge in this area of the Ohio River. Vantlin knew it was not unprecedented for a body to be pulled upstream. Regardless, like all investigations, these officers had to weigh both exculpatory and inculpatory evidence and consider the totality of the circumstances.

It is completely incongruent that the Seventh Circuit found that fact issues existed regarding the existence of probable cause, and then did not correspondingly find that the Appellants had "arguable probable cause" and were

entitled to qualified immunity. That is reversible error and an important reason to grant certiorari.

B. Fifth Amendment.

With regard to William's Fifth Amendment claim, it applies only to custodial interrogations. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). William's interrogation was non-custodial, so his Fifth Amendment claims fail as a matter of law. Even William admits he voluntarily spoke with police, as he testified, "Yeah, they did mention any time I was free to leave." By his own admission, this was a non-custodial interrogation.

With regard to Deadra's claim, a § 1983 claim based on a Fifth Amendment violation arises a confession was (1) involuntary and (2) introduced into evidence at a hearing or at trial. *Gill*, 850 F.3d at 340. Deadra's confession was voluntary. Her confession was suppressed in her criminal case and all charged against her were dropped before trial, so her confession was never "introduced into evidence at a hearing or trial." Thus, her Fifth Amendment claim fails as a matter of law.

V. The Seventh Circuit Cannot Reconcile This Opinion With Its Holding In *Dassey v. Dittmann*.

The popular Netflix documentary series "Making A Murderer" involved Brendan Dassey, a juvenile age sixteen (16), who was allegedly complicit with an adult named Steven Avery in the murder of a female named Teresa Halbach. An issue in that popular documentary was the sufficiency and reliability of Dassey's juvenile confession. That actual case, *Dassey v. Dittmann*, 877

F.3d 297 (7th Cir. 2017), was pending before the Seventh Circuit at the same time as this case, *Hurt v. Vantlin, et al.,* and the following timeline shows how the disposition of these two cases was intertwined:

2/14/17 *Dassey* - oral arguments before the Seventh Circuit

4/13/17 *Hurt* - KSP Defendants filed Notice of Appeal to Seventh Circuit

6/22/17 *Dassey* - opinion rendered by Seventh Circuit

7/14/17 *Hurt* - KSP Defendants filed Appellants' Brief with Seventh Circuit

8/4/17 *Dassey* - Petition for Rehearing *En Banc* granted by Seventh Circuit

8/28/17 *Hurt* - Wise & Jones' Reply Brief filed with Seventh Circuit

9/26/17 *Dassey* - oral arguments before Seventh Circuit *En Banc*

11/8/17 *Hurt* - oral arguments before Seventh Circuit

12/8/17 *Dassey* - *En Banc* opinion rendered by Seventh Circuit

1/23/18 *Hurt* - opinion rendered by Seventh Circuit

2/6/18 *Hurt* - Petition for Rehearing *En Banc* filed

3/7/18 *Hurt* - Petition for Rehearing *En Banc* denied

In *Dassey*, Wisconsin police officers engaged in the same tactics as Appellants - fact-feeding, vague promises of leniency, verbal threats, exerting pressure - but their methods were employed on a mentally-impaired juvenile without his attorney present. *Dassey*, 877 F.3d at 301. A majority of this Court, *en banc*, nevertheless affirmed the voluntariness and reliability of Dassey's confession. *Id*. at 318.[6]

In contrast, this case involves adult confessions from Respondents William and Deadra Hurt, both of whom were adults. Both of them also had no mental infirmities whatsoever. The Respondents were not questioned outside the presence of their counsel as they did not have an attorney. Logically, if the confession in *Dassey* has been deemed voluntary, uncoerced and reliable by the Seventh Circuit, then certainly the Respondents' confessions have to be deemed so as well. Judge Wood's opinion in this case is irreconcilable with the Seventh Circuit's holding in *Dassey*.

Curiously, Judge Wood cites *Dassey* repeatedly in her opinion in this case, which involved William and Deadra Hurt, two non-juveniles. [App. A, pp. 27a, 29a] She appears to have wrongly applied juvenile confession principles to this adult confession case. For example, her opinion

6. A petition for writ of certiorari was filed in *Dassey* on February 20, 2018.

refers to William as a boy. [App. A, p.7a] Judge Wood calls William "very impressionable," and "very vulnerable," without a shred of proof to support these contentions. [Oral Argument at 17:56] At oral argument, Judge Wood referred to William as a "child." [Oral Argument at 17:59]

By treating this like a juvenile case, the Seventh Circuit rewrites the law regarding adult confessions and creates new constitutional restraints.[7] *See Dassey*, 877 F.3d 297 at 318 (debates over interrogation techniques have not resulted in controlling Supreme Court precedent condemning the techniques used, and absent a clear declaration from the Court, we may not create "new constitutional restraints"). Certiorari should be granted to bring this case in line with the Seventh Circuit's holding in *Dassey*.

VI. The Seventh Circuit Erred By Saying It Lacked Jurisdiction To Review The Videotaped Interrogations De Novo, Which Violates *Scott v. Harris*.

The case of *Scott v. Harris*, 550 U.S. 372 (2007) is an important precedent that is strikingly similar procedurally to this case. However, the Seventh Circuit refused to follow *Scott* and did not independently review these videotaped interrogations to determine whether qualified immunity applied. Judge Wood's opinion states that "*Scott* does not treat video footage as a distinct type of evidence that is not subject to the normal summary judgment strictures" and that "nothing about video evidence justifies placing

7. While juvenile confessions are evaluated with special care, there is no such requirement for adults.

it in such a privileged position." [App. A, p. 14a] The Seventh Circuit's refusal to review these videotapes de novo is error.

In *Scott*, a police officer was sued under § 1983 and the Fourth Amendment, the officer moved for summary judgment on the basis of qualified immunity, and his motion was denied by the federal district court on the basis that there were purported issues of fact. *Id.* at 375-376. The officer filed an immediate interlocutory appeal of the qualified immunity issue, and the Eleventh Circuit affirmed the denial of summary judgment. *Id.* at 375-376. The Supreme Court granted certiorari and reversed. *Id.* at 376. The Supreme Court stated as follows:

> There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.

Id. at 378. The Supreme Court reversed the Eleventh Circuit because the videotape presented clear evidence of what occurred and showed no constitutional violation. Id. at 380. They stated that "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; **it should have viewed the facts in the light depicted by the videotape**." *Id.* at 380-381. [emphasis added]

In this case, the interrogation videotapes reveal exactly what happened. These interrogations were videotaped in full, and Respondents allege nothing improper occurred outside of the interrogations. The uncontroverted evidence as is seen on the videotapes is that Respondents listened, understood questions, and gave responsive answers. The videotape shows that the Respondents were not overly emotional throughout most of the interrogation. The videotape shows the officers' demeanor was calm, they used only psychological tactics to elicit the truth, and that they never physically touched Respondents. In summary, the videotapes show unequivocally that no violation of any clearly established constitutional right or law occurred.

When videotape footage of an event such as an interrogation exists, as it does here, and the parties agree that no coercion took place outside of what is captured on the videotape, *Scott* says that circuit courts have a duty to conduct an independent review of the videotape. The Seventh Circuit's failure to review them do novo, rather than relying upon any inferences made by the Southern District, was error, was a clear violation of *Scott*, and merits granting certiorari to clarify this important issue of law.

VII. The Seventh Circuit Improperly Relied Upon Evidence Outside The Record In Analyzing The Reliability Of These Confessions.

The Seventh Circuit rightly states that reliability is a "key inquiry" regarding the Fourth Amendment issue. [App. A, p. 17a] However, they apply the wrong analysis and ignore vital facts. [App. A, p.17a] For example, at oral argument, Judge Wood pulls from thin air that William

was "very impressionable" and "very vulnerable." [Oral Argument at 17:56-18:01] There is no evidence anywhere in the record to support her statements, and she cites none. Then, Judge Wood made the following comment that also is unsupported by any evidence in the record:

> Yes, but you know -- I mean, if we want to go there, the Supreme Court has also pointed out that, at the age of 18, one's frontal cortex is not fully developed. It's not until 25 or 26. And the Supreme Court itself has recognized that, so we're not making this up out of thin air.

[Oral Argument at 17:37-17:50] Judge Wood is not a physician, and there is no medical proof to support an underdeveloped cerebral cortex theory in this case. In fact, there is no proof of any heightened vulnerability on the part of Respondents. Rather, the proof is that they are intelligent, educated, who listen to and answer questions well and who were no more susceptible, naïve, or vulnerable than other young adults their age.

Judge Wood employs her own analysis. She ignores the facts crucial to the issue of reliability - that the Respondents understood and waived their rights, were intelligent, had high school diplomas, were mentally competent, understood and answered questions well, never asked to stop questioning or to leave, their parents were present on site, and they were there voluntarily and free to leave at their discretion. She ignores that the EPD interrogation room was normal in size and decor, the door was unlocked, the interrogations were videotaped, no one was ever touched, no prosecutor was present, they were interrogated once, the durations were reasonable, all voices were calm, and food/drink was to them offered.

Indicia of reliability abound in this case - and the Seventh Circuit ignored them all and improperly relied upon unsupported conclusions that the Respondents were somehow vulnerable or impressionable. Relying upon evidence that exists nowhere in this case is error.

VIII. The Seventh Circuit Wrongly States That Petitioners Did Not Appeal The Failure To Intervene Claim.

The Seventh Circuit states that "only the EPD Defendants appeal the denial of qualified immunity from these [failure to intervene] claims." [App. A, p. 20a] This is erroneous, as in their Appellants' brief, the Petitioners clearly state as follows:

> Since the failure to intervene and conspiracy claims also involve an alleged deprivation of a constitutional right, and then qualified immunity would also apply to them. *See Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017)(failure to intervene and conspiracy claims dismissed on the basis of qualified immunity where there was no constitutional deprivation).

Jones and Wise clearly appealed the fact that qualified immunity also barred any failure to intervene claims asserted against them. This is yet another legal error in the Seventh Circuit's opinion.

CONCLUSION

No clearly established Seventh Circuit law says that the Petitioners' use of standard interrogation tactics on non-juvenile suspects, such as asking leading questions, making verbal threats, making vague promises of leniency, or bluffing are improper. In fact, the Seventh Circuit has always called these police methods and tactics constitutional and even calls them "good investigative practice."

Judge Wood's opinion breaks new ground. She jettisons years of sound, established precedent. In the wake of this opinion, police officer have no clear direction are left "scratching their heads." *Mitchell v. JCG Indus., Inc.*, 753 F.3d 695,699 (7th Cir. 2014). Judge Wood's opinion creates confusion and uncertainty.

Her opinion directly conflicts with a long line of authority from the Seventh Circuit - *U.S. v. Lee, Etherly v. Davis, Gill v. City of Milwaukee, Latta v. Chapala, Cairel v. Alderden, Carter v. Thompson,* and *Dassey v. Dittmann*. Her opinion also conflicts with precedent from the United States Supreme Court - *Fare v. Michael C., White v. Pauly,* and *Scott v. Harris.*

This Seventh Circuit opinion is an outlier and it is simply wrong. It raises questions of exceptional constitutional importance regarding issues of arguable probable cause and qualified immunity. Accordingly, this Petition for Writ of Certiorari should be granted to clarify the law in this vitally important areas of law.

This the 5th day of June, 2018.

Respectfully submitted,

Jason Bell
Counsel of Record
Bell, Hess and Van Zant, PLLC
2819 Ring Road, Suite 101
Elizabethtown, KY 42701
(270) 765-4196
jbell@bhvzlaw.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JANUARY 23, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 17-1771 & 17-1777

WILLIAM HURT, DEADRA HURT
AND ANDREA HURT,

Plaintiffs-Appellees,

v.

MATTHEW WISE, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Indiana, Evansville Division. No. 3:14-cv-00092 — **Jane Magnus-Stinson**, *Chief Judge.*

November 8, 2017, Argued
January 23, 2018, Decided

Before WOOD, *Chief Judge*, and FLAUM and HAMILTON, *Circuit Judges.*

WOOD, *Chief Judge.* Andrea, Deadra, and William Hurt were all arrested after their uncle, Marcus Golike, was found dead on the banks of the Ohio River. The arrests

came after Deadra and William "confessed" that they, with some help from Andrea, murdered Golike. But one by one, each was absolved. Andrea was never criminally charged. The charges against Deadra were dropped after four months. And while the state prosecuted William, he was not convicted on any charge.

With the criminal proceedings behind them, Andrea, Deadra, and William filed a civil suit against the officers and detectives involved in their arrests and prosecutions. Their claims focus on the interrogations of Deadra and William, the decisions to arrest all three plaintiffs, and the alleged fabrication of evidence by the police. All defendants filed motions for summary judgment on the basis of qualified immunity. For the most part, the district court denied the motions. The defendants challenge those rulings in this interlocutory appeal. We conclude that with minor exceptions the district court correctly assessed the situation.

I

A

In June 2012 a male body washed up on the Kentucky side of the Ohio River. A state medical examiner's autopsy revealed that the hyoid bone in the neck of the deceased, plus a rib, had been fractured. There were no other visible injuries. She concluded that the injuries were consistent with asphyxia by strangulation.

Appendix A

Zachary Jones and Matthew Wise of the Kentucky State Police ("KSP") initially took the investigatory reins. They found two items in the front pocket of the man's pants: a letter, enclosed in a plastic bag, from the Social Security Administration addressed to Marcus Golike, and a folded baseball cap. The police soon confirmed that the body was indeed that of Golike, a resident of Evansville, Indiana. At that point the Evansville Police Department ("EPD") and EPD detective Jeff Vantlin assumed primary responsibility for the investigation. Jones and Wise continued to assist.

The Evansville detectives learned that Golike had last been seen at the home of Debbie Hurt, Golike's foster sister and Andrea's, Deadra's, and William's mother. Vantlin went to Debbie's home, where he spoke separately with Debbie and William. At the time, William was 18 years old.

Debbie told Vantlin that Golike had been at her house the night before his body was found. She had made dinner for him, but went to bed before he left. She recalled that it was a Saturday night, and that William and Golike had stayed up playing chess. Vantlin next spoke with William, who corroborated the basic facts, but at first said that the events Debbie described had taken place a few days earlier, on Thursday. When confronted with the discrepancy in dates, William agreed that Debbie might have been correct. Vantlin also observed that William's hand was swollen and freshly scratched. William explained that the swelling was the result of having punched a tree, and that he sustained the scratches while scooping ice cream

at work. Vantlin later visited the ice cream store where William worked and verified the existence of the exposed rods on which William said he had scraped his hand.

A week later, Jones, Vantlin, and Wise returned to the Hurts' home, where Jones interviewed William. Jones suspected that William knew more about Golike's death than he was admitting, and so he accused William of not being forthcoming. When asked, William expressed doubts about his ability to pass a polygraph, but he said that he was willing to try.

The same day, the officers visited Golike's brother and informed him that Golike's body had been found in the river. The brother immediately asked, "Is it verified he was killed, other than jumping off a bridge? Because he has been on that bridge three times before threatening to kill himself." Golike had been diagnosed with paranoid schizophrenia and had been released from prison just days before his death. In prison, he had been on suicide watch. It is not clear when the detectives learned of Golike's full psychological history.

While the officers were interviewing Golike's brother, Debbie called Vantlin and said that Harley Wade, a foster son who had moved in with her not long before, had recently choked her to the point of nearly losing consciousness. She wondered if Harley might be involved in Golike's death. The officers wanted to interrogate Harley, but they dropped that idea when they learned that Harley was a ward of the state and could not be questioned without an attorney present. Instead, they switched their attention

back to William and asked Debbie to bring William to the station for questioning.

Debbie complied with this request. Once William was at the station, Jones and Vantlin took him to an interrogation room, where they read the *Miranda* warnings and William signed a waiver of his rights. The two officers grilled him for roughly four hours. The interrogation took place in two parts: a one-hour session, punctuated by a 40-minute break, and then a two-and-a-half hour session. The entire interrogation was video-recorded.

During the first hour, William repeatedly gave a consistent account of what happened the Saturday night before Golike's death. He told the police that after he and Golike played chess, Golike left the house and William never saw him again. But each time, Jones and Vantlin told William that he was a liar. They insisted that they knew William was involved in Golike's death, that they already had enough information to put him in jail, that William was not "telling [Jones and Vantlin] what [they] need to hear," and that his continuing to tell the same story could not change their minds. All the while, Jones and Vantlin introduced details about the suspected crime. For example, they asked William about what may have happened at the river, whether Golike was wearing a hat, whether Golike had been tied up, whether Harley was the primary culprit, and whether Golike had been choked. William became visibly upset during parts of the interrogation, crying and hitting himself on the head.

After the break, Jones and Vantlin asked William if he had done any "soul-searching." William said that he had, and he again offered the same account he already had provided several times. Jones and Vantlin brushed it aside, calling William a liar and repeating that he was not telling them "what [they] need to hear." Jones told William that he needed to tell the truth, and he made it clear what he meant by that: "we're [*i.e.*, Jones and Vantlin] the ones that determine if you're lying or not. So far, we've both determined you're lying." Jones added that if William did not tell the "truth," he faced a fate "worse than prison."

William eventually broke. He "confessed" that he, Andrea, Deadra, and Harley were responsible for Golike's death. He told Jones and Vantlin that after the chess game, he got in the family van with his siblings. As they drove along, they spotted Golike by the roadside. They stopped and got out of the car, and Harley started joking around with Golike. But Harley got out of control (for unexplained reasons) and started punching and choking Golike. William said that he got a few punches and kicks in as well. They then tied Golike up in bed sheets and put him in the van. Deadra drove to Dress Plaza, Evansville, where they dumped Golike's body into the Ohio River. On the way back from the river, they stopped at the Kangaroo, a convenience store, to buy some snacks using Golike's debit card.

William's "confession" was replete with easily verified and contemporaneous evidence of inaccuracy and unreliability. When William offered any detail about the death, he prefaced it with phrases such as "I'm drawing

clues together," "the way you're telling me," "like you were saying," or "from what you've told me." At other times, he responded to the officers' questions by guessing until they signified that they were satisfied. Finally, at the conclusion of the interrogation, William asked Jones, "Was I getting close to most of the facts of what actually happened?" Jones said he did not know, and William again asked, "Was I close to it?" Instead of following up, Jones left the room.

Several critical "facts" that William offered were facially impossible. For example, if William's account of where he and his siblings had dumped Golike's body—Dress Plaza—was true, the body would have had to float *upstream* four to six miles to have arrived at the location where it was found. There was no physical evidence that Golike had been beaten or tied up, and it later turned out that Golike's debit card was not, and could not have been, used at the Kangaroo, because there was only $0.08 in the account at the relevant time.

William provided only three facts that were even potentially original. Of the three, two could just as easily have been common-sense guesses: which pocket Golike's hat was in when his body was found, and how Harley might have used his thumbs to strangle Golike. The third "fact" is actually nothing of the sort. William at one point said that Golike's hat had been "folded" in Golike's pocket—evidently the right answer— but at other times he says it was "shoved" in the pocket. (We wonder how many teenaged boys observe the difference between folding and shoving.)

William was arrested following his interrogation. The *only* source of probable cause to arrest him was the confession, and so everything turns on it. Deadra, who was 19 at the time, was also arrested following William's "confession," after Jones, Vantlin, Wise, and a now-deceased EPD detective interrogated her the same night. She too was read the *Miranda* warnings and signed away her rights. Her interrogation lasted nearly two hours and was also recorded.

Deadra's interrogation followed the same script as William's. Sobbing for much of the time, Deadra denied involvement in Golike's death. She was immediately accused of lying. Wise told her that her story "ain't gonna work." Jones added that William already had implicated her, and he fed her the details of William's "confession." Jones told Deadra that unless she talked, her whole family was going to jail. For Deadra, he envisioned "at least 25 to 50" years "behind bars." He continued that the only way she was going to save anyone in her family was to tell the truth. If she did not, Jones told her, she was "going to hang."

Deadra struggled to satisfy the officers. She said at one point "I don't know what I'm supposed to tell you." On multiple occasions Vantlin answered that question for her: tell the same story that William did. Like William, Deadra eventually repeated the facts that the detectives had fed her and guessed at answers until she placated them. She finally succeeded in doing so, telling the officers that she drove the van that the siblings used to take Golike to the river. Shortly after "confessing," however,

Deadra appeared ready to back-track. At that point, Jones abruptly ended the interrogation and said, "Now you're starting to recant your story, so what we're going to do is we're going to stop. We've got enough. We're just going to stop the interview. Okay? Because now you're trying to recant your story, trying to add things into it."

Based on William's and Deadra's interrogations, the detectives also arrested Andrea, who was 16 at the time. She was interrogated, but because all defendants, some in the district court and the rest on appeal, concede that she was arrested prior to her interrogation, her experience is not decisive for any of the issues on appeal. It appears that Harley was also indicted, but the charges against him were dismissed at the same time as those against Deadra. He is not a party to this case.

After the interrogations, the detectives followed up in a few minor ways. EPD detective Jack Spencer filed a report four days after the sessions with Deadra and William; in it, he claimed to have taken William to identify the location where Golike's body was dumped in the river. William denies that this ever happened. Vantlin looked into Golike's bank statements and learned that the last charge on Golike's debit card was made two days prior to his disappearance. That was when he learned that the balance in the account was a meager $0.08. This information undermined William's "confession" insofar as it revealed that no one (including William) did or even could have used Golike's debit card to make any purchases at the Kangaroo on the night in question. Vantlin also met with the clerk who was working at the store that

night. The police summary of the interview says that the clerk confidently identified Andrea and Deadra in a photo array, and that she said Harley and a fourth male (not William) looked familiar. But that summary omitted the most important details. In a declaration submitted to the district court, the clerk said that she also told police that she did *not* remember any of the identified people having come into the store and that she may have recognized the faces from watching the news. Several months later, EPD officers William Arbaugh and Jason Pagett filed a police report asserting that William had made incriminating statements to them when he was being transported after his interrogation. William says that this too was fabricated.

Andrea was held for seven days before being released without charges. Deadra and William were both charged with murder, among other crimes. Deadra remained in jail for four months, at which point the state court granted a motion to suppress her "confession" and charges against her were dropped. William stayed in jail for eight months before his trial. The jury did not convict him on a single count.

B

Following this series of events, Andrea, Deadra, and William filed a 14-count federal complaint alleging multiple constitutional and state-law violations. The complaint named as defendants Jones and Wise ("the KSP Defendants"), Arbaugh, Pagett, Spencer, and Vantlin ("the EPD Defendants"), and the state medical examiner. Each

set of defendants filed a motion for summary judgment, seeking qualified immunity or outright dismissal of the case. The district court granted the state medical examiner's motion in full, and it granted the other defendants' motions on all state-law grounds. The district court also granted summary judgment in favor of those of the individual EPD Defendants and KSP Defendants who were not personally involved in the allegedly unconstitutional conduct. Finally, it found that material factual disputes precluded qualified immunity for most of the Hurts' federal claims. That left the following claims:

- Andrea's, Deadra's, and William's Fourth Amendment false arrest claims against Jones, Vantlin, and Wise.

- Andrea's, Deadra's, and William's claims that the KSP and EPD Defendants failed to intervene to prevent the unconstitutional conduct and conspired to violate their constitutional rights.

- Deadra's and William's claims against all the EPD Defendants based on the allegedly fabricated evidence.

- Deadra's and William's due-process claims against Jones, Vantlin, and Wise based on the allegedly coerced confessions.

Each defendant appeals the denial of qualified immunity from each claim still pending against him.

II

Before we can consider the merits of any of the defendants' arguments, we must be assured of our jurisdiction to do so. Ordinarily, interlocutory decisions such as the denial of summary judgment are not subject to appellate review. 28 U.S.C. § 1291. Yet there is a limited exception for defendants who were denied qualified immunity on summary judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Review of such an interlocutory decision is proper if, and only if, the defendant presents a purely legal question for this court to review. *Id.* Any material factual point that is genuinely contested is outside our jurisdiction. *Johnson v. Jones*, 515 U.S. 304, 313, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); see also *Whitlock v. Brueggemann*, 682 F.3d 567, 573 (7th Cir. 2012) ("We have jurisdiction to consider the merits of these appeals only to the extent that they turn on legal rather than factual questions.") (citations and internal quotation marks omitted). The defendant may accept, for purposes of the qualified immunity inquiry, the facts and reasonable inferences favorable to the opponent of immunity, and argue that *those* facts fail to show a violation of clearly established law. *Gutierrez v. Kermon*, 722 F.3d 1003, 1009 (7th Cir. 2013).

The defendants here have tried to take the latter approach, but they have not quite succeeded. Rather than fully accepting the facts in the light most favorable to the plaintiffs, the EPD and KSP Defendants, relying on *Scott v. Harris*, 550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007), have asked us to revisit the inferences that

the district court found could reasonably be drawn from Deadra's and William's recorded interrogation. That we cannot do without going beyond our jurisdiction on this interlocutory appeal. Nothing in *Scott* undermines this point.

In *Scott* the district and appellate courts, faced with a qualified immunity defense, had refused to take into account a video and instead had accepted the plaintiff's account of a car chase. On that basis, they concluded that the defendant police officer was not entitled to qualified immunity. 550 U.S. at 376. After reviewing the video, however, the Supreme Court reversed. *Id.* at 379-81. Uncontestable dashboard footage showed that the fleeing driver was speeding, swerving through lanes of traffic, and running red lights, all while pedestrians looked on. *Id.* The Court ruled that if one account of the facts "is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 380. That aptly described the situation in the case before it, and so the Court concluded that the district court should have taken the video into account. *Id.* at 380-81.

Scott does not treat video footage as a distinct type of evidence that is not subject to the normal summary judgment strictures. It holds only that a factual account should not be credited when the record contains evidence that is flatly contradictory to that account. If the question is whether someone was driving recklessly, video evidence showing a high rate of speed, use of the oncoming traffic's

lane, and running red lights is plainly relevant. If instead the question is what a person meant in a videotaped interview, we are back in the land of inferences that must be taken favorably to the opponent. Courts applying *Scott* have understood this distinction. See, *e.g., Williams v. Brooks*, 809 F.3d 936, 942 (7th Cir. 2016) (relying on video from a dashboard camera rather than the non-moving party's account because it clearly depicted the physical confrontation in question); *Rivera v. Jimenez*, 556 F. App'x 505, 507 (7th Cir. 2014) (relying on prison video of a scuffle rather than non-moving party's account because it "discredit[ed] the plaintiff's version of events"). *Scott* did not create a *per se* rule that video evidence is always subject to an appellate court's independent assessment.

Indeed, nothing about video evidence justifies placing it in such a privileged position. See *Stinson v. Gauger*, 868 F.3d 516, 523 (7th Cir. 2017) (*en banc*) (noting that *Scott* did not overrule *Johnson* and characterizing the issue in *Scott* as about officer conduct in light of depicted facts). And not all disputes are about what events transpired. Sometimes the availability of qualified immunity turns on the inferences that are permissible in light of the historical facts. See, *e.g., Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993) (observing that different conclusions can be reached about the existence of probable cause based on either "the facts or the reasonable inferences to be drawn from them"). Where the parties disagree about inferences, the fact that evidence is found in a video is not important—the purpose of the evidence is what matters.

The video evidence of William's and Deadra's interrogations does not portray the kind of uncontestable facts that were before the Court in *Scott*. It is no more and no less than a record of an interrogation, and so we review it just as we would have if the interviews had been audiotaped, recorded by a stenographer, or reduced to affidavits. We therefore turn to the defendants' qualified immunity motions using the facts and reasonable inferences in the light most favorable to the Hurts. We leave the final resolution of these issues to the trier of fact, should the case get that far.

III

Once a defendant asserts qualified immunity, the plaintiff can proceed only if she can show two things: first, that the "facts, taken in the light most favorable to the plaintiff, make out a violation of a constitutional right," *Allin v. City of Springfield*, 845 F.3d 858, 862 (7th Cir. 2017), and second, that the right was "clearly established at the time of the alleged violation," *id.* Moreover, the plaintiff cannot rest on glittering generalities: her showing must be grounded in the particular context in which the problem arises. We review *de novo* the district court's denial of qualified immunity. *Green v. Newport*, 868 F.3d 629, 632 (7th Cir. 2017).

A

We begin with the false arrest claims. A claim of false arrest is an allegation that a plaintiff was arrested without probable cause, in violation of the Fourth Amendment.

Gutierrez, 722 F.3d at 1007-08. Probable cause is an absolute defense to such a claim. *Id.* Whether probable cause existed at the time of the arrest depends on the totality of the circumstances. *Id.* at 1008. Even if, in hindsight, it appears that probable cause was lacking, qualified immunity is still available if the arresting officers "reasonabl[y] ... could have believed the arrest to be lawful, in light of clearly established law and the information the arresting officers possessed." *Id.* (citations and internal quotation marks omitted). This is often called arguable probable cause.

The district court found that Jones, Vantlin, and Wise were not entitled to qualified immunity from the false arrest claims because there were material factual disputes bearing on the question of arguable probable cause. For example, the court noted, a jury might conclude that Golike committed suicide (since he had threatened suicide before, and he had targeted the bridge near which he was found), that Deadra's and William's "confessions" are unreliable (because almost all of the facts were either fed to them or the result of guesswork), that some of the evidence against the Hurts was fabricated (William's supposed identification of the drop-off spot and his alleged incriminating remarks), and that physical evidence conclusively undermined William's "confession" (since Golike's body was found upstream of the alleged drop-off spot, and inert objects would drift downstream, not upstream). Assuming that the disputes over those facts were resolved in the Hurts' favor, the case for even arguable probable cause to arrest any of the three Hurts falls apart.

Jones, Vantlin, and Wise push back with three arguments. First, they insist that there was at least arguable probable cause to arrest the three based on Deadra's and William's "confessions" because neither of those confessions was coerced. We will say more about coercion when we discuss the Fifth Amendment issue presented in this case. For now, however, we note that this argument is misplaced with respect to a Fourth Amendment false-arrest claim. Reliability, not coercion, is the gravamen of probable cause. See *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) (listing "veracity," "reliability," and "basis of knowledge" as highly relevant in determining the value of a witness's statement); *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964) (probable cause ordinarily exists when there is "reasonably trustworthy information" that a suspect committed a crime). A confession may have been cajoled out of a suspect in a non-coercive way, yet still be "worthless as evidence, and as a premise for an arrest." *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-07 (7th Cir. 2011). This rule makes sense. An officer could sit in a room with a cooperative suspect and could politely ask that person to repeat everything the officer says. The suspect could oblige, even if the story he has been asked to parrot is a confession to a crime. Nothing about the witness's statement has been coerced, but by the same token nothing qualifies it as a reliable confession. That is not to say that coercion is completely irrelevant: to the contrary, the existence of coercion informs reliability even though it is not determinative. But the key inquiry for the Fourth Amendment remains reliability, not coercion.

The EPD Defendants also confuse these concepts when they argue that Deadra and Andrea do not have standing to challenge the reliability of William's "confession." Neither Andrea nor Deadra is asserting a constitutional right on William's behalf when each argues that William's interrogation did not give the police reliable evidence that she was involved in Golike's death. Each makes the straightforward assertion that the police used flimsy information to arrest *her*.

Both sets of defendants also take issue with the legal standard they understand the district court to have applied. By their reading, the district court found that the disputed facts revealed an absence of probable cause, but not necessarily the absence of arguable probable cause. This argument is meritless. Defendants fixate on one line in which the district court wrote "if the jury credits evidence Defendants cite, it could reasonably conclude ... that it was objectively reasonable for officers to believe probable cause to arrest [William] existed." If that belief is objectively reasonable, they urge, then there must have been at least arguable probable cause. But all the district court was saying was that it would be objectively reasonable to believe probable cause existed *if* the evidence is viewed in the defendants' favor. At this stage, that is the wrong perspective. Taking the inferences in the Hurts' favor, a jury could reasonably conclude it was objectively unreasonable for an officer to have believed there was probable cause. The district court included an explicit discussion of arguable probable cause in its opinion, and it went on to apply that standard faithfully.

Essentially, all of the defendants are asking us to reweigh the evidence available to the Hurts, including the filmed interrogations, and to come to an independent conclusion about the existence of arguable probable cause. That is plainly inappropriate: we do not sit to resolve disputed issues of fact, nor do we have appellate jurisdiction over those issues.

B

Another theory the Hurts advance is that the defendants failed to intervene against violations of their constitutional rights and conspired to violate those rights. Both of these theories require plaintiffs to show an underlying constitutional violation. *Gill v. City of Milwaukee*, 850 F.3d 335, 342 (7th Cir. 2017). The failure-to-intervene claim also requires them to prove that the defendant knew of the constitutional violation and that he realistically could have prevented it. *Id.* For the conspiracy claim, plaintiffs must also demonstrate that the defendants agreed to inflict the constitutional harm. *Sow v. Fortville Police Dep't*, 636 F.3d 293, 304-05 (7th Cir. 2011).

The district court denied the defendants' motions for summary judgment on both of these theories. It ruled that, taking the disputed facts favorably to the plaintiffs, there were possible constitutional violations. It added that the presence of an agreement between defendants could be inferred because they extracted and used unreliable confessions to arrest Andrea, Deadra, and William, and fabricated evidence against them despite the evidence pointing to suicide as the cause of death. Each defendant

individually took part in the interrogations or fabrication of evidence. All were thus aware of the constitutional violations, yet none intervened.

Only the EPD Defendants appeal the denial of qualified immunity from these claims. They argue that the failure-to-intervene and conspiracy claims fail because no plaintiff was deprived of a constitutional right. We find no merit in this position. As we already have pointed out, a trier of fact could conclude that Andrea, Deadra, and William were arrested without even arguable probable cause, and thus in violation of the Fourth Amendment.

The EPD Defendants also urge that there was no evidence that any officer had an opportunity to prevent the constitutional violations. They contend that defendants Arbaugh, Pagett, and Spencer could not have stopped the false arrests because none was present at the moment of arrest. Perhaps this position would have had some merit before the Supreme Court decided *Manuel v. City of Joliet*, 137 S. Ct. 911, 197 L. Ed. 2d 312 (2017), but it no longer does. *Manuel* held that the Fourth Amendment protects not only against an initial arrest without probable cause, but also continued detention in its absence. *Id.* at 918-19. It is plausible to infer from each defendant's creation of false evidence that he was aware that the continuing incarcerations were unsupported and could have done something to stop them. The EPD Defendants would also like to argue that none of them knew that they were fabricating evidence and that the confessions were riddled with problems. But those arguments must await trial, as they turn on disputed facts.

With respect to the conspiracy theory, the EPD Defendants take the position that no trier of fact could find, on this record, that there was an agreement to violate the Hurts' constitutional rights. They stress that the Hurts "admitted" in their depositions that they have no *affirmative* evidence of such an agreement. But there is competent circumstantial evidence of an agreement, and there is nothing wrong with circumstantial evidence. At this stage, we have no authority to decide whose evidence of agreement is more persuasive.

C

Deadra and William are also pursuing claims that they characterize as based on "malicious prosecution." For this purpose they are suing only the EPD Defendants. We said in *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), that there is no free-standing constitutional tort of malicious prosecution, though there are other constitutional rights (*e.g.*, such as those under the Due Process Clause and the Fourth Amendment) that protect people against abusive arrests, fabrication of evidence, etc. While *Manuel* rejected some aspects of *Newsome*'s holding, nothing in *Manuel* changed the general rule that the federal constitution does not codify state tort law. But in this case, the fact that the plaintiffs have used the terminology "malicious prosecution" is of no moment. What matters is whether they have identified the constitutional right at issue, and they have done so. The Fourteenth Amendment's Due Process Clause is the relevant constitutional source; it forbids the state from depriving a person of liberty (including by pre-trial

detention) based on manufactured evidence. *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017); see also *Alexander v. McKinney*, 692 F.3d 553, 557 (7th Cir. 2012) (distinguishing pre-trial release on bond, which is not a deprivation of liberty, from pre-trial confinement, which is); *Zahrey v. Coffey*, 221 F.3d 342, 348 (2d Cir. 2000) (eight months of pre-trial detention was a deprivation of liberty). As the EPD Defendants conceded in their reply brief, this type of due process claim can be based on false police reports. See *Whitlock*, 682 F.3d at 580 (using false evidence to deprive a defendant of liberty "in some way" violates the Due Process Clause).

The EPD defendants urge us to reverse the district court's denial of qualified immunity from these claims because the false police reports did not cause the deprivation of either William's or Deadra's liberty. But if William and Deadra can show that the fabricated police reports furthered the prosecution, they have done enough. See *Alexander v. United States*, 721 F.3d 418, 423 (7th Cir. 2013) (including as evidence of causation for the constitutional violation "actions the agents took after Alexander's arrest to further the prosecution, which included testifying in depositions and at trial and intimidating a potential defense witness").

With respect to William, all of the EPD Defendants accuse the district court of misjudging the facts that relate to causation. They note, accurately, that the reports were not used for the arrests or at William's trial. From that, they reason that the reports also contributed nothing to William's pre-trial detention. That conclusion, however,

does not follow from the premise. The police went to some trouble to create the falsified reports. Had they not done so, it is reasonable to assume that William would have been released promptly. Though the "confession" may have been the focal point of the case against William, the prosecution might have ended sooner if the state knew that most of the seemingly inculpatory information at its disposal was fabricated or impossible.

Deadra's claim against EPD Defendants Spencer and Vantlin tracks William's, but her claim against defendants Arbaugh and Pagett is different. Deadra alleges that the latter two defendants fabricated a report on February 14, 2013. At that time, William was still in custody, but Deadra was not: she had been released on October 30, 2012. She raises no other allegations against Arbaugh and Pagett about anything they might have done to deprive her of liberty. We thus conclude that they are entitled to qualified immunity from Deadra's claim based on fabricated evidence.

D

Last, we address Deadra's and William's Fifth Amendment claims against Jones, Vantlin, and Wise. The district court denied qualified immunity with respect to both their procedural claim based on the use of an involuntary confession in a criminal proceeding and their substantive due process claim based on conscience-shocking interrogation tactics.

We can be brief about the substantive due process argument: it should have been winnowed from the case. The bar for "conscience-shocking" is very high; these interviews may have been abusive, but nothing extreme enough to invoke substantive due process occurred. We note as well that this theory adds little to the case. When there is an alleged violation of a specific constitutional provision, that provision should guide the court's analysis. See *City of Sacramento v. Lewis*, 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

That leaves the Hurts' procedural challenge to the use of their involuntary confessions. Introducing an involuntary confession in a criminal prosecution violates the protection against compelled self-incrimination. *Miller v. Fenton*, 474 U.S. 104, 109-10, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985). Vantlin raises two preliminary legal arguments, which if accepted would entitle all three defendants to qualified immunity. First, he argues that Deadra's confession was never introduced against her in a criminal trial, and so she was never compelled to testify against herself. We have already rejected such a cramped understanding of what it means to "use" a confession against someone in a criminal case. See *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026-27 (7th Cir. 2006) (finding that a confession is used in a criminal case if it is introduced at a probable cause hearing, a bail hearing, or an arraignment). It is enough that the statement was used against Deadra in a probable cause affidavit and in a pre-trial hearing.

Vantlin also argues that William voluntarily came to the police station for his interrogation and was not formally arrested until after the interrogation. This means, Vantlin says, that William's interrogation was not custodial and the Fifth Amendment does not apply. That argument jumps over too many steps. Custody and coercion are two separate things. It is true that custodial interrogation is presumptively coercive and requires that the suspect be given adequate procedural safeguards—that is the genesis of the *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). But a confession can be involuntary even if the suspect is not in custody.

Another problem with Vantlin's argument is that the district court never said that William was not in custody during his interrogation. It said only that William came to the station voluntarily. That says nothing of the circumstances surrounding his interrogation. Whether a person is in custody depends on the objective surrounding circumstances. *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 128 L. Ed. 2d 293 (1994). A suspect does not have to be arrested formally to be in custody. *Id.* at 322-23. Here, after William voluntarily came to the police station, he was taken by himself into a small room in the station, read the *Miranda* warnings, and was not free to go during his four-hour interrogation, during which Jones and Vantlin accused him of murder. The district court was well within its rights to consider this as a custodial interrogation. See *Sprosty v. Buchler*, 79 F.3d 635, 641 (7th Cir. 1996) (listing factors indicative of custody).

Jones, Vantlin, and Wise's more serious defense is that they had no reason to think that the confessions were not voluntary. The voluntariness of a confession depends on the totality of circumstances, including both the characteristics of the accused and the nature of the interrogation. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). If those circumstances reveal that the interrogated person's will was overborne, admitting the resulting confession violates the Fifth Amendment. *Miller*, 474 U.S. at 116.

Police coercion is a prerequisite to finding any confession to be involuntary. *Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Physical abuse may be the ultimate coercion, but the Supreme Court has long acknowledged the potency of psychological coercion as well. See, *e.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) ("[C]oercion can be mental as well as physical, and ... the blood of the accused is not the only hallmark of an unconstitutional inquisition." (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960)); *Miller*, 474 U.S. at 109 (confessions procured by either physical or psychological torture can be "revolting to the sense of justice" and thus inadmissible); *Miranda*, 384 U.S. at 448 ("[W]e stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented").

Often psychological coercion is the consequence of the cumulative effect of subtle tactics. Other times, coercion is obvious. For example, it is clearly established that police

threats against the suspect or the suspect's family are a form of psychological coercion that renders a confession involuntary. See, *e.g.*, *Lynumn v. Illinois*, 372 U.S. 528, 534, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963) (confession was involuntary because it came after police threatened to cut off aid that the suspect used to care for her child); *Rogers v. Richmond*, 365 U.S. 534, 543-45, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961) (a confession was unconstitutionally obtained because it came after police threatened to arrest the suspect's wife); *Sornberger*, 434 F.3d at 1023 (an allegation that police threatened to call the Department of Children and Family Services and recommend removing the suspect's children if she maintained her innocence created a material dispute about whether a confession was voluntary).

Whether police have employed sufficiently coercive tactics to render a confession involuntary is a legal question. *United States v. D.F.*, 115 F.3d 413, 417-19 (7th Cir. 1997). But the answer depends on underlying historical facts. *Miller*, 474 U.S. at 112. Here, had the defendants accepted all historical facts favorably to the Hurts and argued that those facts did not show that either Deadra's or William's confession was involuntary, we would be in a position to answer the ultimate legal question. But once again, they have not. The relevant factual background is what distinguishes the present case from *Dassey v. Dittmann*, 877 F.3d 297 (7th Cir. 2017) (*en banc*). In *Dassey*, the facts were firmly established by the state courts, and our only role was to decide whether the state courts had strayed so far from a rational conclusion that habeas corpus relief was warranted. We ruled that

the demanding standard set by 28 U.S.C. § 2254(d) had not been met. *Id.* at 312-18. The present case, a civil one under 42 U.S.C. § 1983, involves no such deference to the state defendants' position; to the contrary, at this stage we must give the plaintiffs the benefit of the doubt.

Despite intimating at times that the question whether a confession is voluntary is one of fact, the district court in the end properly treated it as a legal issue informed by a series of historical facts. It relied on a number of critical facts to support its conclusion that Jones, Vantlin, and Wise were not entitled to qualified immunity. Key among them was the fact that the interrogators had threatened both Deadra and William.

For Deadra, the district court found evidence of three possible threats. She was told that if she did not tell the truth she was going to spend 25-50 years behind bars. Later, the stakes increased and she was told she was "going to hang" if she did not tell the truth. She was also told that if she did not talk, her whole family, including her uninvolved mother, would go to jail. Jones even counted everyone out for her, saying, "There's one, two, three, four, five of you, all of you's [*sic*] going to jail for murder."

Similarly, William was told that he faced a "fate worse than prison." No defendant concedes that Deadra and William may have heard these statements as threats. Instead, they ask that we disregard the district court's recognition that these statements either could have been or were understood as threats. But we cannot do that. A trier of fact could find coercion in the face of such grave

threats, and that is enough to preclude immunity at this stage.

E

False confessions are a real problem, as both the majority and dissenting opinions in *Dassey* recognized. See 877 F.3d at 317-18 (majority opinion); 877 F.3d at 331-32 (Rovner, J., dissenting). Even though William and Deadra "confessed," if a trier of fact could conclude that the officers knew that the confessions were false, then the officers are not entitled to qualified immunity for their actions.

We acknowledge, as we did in *Dassey*, that "[t]he Supreme Court's many cases applying the voluntariness test have not distilled the doctrine into a comprehensive set of hard rules." *Id.* at 303. Nonetheless, when the facts must be taken in the light most favorable to the plaintiffs, and when an interrogation is infected with numerous problems, a full trial may be necessary before a final characterization of the process is possible.

This is not the place for an in-depth look at psychological coercion and false confessions, because we are not charged with making the final decision on the admissibility of William's and Deadra's statements. We must decide only whether, taking the facts and inferences favorably to the plaintiffs, any reasonable officer would have known that he was applying impermissible pressure. The district court concluded that the answer to this more limited question is yes, and we agree with it. We first offer a few examples

from William's interrogation, which was permeated with coercive tactics and fact-feeding, even as all of his attempts to tell the truth were brushed aside:

> Jones: You're lying, you're—you know, you're lying about something. That's why we keep grilling you about it, to get if off your chest, to make you feel better, to help our investigation, you know. We'll deal with whatever later. But right now, we're dealing with this and what we're dealing with is your lying, your inconsistent stories. And there's only one way to solve it ... .

At the same time as William's account was being dismissed as a lie, he was being told that if he had given the "right" story all along, the interrogation would have ended much sooner:

> Jones: Now, if I had asked you right off the bat everything that you had and you told us verbatim, everything else, you know, and all the right stories ... . We'd have been done a long time ago. But we've not heard the truth yet. Not yet.

Jones made it clear to William that he and Vantlin were the ones who would decide if William told the "right" story:

> Jones: I mean, all that you need to do is tell the truth, exactly the truth, and we're the ones that determine if you're lying or not. So far, we've both determined you're lying.

It was bad enough for the officers to threaten William that if he did not change his story that he was "an evil son of a bitch" or looking at a "fate worse than prison." Worse, Jones told William that none of the pain was "going to go away until you tell me the truth" and that William had "not felt pain yet." Jones warned that he could "keep turning the pain on, [] keep turning it on, [] keep turning it on." When William told Jones that he was struggling to breathe, Jones responded: "You're having a hard time breathing ... . You're doing this to yourself ... . I don't have a—you know, a lighter sitting here burning you, but you're feeling like you're on fire. You know what we want to hear. We don't want to hear all that other stuff. You know what we want to hear."

All the while, Jones and Vantlin basically drafted the entire confession by feeding William every critical fact through suggestive questioning. The following example is illustrative:

> Jones: Where did he choke him at and where did this take place at? Come on, man, you—I know you remember.
>
> William: It had to have been down by my house.
>
> Jones: Yeah.
>
> William: You said that we had the van. So it wasn't that far away from my house.
>
> Jones: Did Mark leave and then you guys got in the van and chased him down or what?

William: When he left, I went downstairs and I laid down. Then, I don't know what else happened.

Jones: You do. You've already told me what's happened. Where did you guys beat up Mark at?

William: Was it on Boeke and Riverside?

Jones: Not—No, don't ask me. Where did you beat up Mark at?

William: The Kangaroo?

Jones: Was it at the Kangaroo?

William: You said you had my face on a videotape. You said that if—

Jones: Where did you beat up Mark at?

William: It had to be by the—by my house because we couldn't have—he couldn't have gotten that far by the time I had gone downstairs.

Deadra's interrogation follows the same pattern. From the start, the officers called Deadra a liar each time she denied her involvement, and they told her that she could help herself only if she stopped lying. For her, the risk of holding her ground was that she was "going to hang" and that her whole family was "going to jail for murder." The defendants also told her that no matter

what she said, she was going to be charged with murder. Simultaneously, they minimized her moral guilt. Wise said things such as "I'm not saying that you—you ended his life" and "I'm not saying you're a killer, I'm just saying that you—you drove the van." This was designed to prime Deadra to confess. The officers also told her what William had supposedly confessed to, and insisted that she repeat the same story for them. She had trouble doing that, but they never let up.

On the basis of this record, a trier of fact could find that the officers deliberately coerced confessions from William and Deadra. The rule forbidding such conduct has been established for decades. Perhaps, as the officers argue in their briefs, a trier of fact might come to the opposite conclusion and think that they were pushing, but doing nothing that crossed a constitutional line. It is not for us to resolve that question. It must await further proceedings.

IV

The district court's summary judgment ruling is REVERSED with respect to Deadra's malicious prosecution claim against defendants Arbaugh and Pagett. We also conclude that the district court should have eliminated the substantive-due-process theory. In all other respects, insofar as we have jurisdiction to act here, we AFFIRM the order of the district court denying qualified immunity to the defendants.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, EVANSVILLE DIVISION, FILED MARCH 16, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

No. 3:14-cv-00092-JMS-MPB

WILLIAM HURT, DEADRA HURT,
ANDREA HURT, DEBBIE HURT,

Plaintiffs,

vs.

JEFF VANTLIN, JACK SPENCER, WILLIAM ARBAUGH, JASON PAGETT, LARRY NELSON, CITY OF EVANSVILLE, MATTHEW WISE, ZACHARY JONES, AMY BURROWS-BECKHAM,

Defendants.

March 16, 2017, Decided
March 16, 2017, Filed

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Presently pending before the Court in this case are three Motions for Summary Judgment—one filed by Defendants City of Evansville (the "*City*") and Evansville

Police Department Detective Jeff Vantlin, Detective Jack Spencer, Detective William Arbaugh, Detective Jason Pagett, and Sergeant Larry Nelson[1] (collectively, the "*EPD Defendants*"), [Filing No. 254]; one filed by Kentucky State Police Detectives Zachary Jones and Matthew Wise (collectively, the "*KSP Defendants*"), [Filing No. 256]; and one filed by Kentucky Medical Examiner Dr. Amy Burrows-Beckham, [Filing No. 255]. Plaintiffs are pursuing various state and federal claims against each of the Defendants, alleging that they were wrongfully targeted, arrested, and prosecuted for the death of their uncle, Marcus Golike,[2] whose body was found in the Ohio River in June 2012. Plaintiffs' theory of the case is that the Defendants erroneously focused on them as suspects in Marcus' death and then used unconstitutional tactics to try to build their case by coercing Plaintiffs' confessions and fabricating evidence. For the reasons that follow, the Court grants in part and denies in part the pending motions. To the extent the motions are denied, it is because there are genuine issues of material fact surrounding Marcus' death, the voluntariness of Plaintiffs' subsequent confessions, and the Defendants' intent that prevent summary judgment.

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1. Sergeant Nelson died during the course of this litigation, [Filing No. 223], and Plaintiffs do not dispute that he is entitled to summary judgment, [Filing No. 267 at 20]. Plaintiffs' Complaint included claims against Sergeant Richard Blanton and Lieutenant Dan DeYoung, [Filing No. 1], but those claims were dismissed at the pleadings stage, [Filing No. 112].

2. Mr. Golike's first name is spelled as both "Marcus" and "Markus" in various exhibits. Because the parties primarily refer to him as "Marcus" in their briefs, the Court will do the same.

Put another way, because a reasonable jury could find in Plaintiffs' favor or in Defendants' favor on these genuinely disputed factual issues, summary judgment in Defendants' favor is inappropriate on many of Plaintiffs' claims. The Court does find, however, that KSP Medical Examiner Dr. Burrows-Beckham is entitled to summary judgment as a matter of law.

I.
Standard of Review

A motion for summary judgment asks the Court to find that a trial is unnecessary because there is no genuine dispute as to any material fact and, instead, the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a). As the current version of Rule 56 makes clear, whether a party asserts that a fact is undisputed or genuinely disputed, the party must support the asserted fact by citing to particular parts of the record, including depositions, documents, or affidavits. Fed. R. Civ. P. 56(c)(1)(A). A party can also support a fact by showing that the materials cited do not establish the absence or presence of a genuine dispute or that the adverse party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1)(B). Affidavits or declarations must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on matters stated. Fed. R. Civ. P. 56(c)(4). Failure to properly support a fact in opposition to a movant's factual assertion can result in the movant's fact being considered undisputed, and potentially in the grant of summary judgment. Fed. R. Civ. P. 56(e).

Appendix B

In deciding a motion for summary judgment, the Court need only consider disputed facts that are material to the decision. A disputed fact is material if it might affect the outcome of the suit under the governing law. *Hampton v. Ford Motor Co.*, 561 F.3d 709, 713 (7th Cir. 2009). In other words, while there may be facts that are in dispute, summary judgment is appropriate if those facts are not outcome determinative. *Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 525 (7th Cir. 2005). Fact disputes that are irrelevant to the legal question will not be considered. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

On summary judgment, a party must show the Court what evidence it has that would convince a trier of fact to accept its version of the events. *Johnson v. Cambridge Indus.*, 325 F.3d 892, 901 (7th Cir. 2003). The moving party is entitled to summary judgment if no reasonable fact-finder could return a verdict for the non-moving party. *Nelson v. Miller*, 570 F.3d 868, 875 (7th Cir. 2009). The Court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Darst v. Interstate Brands Corp.*, 512 F.3d 903, 907 (7th Cir. 2008). It cannot weigh evidence or make credibility determinations on summary judgment because those tasks are left to the fact-finder. *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 630 (7th Cir. 2011). The Court need only consider the cited materials, Fed. R. Civ. P. 56(c)(3), and the Seventh Circuit Court of Appeals has "repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment

motion before them," *Johnson*, 325 F.3d at 898. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Ponsetti v. GE Pension Plan*, 614 F.3d 684, 691 (7th Cir. 2010).

II.
BACKGROUND[3]

The following factual background is set forth pursuant to the standards detailed above. The facts stated are not necessarily objectively true, but as the summary judgment standard requires, the undisputed facts and the disputed evidence are presented in the light most favorable to Plaintiffs as the non-moving parties, drawing all reasonable inferences in their favor. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). That said, because the Court ultimately finds that multiple genuine issues of material fact preclude summary judgment on many of Plaintiffs' claims, the Court will not address every factual discrepancy between the parties. Instead, the Court will set forth the overarching background of the case.

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3. The EPD Defendants argue that Plaintiffs did not comply with Local Rule 56-1, which requires a response brief to include a section labeled "Statement of Material Facts in Dispute," and, consequently, "the Court should find that the material facts set out in the [EPD Defendants' memorandum] are not in dispute." [Filing No. 278 at 1.] The Court finds this argument specious, given that Plaintiffs' response brief clearly sets forth the disputed facts in a section titled "Statement of Facts." [Filing No. 267 at 9-20.]

Appendix B

A. Marcus' Death

Marcus was a diagnosed schizophrenic who on multiple occasions had threatened to commit suicide by jumping from a bridge in Evansville. [Filing No. 262-1; Filing No. 261-8 to Filing No. 261-15; Filing No. 262-3 at 2; Filing No. 259.] He was released from prison on June 7, 2012, and listed the Rescue Mission in Evansville as his address. [Filing No. 254-1 at 1.]

On June 17, 2012, three teenagers found a dead male—later identified as Marcus—in the Ohio River. [Filing No. 256-20 at 4; Filing No. 256-4 at 3-4.] Marcus had an Indiana University Hoosiers baseball cap in the front right pocket of his pants and paper maps of Evansville in the front left pocket of his pants. [Filing No. 256-4 at 4.] He was wearing clothing that indicated that he may have been living in a homeless shelter. [Filing No. 256-4 at 4.]

Kentucky State Police ("*KSP*") served as the lead investigators for two days until Marcus was identified as an Evansville resident. [Filing No. 256-20 at 5.] During an autopsy, KSP Medical Examiner Dr. Burrows-Beckham recovered a letter from the decedent's pocket. The letter was from the Social Security Administration and was addressed to Marcus at an Evansville address. [Filing No. 256-4 at 4.] Dr. Burrows-Beckham contacted KSP Detective Jones on June 18, 2012 and "advised that the autopsy was completed and that she ruled the cause of death to be manual strangulation" because of trauma to and fracture of the hyoid bone in Marcus' neck. [Filing No. 256-4 at 4-5; Filing No. 254-1 at 1.] Dr. Burrows-Beckham

also noted that one of Marcus' ribs was fractured and that it appeared to have occurred at the time of his death because of hemorrhaging around the tissue. [Filing No. 256-4 at 5.]

KSP Detective Jones met with EPD Detective Vantlin, and they agreed that EPD would take the lead because "the incident most likely had taken place in Evansville." [Filing No. 256-20 at 5.] On June 27, 2012, Marcus' identity was conclusively determined through fingerprint analysis. [Filing No. 256-4 at 5.]

B. Initial Investigation

On June 20, 2012, KSP Detectives Wise and Jones and EPD Detective Vantlin talked to Debbie Hurt—Marcus' foster sister. [Filing No. 254-1.] Debbie is William, Deadra, and Andrea's mother—Deadra is Debbie's biological daughter, and Debbie later adopted William and Andrea. Debbie told the officers that Marcus had last been at her house on Saturday, June 16, 2012, and that she made him dinner and went to bed, but that Marcus stayed up playing chess with William and then Marcus was gone in the morning. [Filing No. 254-1 at 2.] EPD Detective Vantlin also talked to William, who stated that Marcus was at Debbie's house on Thursday, June 14, 2012 and that they played a game of chess and talked for two hours. [Filing No. 256-4 at 6.] EPD Detective Vantlin told William that Debbie said Marcus was at the house on Saturday, June 16th, not on Thursday, June 14th, and William confirmed that it could have been Saturday, June 14th. [Filing No. 254-1 at 3.] EPD Detective Vantlin noticed that William

had two minor abrasions on his right hand near his knuckles and that his hand appeared to be slightly swollen. [Filing No. 254-1 at 3.] William told EPD Detective Vantlin that he has anger issues and had punched a tree. [Filing No. 254-1 at 3.] William also pointed to an older wound and said he did it when grating laundry soap and that the newer skin breaks happened when he reached into the freezer at the ice cream shop where he works. [Filing No. 254-1 at 3.] According to KSP Detective Jones, William stated that he did not think he could pass a polygraph but that he would be willing to take one or come to EPD for further interviewing if needed. [Filing No. 256-4 at 6.]

Debbie later called KSP Detective Jones and stated that her foster son Harley Wade had previously choked her almost to the point of her passing out and that she was scared he might be involved in Marcus' death. [Filing No. 256-4 at 6.] The detectives wanted to interview Harley, but because he was placed in foster care and a ward of Indiana, they could not interrogate him and "decided to move our focus to William Hurt." [Filing No. 256-4 at 6.]

On June 28, 2012, EPD Detective Vantlin and KSP Detectives Wise and Jones went to the home of Marcus' brother and told him that Marcus' body had been recovered from the Ohio River. [Filing No. 259.] Marcus' brother's response was "[i]s it verified he was killed, other than jumping off a bridge? Because he has been on that bridge three times before threatening to kill himself." [Filing No. 259.]

C. Interrogations and Confessions

On June 28, 2012, William went to EPD headquarters and signed a waiver of his *Miranda* rights. [Filing No. 256-4 at 6; Filing No. 256-7 at 2.] He was 18 years old at that time. [Filing No. 256-24 at 27.] William was interrogated for approximately five hours and ultimately confessed to being involved in Marcus' death and dumping his body in the Ohio River by the Dress Plaza. [Filing No. 256-4 at 6-7; Filing No. 256-8 (transcript of interrogation).] William stated that he, Deadra, Andrea, and Harley were in the Hurt's van when they saw Marcus. [Filing No. 254-6 at 27-28.] William said they stopped the van and were joking with Marcus and then it "started to get out of hand" and Harley got mad and started hitting Marcus. [Filing No. 254-6 at 29.] William said he also punched Marcus more than five times and then Harley choked Marcus. [Filing No. 254-6 at 30-31.] William said Marcus passed out and then Harley kicked him two or three times. [Filing No. 254-6 at 33.] William said they then tied Marcus up with sheets and put him in the back of the van. [Filing No. 254-6 at 35-38.] William said that Deadra was driving the van and that they dumped Marcus in the river. [Filing No. 254-6 at 40-41.] William said they then went to clean out the van at a gas station at 2 a.m. or 3 a.m. and then bought $20 to $30 of candy and other items from the Kangaroo convenience store and used Marcus' debit card. [Filing No. 254-6 at 53-54; Filing No. 254-6 at 57-60.] At the end of the interrogation, KSP Detective Jones told William, "[Y]ou did a good job. You did all right. It took you a while to get there, but you did." [Filing No. 254-6 at 67.] William responded, "Was I close to it?" [Filing No. 254-6 at 68.]

Appendix B

The parties dispute the voluntariness of William's confession, which was videotaped. [*See* Filing No. 252 (manually filed videotape of William's interrogation); Filing No. 258 at 4-5 (EPD Defendants' version of William's allegedly voluntary confession); Filing No. 257 at 6-9 (KSP Defendants' version of William's allegedly voluntary confession); Filing No. 267 at 12-14 (Plaintiffs' version of William's allegedly involuntary confession).]

After William was interrogated, Deadra was arrested and signed a waiver of her *Miranda* rights at EPD headquarters. [Filing No. 256-7 at 1; Filing No. 258 at 17.] Deadra was 19 years old at that time. [Filing No. 256-24 at 27-28.] She was interrogated for approximately one hour and fifty-two minutes. [Filing No. 256-9 (transcript of interrogation).] Deadra was told that William had confessed and had told the officers that she had driven them to the river with Marcus unconscious in the back of the van. [Filing No. 256-9 at 2.] Deadra adamantly denied any involvement. [Filing No. 256-9 at 2.] Officers told her, among other things, that "[t]he only way that you're going to save your ass or anybody else's ass, is if you tell the truth. If not, you're going to hang. Do you understand this?" [Filing No. 256-9 at 11.] Ultimately, Deadra confessed to being involved in Marcus' death by driving the van. [Filing No. 256-9 (transcript of interrogation).]

The parties dispute the voluntariness of Deadra's confession, which was videotaped. [*See* Filing No. 252 (manually filed videotape of Deadra's interrogation); Filing No. 258 at 6-7 (EPD Defendants' version of Deadra's allegedly voluntary confession); Filing No. 257 at 9-11

(KSP Defendants' version of Deadra's allegedly voluntary confession); Filing No. 267 at 14-15 (Plaintiffs' version of Deadra's allegedly involuntary confession).]

After William and Deadra were interrogated, Andrea was brought in for questioning. [Filing No. 258 at 18.] She signed a juvenile waiver of her *Miranda* rights at EPD headquarters with her guardian, Ron Hurt, present. [Filing No. 256-7 at 3.] Andrea was 16 years old at that time. [Filing No. 256-24 at 28.] Andrea was interrogated for approximately two hours and sixteen minutes. [Filing No. 252.] She adamantly denied being present for or involved in Marcus' death, even after being told that William and Deadra said she was in the van. [Filing No. 256-27.] Andrea later said that she had been in the van, but then she recanted the testimony. [Filing No. 256-27 at 22-28].

The parties dispute the voluntariness of Andrea's confession, which was videotaped. [*See* Filing No. 252 (manually filed videotape of Andrea's interrogation); Filing No. 258 at 7-8 (EPD Defendants' version of Andrea's allegedly voluntary confession); Filing No. 257 at 11-12 (KSP Defendants' version of Andrea's allegedly voluntary confession); Filing No. 267 at 15-16 (Plaintiffs' version of Andrea's allegedly involuntary confession).]

D. Subsequent Investigation

A police report by EPD Detective Spencer dated July 2, 2012 states that he took William to the Dress Plaza early on June 29, 2012 and that William directed him to

the ramp where Marcus' body was dumped. [Filing No. 256-10 at 38.] The report indicates that William said he believed that Marcus was dead when he was thrown in the river. [Filing No. 256-10 at 38.] William attests that he never went to the Dress Plaza on June 29, 2012. [Filing No. 261-31.]

EPD Detective Vantlin's police report details the extensive investigation he undertook to find corroborating evidence after Plaintiffs confessed to being involved in Marcus' death. [Filing No. 254-1 at 12-19.] On July 5, 2012, EPD Detective Vantlin learned that Marcus received approximately $527 per month from social security benefits. [Filing No. 254-1 at 14.] He later learned that there was no activity on Marcus' bank account between June 14th and the day he died. [Filing No. 254-1 at 15.] The last transaction on the account was for $30 at 1:44 pm on June 12, 2012, leaving a remaining balance of $0.08. [Filing No. 254-1 at 17.]

EPD Detective Vantlin's report notes that during a prior interview with Marcus' brother, KSP Detective Jones "collected a letter . . . addressed to [Marcus] from the Social Security Administration. The letter indicated that [Marcus] had been overpaid and he owed them $726.00." [Filing No. 254-1 at 17.]

Detective Vantlin visited the scene where Marcus' body was allegedly dumped, but he "did not locate any evidence from Marcus Golike or the suspects." [Filing No. 254-1 at 12.] A search warrant was executed at Debbie Hurt's house, but no corroborating evidence was located. [Filing No. 254-12 at 13.]

Appendix B

On July 6, 2012, EPD Detective Vantlin met with Sarah Richter, a clerk at the Kangaroo Express who worked the night of June 17, 2012. [Filing No. 254-1 at 14.] Detective Vantlin's report states that Ms. Richter told him that she "remembered some kids, possibly 4, come into the store between 2 AM and 4 AM. They bought about $30.00 worth of candy and soda and used a debit card to pay for the items." [Filing No. 254-1 at 14.] The Kangaroo Express surveillance video from the night of Marcus' death was unavailable because it had already been recorded over. [Filing No. 254-1 at 14.] EPD Detective Vantlin reviewed surveillance video from other locations but "did not see any of the suspects associated with this case." [Filing No. 254-1 at 16.]

On July 26, 2012, Ms. Richter was shown four photo arrays.[4] [Filing No. 254-1 at 21-22.] The police report indicates that she was 60-70% certain she recognized the photo of a male who is not one of the Plaintiffs, stated that Harley and another male who is not one of the Plaintiffs "looked familiar," recognized Andrea "100%" as "one of the group in question," and recognized Deadra "80%." [Filing No. 254-1 at 21-22.]

In a declaration dated August 18, 2015, Ms. Richter attests that when she spoke with EPD Detective Vantlin, "I told him that I do not remember any kids coming into the store during those hours." [Filing No. 261-33.] With

4. The police report lists Officer J. Dickinson as the officer that showed Ms. Richter the photo arrays. [Filing No. 254-1 at 21.] It states that he "was asked to do so by Sgt. L. Nelson for Det. J. Vantlin." [Filing No. 254-1 at 21.]

regard to her alleged photo identifications, Ms. Richter attests as follows:

5. The only other direct interaction I had with an Evansville police officer was a little while later, on a different day. That police officer came to the Kangaroo Express when I was working and asked me to look at photographs to see if I recognized any of the people in them. He showed me three or four large photographs. I told him that some of them looked familiar, but that I didn't know whether it was because I recognized them from seeing them on TV. I watch the news and had seen a lot of news reports about the four kids who were arrested for murdering their uncle.

6. I told the police officer that kids usually come in the store during the daytime. Plus, the Kangaroo Express I worked at was located in a predominately African American neighborhood and I would have especially noticed three to four white kids in the store using a debit or credit card to pay for items.

[Filing No. 261-33.]

E. Criminal Prosecutions

On June 30, 2012, a Vanderburgh Superior Court judge found probable cause to arrest William and Deadra for Murder, Attempted Robbery Resulting in Serious Bodily Injury, and Criminal Confinement. [Filing No. 254-16 at 1-2; Filing No. 254-17 at 1-2.] William was ultimately charged with Murder, Robbery Resulting in Serious Bodily Injury, and Obstruction of Justice and held in prison. [Filing No. 254-16 at 3.] Deadra was ultimately charged with Murder, Attempted Robbery Resulting in Serious Bodily Injury, and Obstruction of Justice and held in prison. [Filing No. 254-17 at 3.] The case against Andrea was dismissed before formal charges were filed. [Filing No. 254-18 at 1.]

On August 31, 2012, Deadra filed a motion asking the trial court to suppress her confession. [Filing No. 254-17 at 5.] On October 25, 2012, after hearing oral argument

on the motion, the trial court granted it and suppressed Deadra's confession. [Filing No. 254-17 at 6.] The charges against Deadra were dismissed on October 30, 2012. [Filing No. 254-17 at 7.] Deadra was imprisoned for more than four months from the time of her arrest until her release. [Filing No. 254-12.]

The trial court denied a motion to suppress William's confession. [Filing No. 254-16 at 4-5.] A pretrial conference was held on February 14, 2013, and EPD Detectives Pagett and Arbaugh stated that while transporting William to jail following his confession on June 28, 2012, William stated, "It's fine, I have to pay for what I did" and asked "[d]o you think they will just give me a year in jail for this?" [Filing No. 254-22.] EPD Detectives Pagett and Arbaugh were asked to record those statements in a supplemental case report and they did. [Filing No. 254-22.] William denies ever making those statements. [Filing No. 254-25 at 34.]

A jury trial was held, and the jury found William not guilty of Murder and Robbery. [Filing No. 254-16 at 10.] The jury could not agree on a verdict for the Obstruction of Justice charge. [Filing No. 254-25 at 10.] William was imprisoned for approximately eight months from the time of his arrest until his release after the jury trial. [Filing No. 254-16.]

F. Federal Case

On June 27, 2014, Plaintiffs filed a Complaint in this Court, asserting various federal and state claims against the Defendants. [Filing No. 1.] It remains the

operative Complaint, although the Court dismissed some of Plaintiffs' claims in an Order on Motion for Partial Judgment on the Pleadings. [Filing No. 112.] Plaintiffs subsequently filed a Statement of Claims, confirming that they assert the following claims in this litigation:

- Federal malicious prosecution pursuant to 42 U.S.C. § 1983 against the EPD Defendants and the KSP Defendants;

- A Fourth Amendment claim pursuant to 42 U.S.C. § 1983 against the EPD Defendants and the KSP Defendants;

- A Due Process claim pursuant to 42 U.S.C. § 1983 against the EPD Defendants, the KSP Defendants, and Dr. Burrows-Beckham;[5]

- A failure to intervene claim pursuant to 42 U.S.C. § 1983 against the EPD Defendants, the KSP Defendants, and Dr. Burrows-Beckham;

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5. It is apparent from the parties' briefing that Plaintiffs bring both a Fifth Amendment due process claim and a Fourteenth Amendment substantive due process claim based on the interrogation tactics used and the self-incriminating statements obtained as a result. The Plaintiffs' vague Statement of Claims has hindered the Court's review by not specifying which Plaintiffs are pursuing which claims against which Defendants or identifying any specific legal bases for the generally identified claims. The Court has attempted to work through the parties' extensive briefing to address all claims pending in this litigation, but to the extent any were overlooked, they are considered waived for failure to develop a cogent argument.

- Conspiracy to deprive constitutional rights pursuant to 42 U.S.C. § 1983 against the EPD Defendants, the KSP Defendants, and Dr. Burrows-Beckham;

- Supervisory liability pursuant to 42 U.S.C. § 1983 against EPD Sergeant Nelson;[6]

- *A Monell* claim pursuant to 42 U.S.C. § 1983 against the City;

- A state law claim for false arrest or false imprisonment against the EPD Defendants, the KSP Defendants, and the City;

- State law claims for malicious prosecution, intentional infliction of emotional distress, and defamation against the KSP Defendants; and

- Indemnification and *respondeat superior* state law claims against the City.

[Filing No. 120 (initial Statement of Claims); Filing No. 225 (reaffirming intention to pursue claims from initial Statement of Claims).]

The EPD Defendants, the City, the KSP Defendants, and Dr. Burrows-Beckham have all moved for summary judgment on all of Plaintiffs' claims against them. [Filing No. 254; Filing No. 255; Filing No. 256.] Those motions are now fully briefed and ready for the Court's decision.

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6. This claim is now dismissed due to the death of Sergeant Nelson, as noted earlier.

Appendix B

III.
Discussion

A. Genuine Issues of Material Fact

The Court has reviewed the parties' briefs and the designated evidence they cite to support their arguments. After doing so, the Court concludes that there are genuine issues of material fact surrounding key elements of this case, including whether Marcus committed suicide or was killed; whether the confessions of William, Deadra, and Andrea were voluntary or involuntary; and whether the evidence supports the notion that various officers acted with malice and had an agreement to implicate Plaintiffs during the interrogations and subsequent investigation.

The following chart, which is based on a sample of the evidence relied on by the parties on summary judgment, summarizes some examples of these genuine issues of material fact:

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
Whether Marcus committed suicide or was killed	**Marcus Committed Suicide** - Marcus suffered from mental illness and had threatened to commit suicide by jumping off the bridge by where his body was found at least three times - Body found four to six miles upstream from where Plaintiffs allegedly dumped it - Letter from Social Security Administration in plastic bag in Marcus' pocket, possibly indicating he wanted to preserve letter for body identification after suicide	**Marcus Was Killed** - Hyoid bone in neck broken, which indicated homicide by strangulation to medical examiner - Rib broken around time of death - William's cuts on hands and changing story - Harley's prior aggressive behavior with Debbie, including pretending to strangle her

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
	- No external injuries to body from alleged beating or alleged boat dragging body four to six miles upstream - No forensic evidence linking Plaintiffs to Marcus' body or Marcus' body to van where Plaintiffs allegedly transported him	
Voluntariness of William's Confession	**William Confession Involuntary** - Videotape of Interrogation - Young Age (18)	**William Confession Voluntary** - Videotape of Interrogation - Multiple explanations for swollen hands and admitted anger issues

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
	- Interrogation tactics included feeding William story about alleged murder, lying about evidence, and telling him he was facing "prison forever" and then a "fate worse than prison" - At the end of his confession he stated "Was [I right] on most of the facts of what actually happened or . . .? Was I close to it?" - Acquitted on Murder and Robbery charges after jury trial	- Signed *Miranda* waiver - Not physically harmed or denied food during interrogation - Some corroborating evidence, such as William knowing the pocket where Marcus' folded hat was found

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
Voluntariness of Deadra's Confession	**Deadra Confession Involuntary** - Videotape of Interrogation - Young Age (19) - Told William had confessed and implicated her - Deadra twice asked for a lie detector test and was denied	**Deadra Confession Voluntary** - Videotape of Interrogation - Signed *Miranda* waiver - Not physically harmed or denied food during interrogation - William confessed and implicated her

Appendix B

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
	- Interrogation tactics included feeding Deadra story about alleged murder, telling her she was going to go to prison for 25-50 years, that she was going "to hang," and that her family members would be hurt unless she told the truth - Confession suppressed by trial court	

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
Voluntariness of Andrea's Confession	**Andrea Confession Involuntary** - Videotape of Interrogation - Young Age (16) - Andrea told that William and Deadra had confessed and implicated her - Interrogation tactics included threatening Andrea that they could make her "bawl [her] eyes out" and telling her what newspaper would say about her	**Andrea Confession Voluntary** - Videotape of Interrogation - Signed juvenile *Miranda* waiver - Not physically harmed or denied food during interrogation - William and Deadra confessed and implicated her

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
	- Andrea confessed and then recanted, stating that "[t]he only reason I said I was there was cause that's what you told me." - State dismissed criminal case before formal charges filed	
Whether Officers had Malice and Agreement to Implicate Plaintiffs	**Officers Had Malice and Agreement** - EPD Detective Spencer allegedly fabricated police report of trip to Dress Plaza with William on June 29, 2012, where William allegedly	**Officers Did Not Have Malice or Agreement** - Defendants deny fabricating any evidence or having agreement to implicate Plaintiffs

Issue of Material Fact	**Evidence Plaintiffs Cite for their Conclusion**	**Evidence Defendants Cite for their Conclusion**
	showed him where Marcus' body was dumped. William denies this trip happened. - EPD Detective Vantlin allegedly fabricated police report of Kangaroo Express clerk recalling four teens being at store and using debt card night of June 17, 2012. Plaintiffs cite affidavit from clerk stating that she told police she did not remember any kids coming into the store during those hours.	- Defendants claim no motive to do so

Appendix B

Issue of Material Fact	Evidence Plaintiffs Cite for their Conclusion	Evidence Defendants Cite for their Conclusion
	- EPD Officer Dickinson allegedly fabricated police report of Kangaroo Express clerk identifying some of the Plaintiffs in a photo array. Plaintiffs cite affidavit from clerk stating that while she told him some looked familiar, she didn't know if it was from seeing them on TV. - EPD Detectives Arbaugh and Pagett allegedly fabricated police report seven months after they say William made inculpatory statements in police car, which he denies.	

Appendix B

Issue of Material Fact	Evidence Plaintiffs Cite for their Conclusion	Evidence Defendants Cite for their Conclusion
	- Lack of physical evidence to corroborate alleged story of crime—no evidence Marcus' debit card used, no evidence of Plaintiffs in Kangaroo Express or where body allegedly dumped, and no evidence of motive	

B. Generally Applicable Federal Law

Plaintiffs assert their federal claims pursuant to 42 U.S.C. § 1983. Section 1983 provides that "[e]very person who, under color of any . . . State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law." 42 U.S.C. § 1983. A § 1983 claim allows a plaintiff to seek money damages from government officials who have violated his or her constitutional rights. *Wilson v. Layne*, 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). A damages suit under § 1983 requires that a defendant be personally involved in the alleged constitutional deprivation. *Matz v. Klotka*, 769 F.3d 517, 528 (7th Cir. 2014). "Moreover, under § 1983, a plaintiff may not rely on the doctrine of *respondeat superior* to hold supervisory officials liable for the misconduct of their subordinates." *Id.* "Rather, the supervisory officials also must have had some personal involvement in the constitutional deprivation, essentially directing or consenting to the challenged conduct." *Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 614-15 (7th Cir. 2002).

"Government officials performing discretionary functions enjoy a qualified immunity . . . ." *Leaf v. Shelnutt*, 400 F.3d 1070, 1079 (7th Cir. 2005). It is "*immunity from suit* rather than a mere defense to liability." *Estate of Miller, ex rel. Bertram v. Tobiasz*, 680 F.3d 984, 988 (7th Cir. 2012) (emphasis in original) (citation and quotation marks omitted). "Qualified immunity gives government

officials 'the benefit of legal doubts.'" *Rooni v. Biser*, 742 F.3d 737, 743 (7th Cir. 2014) (quoting *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991)); *see Findlay v. Lendermon*, 722 F.3d 895, 899 (7th Cir. 2013) ("Qualified immunity protects public servants from liability for reasonable mistakes made while performing their public duties."). Its purpose is "to provide reasonable notice to government officials that certain conduct violates constitutional rights before a plaintiff can subject them to liability." *Narducci v. Moore*, 572 F.3d 313, 318 (7th Cir. 2009). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). "Once the defense of qualified immunity is raised, 'it becomes the plaintiff's burden to defeat it.'" *Estate of Escobedo v. Martin*, 702 F.3d 388, 404 (7th Cir. 2012) (quoting *Wheeler v. Lawson*, 539 F.3d 629, 639 (7th Cir. 2008)).

"To determine whether a defendant is entitled to qualified immunity, courts must address two issues: (1) whether the defendant violated the plaintiff's constitutional rights and (2) whether the right at issue was clearly established at the time of the violation." *Rooni*, 742 F.3d at 742 (citation omitted). The Court may decide these factors in either order. *Miller v. Harbaugh*, 698 F.3d 956, 962 (7th Cir. 2012). If the right at issue was not clearly established at the time of the violation, the Court may exercise its discretion not to determine whether the defendant violated that plaintiff's constitutional right. *See*

Pearson, 555 U.S. at 236 ("[T]he judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

To determine whether a right is clearly established, the Court looks to controlling precedent from both the Supreme Court of the United States and the Seventh Circuit Court of Appeals, and if there is no such precedent it "cast[s] a wider net" and examines "all relevant case law to determine whether there was such a clear trend in the case law that [it] can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time." *Abbott v. Sangamon Cnty., Ill.*, 705 F.3d 706, 731 (7th Cir. 2013). "To be clearly established at the time of the challenged conduct, the right's contours must be 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right,' and 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Rabin v. Flynn*, 725 F.3d 628, 632 (7th Cir. 2013) (quoting *Humphries v. Milwaukee Cnty.*, 702 F.3d 1003, 1006 (7th Cir. 2012)).

C. Plaintiffs' Claims Against Dr. Burrows-Beckham

Plaintiffs assert multiple claims against Dr. Burrows-Beckham pursuant to 42 U.S.C. § 1983, including due process violations, failure to intervene, and conspiracy.

[Filing No. 120 (initial Statement of Claims); Filing No. 225 (reaffirming intention to pursue claims from initial Statement of Claims).] Dr. Burrows-Beckham moves for summary judgment on these claims, emphasizing that "[i]t is undisputed that Dr. Burrows-Beckham formulated her opinion as to the cause and manner of [Mr.] Golike's death prior to any contact with any law enforcement agency on June 19, 2012." [Filing No. 255-1 at 11.] Dr. Burrows-Beckham argues that she is entitled to qualified immunity and summary judgment on all of Plaintiffs' claims because she independently reached the conclusion regarding the cause of Mr. Golike's death before the events affecting the analysis of the due process, failure to intervene, and conspiracy claims took place. [Filing No. 255-1 at 7-12.]

In response, Plaintiffs concede that Dr. Burrows-Beckham is entitled to summary judgment on their failure to intervene claim. [Filing No. 264 at 2.] They dispute, however, that summary judgment should be entered on the due process and conspiracy claims because "[Dr.] Burrows-Beckham's extreme contortion of reality and her deviation from standard medical norms to do so were part of Defendants' plot to frame Plaintiffs for a murder that never happened." [Filing No. 264 at 2.] They emphasize that Dr. Burrows-Beckham's initial conclusion at the time of the autopsy was "asphyxia consistent with strangulation" and that she did not make a final conclusion of "asphyxia and blunt force injuries sustained in an assault" until after speaking with KSP Detective Jones. [Filing No. 264 at 5.] Plaintiffs' expert, Dr. James Filkins, opines that based on the record evidence, there was insufficient medical and pathological evidence to conclude with a reasonable degree

of medical certainty that Mr. Golike died from asphyxia and blunt force injuries sustained in an assault. [Filing No. 261-4 at 10.] Instead, Dr. Filkins concludes that the evidence supports a finding of an "undetermined" cause of death. [Filing No. 261-4 at 10.]

In reply, Dr. Burrows-Beckham emphasizes her handwritten notes, which confirm that she quickly concluded that the hyoid bone fracture was not from a fall or jump from a bridge before she had any contact with police or even knew that the body was that of Mr. Golike. [Filing No. 277 at 2-3.] Dr. Burrows-Beckham contends that because she reached that result without any police influence, there is no evidence that she was involved in any alleged constitutional violation and summary judgment should be entered in her favor. [Filing No. 227 at 6-7.] She also emphasizes that Plaintiffs' expert found no evidence that she intentionally misrepresented anything or that she dishonestly arrived at her opinions. [Filing No. 277 at 7.] Dr. Burrows-Beckham further emphasizes that Plaintiffs' expert did not conclude that Mr. Golike's death should be ruled a suicide, and he concedes he cannot exclude murder. [Filing No. 277 at 7.]

Plaintiffs do not dispute that Dr. Burrows-Beckham was a state actor at the time she performed the autopsy and made her findings regarding the cause of Marcus' death. *See Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986) ("The medical examiner's function in performing an autopsy is analogous to that of a police officer investigating a suspected homicide. Therefore, coroners enjoy the same qualified immunity as police officers or other investigators

for the state prosecutor."); *Estate of Conner by Conner v. Ambrose*, 990 F. Supp. 606, 617 (N.D. Ind. 1997) ("As a coroner, determining the cause of death is a state function."). While Plaintiffs dispute that Dr. Burrows-Beckham is entitled to the defense of qualified immunity, they do not dispute that she may invoke it at this stage of the proceedings. *Kompare*, 801 F.2d at 887.

As set forth above, "[t]o determine whether a defendant is entitled to qualified immunity, courts must address two issues: (1) whether the defendant violated the plaintiff's constitutional rights and (2) whether the right at issue was clearly established at the time of the violation." *Rooni*, 742 F.3d at 742 (citation omitted). The Court may decide these factors in either order. *Miller*, 698 F.3d at 962.

The Court will first consider whether Dr. Burrows-Beckham violated Plaintiffs' constitutional rights. Plaintiffs allege that Dr. Burrows-Beckham violated their constitutional right to due process because "she distorted her final cause of death finding in order to falsely suggest there was uncontrovertibly a murder when, in fact, she knew that a suicide was probable." [Filing No. 264 at 8.] Put another way, Plaintiffs claim that Dr. Burrows-Beckham "manufactured false evidence"—namely, a cause of death indicating criminal behavior rather than suicide. They claim that "[c]rediting Plaintiffs' evidence, it appears that after Burrows-Beckham learned that the detectives wanted a homicide, she leapt through considerable hoops to deny the likelihood that this death was a suicide." [Filing No. 264 at 2.]

The undisputed evidence shows that Marcus' body arrived at the Henderson County Coroner's Office on June 17, 2012. [Filing No. 276-1 at 1.] The intake form listed "poss[ible] drowning" as the possible cause of death. [Filing No. 276-1 at 1.] Dr. Burrows-Beckham performed an autopsy on June 18, 2012, and her initial report indicates that her findings for the "unidentified male" were "consistent with asphyxia via strangulation," citing the body's fractured hyoid bone, broken rib, and that it was found in the river.[7] [Filing No. 276-2.] After the body was tentatively identified as Marcus, a handwritten note from Dr. Burrows-Beckham dated June 20, 2012 confirms that the police told her that Marcus had previously threatened to commit suicide by jumping off the bridge. [Filing No. 276-1 at 3.] But a handwritten note from Dr. Burrows-Beckham the following day confirms her intention to tell EPD that she did not think the fractured hyoid bone in Marcus' neck was from a jump or fall from the bridge. [Filing No. 277 at 3 ("Tell him don't think fx hyoid from fall/jump into river from bridge.").]

Plaintiffs are correct that a state actor who manufactures false evidence that is used to deprive liberty violates clearly established constitutional rights. *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012). False evidence is evidence that is "known to be untrue by the witness." *Fields v. Wharrie*, 740 F.3d 1107, 1110 (7th Cir. 2014). "[W]hen the question is whether to grant immunity to a public employee, the focus is on [her] conduct, not on

7. At some later point, "unidentified male" was crossed out and replaced with Marcus' name.

whether that conduct gave rise" to another cause of action in the case. *Id.* at 1114.

Based on the undisputed evidence detailed above, the Court agrees with Dr. Burrows-Beckham that no reasonable jury could conclude that she violated Plaintiffs' constitutional rights by manufacturing false evidence at the direction of other Defendants. It is undisputed that Marcus' body had a broken hyoid bone and a broken rib and that based on those findings, Dr. Burrows-Beckham concluded the day after the body was found that the cause of death was "consistent with asphyxia via strangulation." [Filing No. 276-2.] It is also undisputed that Dr. Burrows-Beckham reached that conclusion before Marcus' identity was confirmed and that she maintained it despite receiving information from the police that Marcus had previously threatened to commit suicide by jumping from that bridge. While Plaintiffs emphasize that Dr. Burrows-Beckham's final conclusion regarding Marcus' cause of death was "asphyxia and blunt force injuries sustained in an assault"—not her initial conclusion of "asphyxia via strangulation"—this is a distinction without a difference because both indicate criminal activity, not suicide.

In sum, the undisputed evidence does not support Plaintiffs' version of events that Dr. Burrows-Beckham violated their constitutional right to due process by allegedly manufacturing false evidence. Even making all reasonable inferences in Plaintiffs' favor, the evidence confirms that Dr. Burrows-Beckham quickly reached a conclusion that Marcus' death was not a suicide based on undisputed injuries she found, informed the police of that

conclusion, and never wavered. The Court's conclusion that Plaintiffs have not put forth evidence of a constitutional violation also dooms their federal conspiracy claim against Dr. Burrows-Beckham. *See Katz-Crank v. Haskett*, 843 F.3d 641, 650 (7th Cir. 2016) ("Without a viable federal constitutional claim, the conspiracy claim under § 1983 necessarily fails; there is no independent cause of action for § 1983 conspiracy."). Accordingly, the Court concludes that Dr. Burrows-Beckham is entitled to summary judgment as a matter of law on Plaintiffs' claims against her.

D. Plaintiffs' Federal Claims against the EPD and KSP Defendants

1) § 1983 Claim for False Arrest in violation of the Fourth Amendment

Plaintiffs assert a § 1983 false arrest claim pursuant to the Fourth Amendment against the EPD and the KSP Defendants, [Filing No. 120; Filing No. 225], and the EPD and KSP Defendants ask for summary judgment in their favor on that claim. It is undisputed that EPD Detective Vantlin and KSP Detectives Wise and Jones were the only Defendants involved in the interrogations that led to Plaintiffs' arrests.[8] [Filing No. 257 at 3-4 (citing

8. The EPD Defendants argue that EPD Detectives Arbaugh, Pagett, and Spencer were not involved in Plaintiffs' interrogations and arrests. [Filing No. 258 at 20-22.] They ask for summary judgment on Plaintiffs' false arrest claims against those officers because they were not personally involved in the alleged constitutional deprivation underlying the false arrest claim, as is required to succeed on a

Filing No. 256-20 at 20-21).] The parties vehemently dispute whether probable cause existed at the time each Plaintiff was arrested, challenging the voluntariness of each Plaintiff's confession in the process. [Filing No. 258 at 14-20; Filing No. 257 at 16-22; Filing No. 267 at 22-36; Filing No. 268 at 21-37.]

A claim that a plaintiff was arrested without probable cause is a claim for false arrest under the Fourth Amendment. *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013) ("The Fourth Amendment, not the due process clause, is the proper basis for challenging the lawfulness of an arrest.") (citing *Alexander v. McKinney*, 692 F.3d 553, 558 (7th Cir. 2012)). Establishing that probable cause existed to arrest a plaintiff "is an absolute defense" to a Fourth Amendment false arrest claim. *Gonzalez v. City of Elgin*, 578 F.3d 526, 537 (7th Cir. 2009).

Probable cause to arrest a person exists if, at the time of the arrest, the facts and circumstances "are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* The Court may decide whether probable cause exists "[o]nly if the underlying facts claimed to support probable cause are not in dispute." *Id.* If those

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§ 1983 claim. *Matz*, 769 F.3d at 528. As the EPD Defendants point out in their reply brief, [Filing No. 278 at 2], Plaintiffs did not respond to this argument, [Filing No. 267]. Therefore, the Court grants summary judgment in favor of EPD Detectives Arbaugh, Pagett, and Spencer on Plaintiffs' Fourth Amendment false arrest claims against them.

facts are in dispute, then "[t]he jury must determine the existence of probable cause." *Id.*; *see also Maxwell v. City of Indianapolis*, 998 F.2d 431, 434 (7th Cir. 1993) ("While many formulations for probable cause exist, all refer to the exercise of judgment, which turns on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. These sorts of assessments typically would fall within the province of the jury, which determines whether probable cause existed in a given case . . . .") (citations omitted). "[A] conclusion that probable cause existed as a matter of law is appropriate only when no reasonable jury could find that the officers did not have probable cause to arrest [plaintiff]." *Maxwell*, 998 F.2d at 434.

Determining whether probable cause existed at the time of an arrest requires determining when a person was under arrest. *Fox v. Hayes*, 600 F.3d 819, 833 (7th Cir. 2010).[9] "An arrest occurs when, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* (citation omitted). Various factors to consider when analyzing whether a person was under arrest include

9. *Fox* stems from a civil suit following a jury verdict in favor of a father who was charged with killing his daughter and imprisoned for eight months before DNA evidence exonerated him. 600 F.3d at 819. The jury in Mr. Fox's civil suit found in his favor and awarded him $15,500,000. *Id.* Although the procedural posture of *Fox* differs from the procedural posture in the summary judgment context at bar, the Seventh Circuit's guidance in *Fox* is still helpful because the evidence on appeal in that case also had to be viewed in a light most favorable to the plaintiff, which the Seventh Circuit emphasized many times in its decision. *Id.* at 826.

whether he asked to leave, whether the police informed him that he is suspected of a crime, whether his movement is limited, whether officers engage in coercive conduct suggesting that cooperation is required, and whether he is in a private location. *Id.* Administering *Miranda* warnings may give a clear indication that a person is considered a suspect and may be under arrest. *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1018 (7th Cir. 2006). Whether probable cause existed at the moment of an arrest "requires a close look at the facts" of a case. *Fox*, 600 F.3d at 833. While officers need not have enough evidence to support a conviction or even to show that their belief is more likely true than false, they "must have more than a bare suspicion that they have the right guy." *Id.* Officers cannot ignore disputed facts, rely on facts without regard to the full context of the circumstances known to them, or "interpret the relatively lenient probable cause standard as license to rely on their version of the events." *Id.* at 834. Instead, on summary judgment, plaintiffs' version "carries the day." *Id.* At bottom, to have probable cause, officers need "concrete facts sufficient to elevate their hunch . . . to a reasonable belief." *Id.* at 835.

"A confession is voluntary if the totality of the circumstances demonstrates that it was the product of rational intellect and not the result of physical abuse, psychological intimidation, or deceptive interrogation tactics calculated to overcome the defendant's free will." *Watson v. DeTella*, 122 F.3d 450, 453 (7th Cir. 1997); *see United States v. Murdock*, 491 F.3d 694, 699 (7th Cir. 2007) (holding that statements are involuntary only where obtained through coercion or overreaching as to

"overbore the accused's free will"). Because a confession should not be the product of "youthful ignorance or the naiveté born of inexperience," the defendant's "age, intelligence, education, and experience with the criminal justice system" are also considered. *Watson*, 122 F.3d at 453. "Threats to a suspect's family or children, even if implicit, certainly may render confessions involuntary . . . ." *Sornberger*, 434 F.3d at 1023. Genuine issues of material fact regarding the voluntariness of a person's confession preclude summary judgment. *Id.*

a) William's Arrest

Plaintiffs make a cursory argument that William was seized for Fourth Amendment purposes when he was "ordered to go to the police station, *Mirandized*, and interrogated." [Filing No. 267 at 20.] The evidence they cite, however, includes William's admissions at his deposition that he voluntarily went to the police station after his mother told him to, that he was not under arrest when he got there, and that he was arrested when he left the interview room. [Filing No. 261-22 at 5-11]. Based on William's testimony, the Court agrees with the Defendants that William was not under arrest as a matter of law when he went to the police station.

The Court concludes, however, that reasonable minds could differ regarding whether probable cause existed for William's arrest after his interrogation because of the genuine issues of material fact surrounding the voluntariness of his confession:

Appendix B

Issue of Material Fact	**Sample Evidence Plaintiffs Cite for their Conclusion**	**Sample Evidence Defendants Cite for their Conclusion**
Voluntariness of William's Confession	**William Confession Involuntary** - Videotape of Interrogation - Young Age (18) - Interrogation tactics included feeding William story about alleged murder, lying about evidence, and telling him he was facing "prison forever" and then a "fate worse than prison"	**William Confession Voluntary** - Videotape of Interrogation - Multiple explanations for swollen hands and admitted anger issues - Signed *Miranda* waiver - Not physically harmed or denied food during interrogation

Appendix B

Issue of Material Fact	**Sample Evidence Plaintiffs Cite for their Conclusion**	**Sample Evidence Defendants Cite for their Conclusion**
	- At the end of his confession he stated "Was [I right] on most of the facts of what actually happened or . . .? Was I close to it?" - Acquitted on Murder and Robbery charges after jury trial	- Some corroborating evidence, such as William knowing the pocket where Marcus' folded hat was found

If the jury credits the evidence Plaintiffs cite, it could reasonably conclude that William's confession was coerced and that it was objectively unreasonable for the officers to believe that probable cause existed to arrest him.[10] But if the jury credits the evidence Defendants cite, it could reasonably conclude that William's confession was voluntary and that it was objectively reasonable for officers to believe probable cause to arrest him existed. The Court's conclusion that there is a genuine dispute of material fact on this point is bolstered by the fact that both parties rely on the video recording of William's interrogation to support their desired conclusion regarding probable cause. The jury can watch that video, consider it in the context of the circumstances known at that time—including the issues of material fact surrounding Marcus' death—and determine whether the officers had an objectively reasonable basis to elevate their hunch to a reasonable belief that William had committed a crime.

At this stage of the proceedings, the Court must make all reasonable inferences in William's favor. Doing so precludes it from finding that probable cause existed as a matter of law at the time of his arrest. *See Fox*, 600

10. In their response briefs, Plaintiffs argue that probable cause did not exist to arrest William if the confession is not considered. [Filing No. 267 at 28-30; Filing No. 268 at 28-30.] Defendants did not reply to this argument. [Filing No. 273; Filing No. 278.] Given the previously detailed issues of material fact surrounding Marcus' death—including that his body was found four to six miles upstream from where Plaintiffs allegedly dumped it—even if Defendants had argued that probable cause existed for William's arrest without the confession, the Court would not have agreed as a matter of law on summary judgment.

F.3d at 834 ("The defendants present a laundry list of facts (three pages of bullet points in their opening brief) that they believe support a probable cause finding. Their list suffers from many shortcomings, the most serious being that it is comprised largely of disputed facts. . . . It is true that probable cause is determined from the perspective of what the officers knew at the time of the arrest, but that does not mean that the jury was compelled to believe the officers' testimony in reaching a probable cause determination."); *see also Maxwell*, 998 F.2d at 434 ("[O]n the other hand, if the question of probable cause arises in a damages suit, it is a proper issue for the jury if there is room for a difference of opinion concerning the facts or the reasonable inferences to be drawn from them. Accordingly, a conclusion that probable cause existed as a matter of law is appropriate only when no reasonable jury could find that the officers did not have probable cause to arrest [plaintiff].") (citations omitted). Moreover, given the circumstances and the genuine issue of material fact surrounding the voluntariness of William's confession, the Court agrees with Plaintiffs that Defendants cannot rely on the prosecutor's subsequent decision to charge William as evidence that probable cause existed at the time of his arrest. *See Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) ("a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision").

Defendants also invoke qualified immunity. [Filing No. 258 at 40-41; Filing No. 257 at 43-44.] When the

constitutionality of an officer's action depends on the existence of probable cause, the officer must have had "arguable probable cause" for qualified immunity to attach. *Bruce v. Guernsey*, 777 F.3d 872, 878 (7th Cir. 2015) (citing *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998)). "[E]ven when an officer lacks probable cause, he is still entitled to qualified immunity when a reasonable officer could have reasonably believed that probable cause existed in light of well-established law." *Bruce*, 777 F.3d at 878-79 (citation omitted). In this context, qualified immunity provides shelter for officers who have "arguable probable cause" to arrest—*i.e.*, those officers that reasonably but mistakenly believe they have probable cause. *Gutierrez v. Kermon*, 722 F.3d 1003, 1008 (7th Cir. 2013). As Plaintiffs point out in response to Defendants' qualified immunity argument, however, the numerous genuine issues of material fact in this case result in a "substantial, if not complete, overlap of the issue of immunity and the principle issue on the merits." [Filing No. 267 at 22 (citing *Maxwell*, 998 F.2d at 435).] The Court cannot conclude that EPD Detective Vantlin and KSP Detectives Wise and Jones are entitled to qualified immunity on William's § 1983 false arrest claim at this juncture. *See Maxwell*, 998 F.2d at 435 ("In effect, we have come full circle on the probable cause question. Because we have already established that the conclusion by the three officers concerning the existence of probable cause may be found to be objectively unreasonable, they are not entitled to qualified immunity at this juncture."). Accordingly, the Court rejects their request for summary judgment on William's false arrest claim.

b) Deadra's Arrest

Defendants concede that Deadra was arrested before her confession. [Filing No. 258 at 6 (EPD Defendants' brief); Filing No. 257 at 9 (KSP Defendants' brief).] Because the existence of probable cause is analyzed at the time of arrest, the probable cause inquiry turns on the evidence and circumstances known to the officers at the time of arrest. *Wheeler v. Lawson*, 539 F.3d 629, 637 (7th Cir. 2008). Any evidence that came to light after Deadra's arrest—such as her confession or Andrea's subsequent confession—is not relevant to the probable cause inquiry regarding Deadra's arrest. *Id.* Because the alleged probable cause for Deadra's arrest hinges on William's allegedly coerced confession implicating her, the Court must deny summary judgment on Deadra's false arrest claim for the same reasons it concluded that EPD Detective Vantlin and KSP Detectives Wise and Jones were not entitled to qualified immunity or summary judgment on William's false arrest claim.[11]

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11. The EPD Defendants briefly argue that a plaintiff cannot attack the constitutionality of another plaintiff's interrogation, [Filing No. 278 at 8], but the case on which they rely for that argument analyzes an Illinois state law malicious prosecution claim and does not support their position, *see Cairel v. Alderden*, 821 F.3d 823, 834-35 (7th Cir. 2016) (emphasizing the additional evidence supporting probable cause other than the allegedly coerced confession, including two victims identifying the party who later confessed). Deadra does not make an independent claim attacking the constitutionality of William's confession; instead, she challenges the existence of probable cause to support *her arrest* based on the information the officers knew at that time, which includes William's allegedly coerced confession.

c) Andrea's Arrest

The EPD Defendants concede that Andrea was arrested prior to her interrogation. [Filing No. 258 at 18.] The KSP Defendants do not make this concession. [Filing No. 257 at 11.] If Andrea was arrested before her confession, the alleged probable cause for that arrest was based on the allegedly coerced confessions of William and Deadra implicating her. If Andrea was arrested after her confession, then the alleged probable cause was based on her own allegedly coerced confession and the allegedly coerced confessions of William and Deadra. Either way, the Court concludes that reasonable minds could differ regarding whether probable cause existed for Andrea's arrest because of the identified genuine issues of material fact surrounding the voluntariness of William's confession (previously detailed) and the voluntariness of Andrea and Deadra's confessions:

Appendix B

Issue of Material Fact	**Sample Evidence Plaintiffs Cite for their Conclusion**	**Sample Evidence Defendants Cite for their Conclusion**
Voluntariness of Deadra's Confession	**Deadra Confession Involuntary** - Videotape of Interrogation - Young Age (19) - Told William had confessed and implicated her - Deadra twice asked for a lie detector test and was denied	**Deadra Confession Voluntary** - Videotape of Interrogation - Signed *Miranda* waiver - Not physically harmed or denied food during interrogation - William confessed and implicated her

Appendix B

Issue of Material Fact	Sample Evidence Plaintiffs Cite for their Conclusion	Sample Evidence Defendants Cite for their Conclusion
	- Interrogation tactics included feeding Deadra story about alleged murder, telling her she was going to go to prison for 25-50 years, that she was going "to hang," and that her family members would be hurt unless she told the truth - Confession suppressed by trial court	

Appendix B

Issue of Material Fact	**Sample Evidence Plaintiffs Cite for their Conclusion**	**Sample Evidence Defendants Cite for their Conclusion**
Voluntariness of Andrea's Confession	**Andrea Confession Involuntary** - Videotape of Interrogation - Young Age (16) - Andrea told that William and Deadra had confessed and implicated her - Interrogation tactics included threatening Andrea that they could make her "bawl [her] eyes out" and telling her what newspaper would say about her	**Andrea Confession Voluntary** - Videotape of Interrogation - Signed juvenile *Miranda* waiver - Not physically harmed or denied food during interrogation - William and Deadra confessed and implicated her

Appendix B

Issue of Material Fact	Sample Evidence Plaintiffs Cite for their Conclusion	Sample Evidence Defendants Cite for their Conclusion
	- Andrea confessed and then recanted, stating that "[t]he only reason I said I was there was cause that's what you told me." - State dismissed criminal case before formal charges filed	

Plaintiffs' version of the facts must carry the day at this stage of the litigation, and for the reasons that the Court denied qualified immunity and summary judgment on William and Deadra's false arrest claims, the Court must also conclude that EPD Detective Vantlin and KSP Detectives Wise and Jones are not entitled to qualified immunity or summary judgment on Andrea's false arrest claim.

2) Fifth and Fourteenth Amendment Due Process Claims Based on Interrogations

Plaintiffs assert a Fifth Amendment due process claim for allegedly being coerced into making self-incriminating statements, [Filing No. 267 at 41-46], and a Fourteenth Amendment substantive due process claim for the interrogation tactics the Defendants used, [Filing No. 267 at 52-53]. Plaintiffs have previously clarified "that their due process claim is only on behalf of William and Deadra, since they were the two that allege they were deprived of their liberty between the time of their arrests and the point where they were released." [Filing No. 112 at 12-13 (citing Filing No. 80 at 20).] While Plaintiffs do not expressly state which Defendants they pursue this claim against, because EPD Detective Vantlin and KSP Detectives Wise and Jones were the only officers personally involved in William and Deadra's interrogations, the due process claims may only proceed against them. Accordingly, the Court enters summary judgment in favor of EPD Detectives Arbaugh, Pagett, and Spencer, to the extent Plaintiffs asserted due process claims against them.

Appendix B

The Fifth Amendment privilege against self-incrimination "concerns the use of compelled statements in criminal prosecutions." *Matz v. Klotka*, 769 F.3d 517, 530 (7th Cir. 2014). To be violated, it requires "at the very least, the initiation of a legal proceeding, rather than mere police questioning, before a suspect's self-incrimination rights are implicated." *Sornberger*, 434 F.3d at 1024. Consequently, a person who incriminates herself but is never prosecuted—like Andrea—cannot successfully pursue a due process claim based on the allegedly compelled self-incrimination. *Id.* The incriminating testimony need not be actually introduced at trial to be "used" for purposes of the Self-Incrimination Clause. *Id.* The fact that Deadra's allegedly coerced confession was used against her in the probable cause affidavit and at a pretrial hearing but not at trial—since her criminal case was dismissed before trial after the trial court suppressed her confession—is sufficient to state a due process claim. *Id.*

Likewise, a Fourteenth Amendment substantive due process claim based on an interrogation will "depend upon the coercive nature of the interrogation." *Gill v. City of Milwaukee*, 850 F.3d 335, 2017 U.S. App. LEXIS 4032, 2017 WL 897344, at *3 (7th Cir. 2017); *see also Cairel v. Alderden*, 821 F.3d 823, 833 (7th Cir. 2016) (holding that a plaintiff may bring a § 1983 substantive due process claim pursuant to the Fourteenth Amendment for police behavior that "shocks the conscience," including "conscience-shocking interrogation tactics"). "Determining what constitutes such behavior can be difficult; the ultimate question is whether the conduct is too close to the rack

and the screw." *Cairel*, 821 F.3d at 833 (citation omitted). The "official conduct most likely to rise to the conscience-shocking level is the conduct intended to injure in some way unjustifiable by any government interest." *Id.*

William and Deadra argue that issues of material fact preclude summary judgment on their due process claims based on the allegedly compelled self-incrimination because the parties vehemently dispute whether William and Deadra's confessions were coerced or voluntary. [Filing No. 267 at 41-46.] While Defendants dispute that argument, the Court has already found that genuine issues of material fact preclude the Court from finding William and Deadra's confessions to be voluntary as a matter of law. Moreover, it is certainly reasonable to conclude that a jury could find that William and Deadra's allegations about the interrogation tactics shock the conscience considering that EPD Chief Bolin testified that he was "shocked" by the allegations and, if true, they would constitute serious officer misconduct. [Filing No. 261-25 at 5-6.] For the reasons previously stated in analyzing William and Deadra's false arrest claims, the Court must conclude that EPD Detective Vantlin and KSP Detectives Wise and Jones are not entitled to qualified immunity or summary judgment on William or Deadra's Fifth Amendment due process claim or Fourteenth Amendment substantive due process claim.

3) Federal Malicious Prosecution Claim

Plaintiffs assert a federal malicious prosecution claim pursuant to § 1983 on allegations that "Defendants

deliberately withheld exculpatory evidence, as well as fabricated false reports and other evidence, thereby misleading and misdirecting the criminal prosecution."[12] [Filing No. 1 at 22-23.] Plaintiffs allege that this behavior affected their constitutional right to a fair trial in violation of the Fifth and Fourteenth Amendments to the United States Constitution. [Filing No. 1 at 23.] Defendants concede that the fabrication of evidence may support a federal malicious prosecution claim, [Filing No. 258 at 26], but they argue that some of them are entitled to summary judgment because of a lack of personal involvement and that the rest are entitled to summary judgment because

12. The Court agrees with Defendants that the allegedly coerced confessions are not "fabricated evidence" that could support such an allegation. *See Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017) (emphasizing that while coercively interrogating a witness "may be deplorable," the resulting confession is not "falsified evidence" because it "may turn out to be true"). Moreover, the due process right to a fair trial "isn't implicated absent a violation of the *Brady* duty to disclose facts about the coercive tactics used to obtain it." *Id.* The Court also agrees with Defendants that Plaintiffs cannot successfully pursue a due process claim regarding the interrogations related to an alleged *Brady* violation because Plaintiffs knew what occurred during their interrogations and there are video recordings of the full interrogations. [Filing No. 258 at 38]; *see Sornberger*, 434 F.3d at 1029 ("Here, Teresa complains that Officers Sheppard and Riley failed to disclose the circumstances of her interrogation. However, Teresa already was quite familiar with those circumstances. Teresa knew herself what occurred during the interrogation, and the police were under no *Brady* obligation to tell her again that they coerced her into confessing."). In analyzing Plaintiffs' malicious prosecution claim, the Court will focus solely on the allegedly fabricated evidence Plaintiffs point to as support for that claim.

there is no evidence that they knew the evidence was false or that it had any effect on Plaintiffs' prosecutions, [Filing No. 258 at 20-21; Filing No. 258 at 26-28].

The Seventh Circuit has "held that a federal claim for malicious prosecution is actionable only if the state fails to provide an adequate alternative, whether called a claim of malicious prosecution or something else." *Julian v. Hanna*, 732 F.3d 842, 845 (7th Cir. 2013) (holding that because the Indiana Tort Claims Act grants absolute immunity to state law enforcement officers, Indiana "deprives plaintiffs who assert due process claims against state officers of an adequate alternative remedy to a federal suit."). In response to Defendants' Motion for Judgment on the Pleadings, the Court previously found that Plaintiffs could proceed with their federal malicious prosecution claim based on Seventh Circuit precedent interpreting Indiana law. [Filing No. 112 at 12-15.] Defendants do not challenge this conclusion on summary judgment, and the Court will not readdress it.

A federal malicious prosecution claim "borrows the elements of the state tort." *Katz-Crank v. Haskett*, 843 F.3d 641, 649 (7th Cir. 2016). "The law of malicious prosecution in Indiana requires the plaintiff to prove the following elements: (1) the defendant instituted or caused to be instituted an action against the plaintiff; (2) the defendant acted with malice and (3) without probable cause; and (4) the action was terminated in the plaintiff's favor." *Id.* "Malicious prosecution is not by itself an infringement on the constitutional right to due process under the Fourteenth Amendment." *Welton v. Anderson*, 770 F.3d

670, 674 (7th Cir. 2014). Instead, it must also be based on a separate deprivation of a constitutional right. *Id.* This is because "there is no such thing as a constitutional right not to be prosecuted without probable cause." *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013).

To support a § 1983 malicious prosecution claim, a plaintiff must prove "a violation of a particular constitutional right, such as the right to be free from unlawful seizures under the Fourth Amendment, or the right to a fair trial under the Due Process Clause." *Howlett v. Hack*, 794 F.3d 721, 727-28 (7th Cir. 2015). The Seventh Circuit has "consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way." *Avery*, 847 F.3d at 439; *see also Saunders-El v. Rohde*, 778 F.3d 556, 560 (7th Cir. 2015) ("In *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012), we expressly stated that 'a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty in some way.'"). While the need to appear in court or attend trial does not constitute a liberty violation, incarceration pending trial does. *See Cairel*, 821 F.3d at 831; *Saunders-El*, 778 F.3d at 560-61 ("'the alleged liberty deprivation came not from the initial arrest, but from the time spent in confinement after arrest'") (quoting *Alexander v. McKinney*, 692 F.3d 553, 557 (7th Cir. 2012)).

Plaintiffs identify four pieces of allegedly fabricated evidence to support their malicious prosecution claim. [Filing No. 267 at 39.] They are as follows:

- A police report by EPD Detective Spencer dated July 2, 2012, stating that he took William to the Dress Plaza early on June 29, 2012 and that William directed him to the ramp where Marcus' body was dumped. [Filing No. 256-10 at 38.] William attests that he never went to the Dress Plaza on June 29, 2012. [Filing No. 261-31.]

- EPD Detective Vantlin's police report indicating that on July 6, 2012, he met with Sarah Richter, a clerk at the Kangaroo Express who worked the night of June 17, 2012. [Filing No. 254-1 at 14.] EPD Detective Vantlin's report states that Ms. Richter told him that she "remembered some kids, possibly 4, come into the store between 2 AM and 4 AM. They bought about $30.00 worth of candy and soda and used a debit card to pay for the items." [Filing No. 254-1 at 14.] In a declaration dated August 18, 2015, Ms. Richter attests that when she spoke with EPD Detective Vantlin "I told him that I do not remember any kids coming into the store during those hours." [Filing No. 261-33.]

- A police report by EPD Officer J. Dickinson on July 26, 2012, stating that at EPD Detective Vantlin's direction, he showed Ms. Richter four photo arrays and that she was 60-70% sure she recognized Harley, 100% sure she recognized Andrea, and 80% sure she recognized Deadra. [Filing No. 254-1 at 21-22.] In a declaration dated August 18, 2015, Ms. Richter attests that she told police that some of the people in the photographs looked familiar but that

she did not know if it was because she recognized them from seeing them on TV. [Filing No. 261-33.] That information is not in the police report. [Filing No. 254-1 at 21-22.]

- A pretrial conference in William's criminal case was held on February 14, 2013, and EPD Detectives Pagett and Arbaugh stated that while transporting William to jail following his confession on June 28, 2012, William told them, "It's fine, I have to pay for what I did," and asked "[d]o you think they will just give me a year in jail for this?" [Filing No. 254-22.] EPD Detectives Pagett and Arbaugh made a supplemental police report with that information, [Filing No. 254-22], but William denies ever making those statements, [Filing No. 254-25 at 34].

As an initial matter, the Court agrees with Defendants that because Plaintiffs' malicious prosecution claims are rooted in § 1983 and that statute requires a defendant's personal involvement, Plaintiffs cannot succeed against any Defendants other than the officers specifically involved with the allegedly fabricated evidence—EPD Officers Vantlin, Pagett, Arbaugh, and Spencer.[13] The Court will enter summary judgment in favor of the KSP Defendants on Plaintiffs' federal malicious prosecution claim. The Court also agrees with Defendants that because Plaintiffs have not identified any allegedly fabricated evidence related to Andrea and she was never

13. Officer J. Dickinson has never been a Defendant in this action. [Filing No. 1.]

formally charged or imprisoned, EPD Detective Vantlin is also entitled to summary judgment on Andrea's federal malicious prosecution claim.

After those rulings, the only federal malicious prosecution claims that remain are those that William and Deadra bring against EPD Defendants Vantlin, Spencer, Arbaugh, and Pagett for allegedly fabricating the cited evidence. The Court rejects the EPD Defendants' argument that these claims cannot proceed because there is allegedly no evidence that the officers involved had malice or knew that the evidence was false. [Filing No. 258 at 26-27.] To the contrary, William and Deadra cite ample evidence to establish a genuine issue of material fact regarding the officers' knowledge and intent:

Appendix B

Issue of Material Fact	Evidence Plaintiffs Cite for their Conclusion	Evidence Defendants Cite for their Conclusion
Whether Officers had Malice	**Officers Had Malice** - EPD Detective Spencer allegedly fabricated police report of trip to Dress Plaza with William on June 29, 2012, where William allegedly showed him where Marcus' body was dumped. William denies this trip happened. - EPD Detective Vantlin allegedly fabricated police report of Kangaroo Express clerk recalling four teens being at store and using debt card night of June 17, 2012. Plaintiffs cite affidavit from clerk stating that she told police she did not remember any kids coming into the store during those hours.	**Officers Did Not Have Malice** - Defendants deny fabricating any evidence or having agreement to implicate Plaintiffs - Defendants claim no motive to do so

Appendix B

Issue of Material Fact	Evidence Plaintiffs Cite for their Conclusion	Evidence Defendants Cite for their Conclusion
	- EPD Officer Dickinson allegedly fabricated police report of Kangaroo Express clerk identifying some of the Plaintiffs in a photo array. Plaintiffs cite affidavit from clerk stating that while she told him some looked familiar, she didn't know if it was from seeing them on TV. - EPD Detectives Arbaugh and Pagett allegedly fabricated police report seven months after they say William made inculpatory statements in police car, which he denies. - Lack of physical evidence to corroborate alleged story of crime—no evidence Marcus' debit card used, no evidence of Plaintiffs in Kangaroo Express or where body allegedly dumped, and no evidence of motive	

The Court must credit William and Deadra's evidence in ruling on summary judgment and, if it is true that all of that evidence was fabricated, it would be reasonable for a jury to conclude that the Defendants involved acted with malice. *See Sornberger*, 434 F.3d at 1017-18 (reversing district court for resolving factual issue in favor of non-movant on summary judgment and emphasizing that inferences must be resolved in favor of non-movant).

The Court also rejects the EPD Defendants' argument that they are entitled to summary judgment because the allegedly fabricated evidence did not have any effect on the prosecutions of William and Deadra. [Filing No. 258 at 26-27.] The Seventh Circuit recently confirmed that it has "consistently held that a police officer who manufactures false evidence against a criminal defendant violates due process if that evidence is later used to deprive the defendant of [his] liberty *in some way*." *Avery*, 847 F.3d at 439 (emphasis added). It is undisputed that William was incarcerated for eight months after his arrest and that Deadra was incarcerated for four months following her arrest. [Filing No. 254-12; Filing No. 254-16.] While the identified evidence was not relied on in the probable cause affidavit, the Court cannot find as a matter of law that it was not used to support the continued incarceration of William and Deadra on the pending charges. Because there "is no disputing that such conduct [fabricating evidence] violates clearly established constitutional rights," the EPD Defendants are not entitled to qualified immunity or summary judgment. *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012) (citing *Dominguez v. Hendley*, 545 F.3d 585, 589 (7th Cir. 2008)). The Court denies the request

for summary judgment on William and Deadra's federal malicious prosecution claim against EPD Detectives Vantlin, Pagett, Arbaugh, and Spencer.

4) § 1983 Claims for Failure to Intervene and Conspiracy

Plaintiffs assert federal claims for conspiracy and failure to intervene against the EPD Defendants and the KSP Defendants. For both claims, the EPD Defendants and the KSP Defendants argue that there is no underlying constitutional violation and that any conclusions in favor of these claims are based on mere speculation. [Filing No. 257 at 41-43; Filing No. 258 at 38-40.] Because these federal claims are related, the Court will address them together.

To succeed on a failure to intervene claim or on a conspiracy claim, there must be an underlying denial of constitutional rights. *Gill*, -- F.3d --, 2017 U.S. App. LEXIS 4032, 2017 WL 897344, at *4. For a failure to intervene claim, a plaintiff must demonstrate that the defendants knew that a constitutional violation was committed and had a realistic opportunity to prevent it. *Id.* Specifically, "[a]n officer who is present and fails to intervene to prevent other law enforcement officers from infringing the constitutional rights of citizens is liable under § 1983 if that officer had reason to know: (1) that excessive force was being used, (2) *that a citizen has been unjustifiably arrested*, or (3) that any constitutional violation has been committed by a law enforcement official; and the officer had a realistic opportunity to intervene to prevent the

harm from occurring." *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994 (emphasis added). For a conspiracy claim, a plaintiff must show "an agreement between the officers to inflict injury or harm on [plaintiff]." *Akbar v. Calumet City*, 632 F. App'x 868, 872 (7th Cir. 2015) (citing *Sow v. Fortville Police Dep't*, 636 F.3d 293, 304-05 (7th Cir. 2011)). "Although an agreement may be inferred from circumstantial evidence, any such inference must be based on more than speculation or conjecture." *Akbar*, 632 F. App'x at 872 (citing *Sow*, 636 F.3d at 305). That said, "a pattern of harassment by several officers over a period of months" is sufficient because it would be "a challenge to imagine a scenario in which that harassment would not have been the product of a conspiracy." *Geinosky v. City of Chicago*, 675 F.3d 743, 749 (7th Cir. 2012).

The EPD Defendants and the KSP Defendants ask for summary judgment in their favor on Plaintiffs' failure to intervene and conspiracy claims. [Filing No. 257 at 41-43; Filing No. 258 at 38-40.] They argue that because there are no underlying constitutional violations, these claims must fail as a matter of law. [Filing No. 257 at 41-43; Filing No. 258 at 38-40.] The Court has already found that it cannot conclude that there are no underlying constitutional violations as a matter of law because of the disputed issues of material fact previously detailed. The Court rejects Defendants' request for summary judgment on the failure to intervene and conspiracy claims on that basis.

The EPD Defendants and the KSP Defendants also argue that there is no evidence that they had a

reasonable opportunity to intervene to prevent underlying constitutional violations or that they had any agreement to inflict injuries on the Plaintiffs, such that there was a conspiracy. [Filing No. 257 at 41-43; Filing No. 258 at 38-40.] But Plaintiffs' theory of the case is that the Defendants erroneously focused on them as suspects in their uncle's death, which may have been a suicide, and then used unconstitutional means to build their case over the course of months by coercing Plaintiffs' confessions and fabricating evidence to support their theory that the death was a murder and that Plaintiffs were involved. The Court has extensively detailed the evidence Plaintiffs cite in support of their theory, and that evidence must carry the day on summary judgment. The Court finds that a reasonable jury could conclude that the EPD Defendants and the KSP Defendants had an agreement to build a case against Plaintiffs in the death of their uncle by coercing their confessions and fabricating evidence, and that none of them intervened to stop. At this stage of the proceedings, Defendants' request for summary judgment on the failure to intervene and civil conspiracy claims must be denied.

5) *Monell* Claim against City of Evansville Based on Interrogations

Plaintiffs assert a *Monell* claim against the City, but they clarify in their response brief that the *Monell* claim is based on their theory that the "City of Evansville may be directly liable under § 1983 for constitutional violations caused by the 'failure to supervise' the interrogation practices of Evansville police officers." [Filing No. 267

at 54.] They contend that a jury must decide the *Monell* claim "[b]ecause no coherent system of supervision exists to ensure that EPD detectives do not use coercion to elicit false confessions, [and] Detective Vantlin was able to elicit a false confession from Plaintiffs, causing constitutional injuries." [Filing No. 267 at 55.] The City disagrees, contending that Plaintiffs fail to present any evidence of a widespread practice and emphasizing that Plaintiffs "do not have any evidence of any other individuals who suffered a constitutional injury as the result of the City's alleged failure to supervise interrogations." [Filing No. 278 at 24.]

Municipalities are susceptible to liability under § 1983, but they cannot be held liable under a theory of *respondeat superior*. *Palmer v. Marion Cty.*, 327 F.3d 588, 594 (7th Cir. 2003) (citing *Monell v. Dept. of Soc. Servs. of the City of New York*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). The "critical question" under *Monell* is whether a municipal policy or custom caused the harm or if, instead, the harm resulted from acts of the entity's agents. *Glisson v. Indiana Dep't of Corr.*, 849 F.3d 372, 2017 WL 680350, at *5 (7th Cir. 2017) (en banc). "'A person who wants to impose liability on a municipality for a constitutional tort must show that the tort was committed (that is, authorized or directed) at the policymaking level of government.'" *Id.* (quoting *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011)). "Either the content of an official policy, a decision by a final decisionmaker, or evidence of custom will suffice." *Glisson*, 849 F.3d 372, 2017 WL 680350, at *5.

Appendix B

To establish liability based on the City's alleged failure to supervise its interrogating officers, a plaintiff must show "deliberate indifference" on the part of the City. *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010). "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011) (citation omitted). When City policymakers are on actual or constructive notice that their persistent failure to supervise subordinates will cause constitutional violations, the City may be deemed deliberately indifferent to the consequences of its inaction. *Id.*

"*Monell* claims based on allegations of an unconstitutional municipal practice or custom—as distinct from an official policy—normally require evidence that the identified practice or custom caused multiple injuries." *Chatham v. Davis*, 839 F.3d 679, 685 (7th Cir. 2016) (citing *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010) ("[T]here is no clear consensus as to how frequently [an injury] must occur to impose *Monell* liability, except that it must be more than one ... or even three [times]."); *Calhoun v. Ramsey*, 408 F.3d 375, 380 (7th Cir. 2005) (stating that a custom or practice claim "requires more evidence than a single incident to establish liability")).

The City correctly points out that Plaintiffs do not designate any evidence that the City authorized its officers to conduct coercive interrogations through policy or custom. *See Bloodworth v. Vill. of Greendale*, 475 F. App'x

92, 95 (7th Cir. 2012) (granting summary judgment in favor of municipal entities after noting that plaintiff "presented no evidence showing that either the Village or the County had authorized their employees, through official policy or custom, to . . . conduct custodial interrogations"). In fact, EPD Chief Bolin testified that if Plaintiffs' allegations regarding EPD Detective Vantlin's interrogation tactics are true, Detective Vantlin violated EPD policy that "states unequivocally that no form of coercion or promise of reward will be used to obtain a confession or admission of guilt." [Filing No. 261-25 at 6-9.] Plaintiffs also have not designated any evidence of other allegedly coercive interrogations conducted by EPD Detective Vantlin or other City officers. Accordingly, Plaintiffs do not present any evidence that City policymakers were on actual or constructive notice that their persistent failure to supervise subordinates would cause constitutional violations, such that there was deliberate indifference. For these reasons, the Court concludes that the City is entitled to summary judgment on Plaintiff's *Monell* claim as a matter of law.

E. Plaintiffs' State Law Claims against the EPD Defendants and the City

Plaintiffs assert state law claims for false arrest and false imprisonment against the EPD Defendants and the City. [Filing No. 120; Filing No. 225.] They also assert state law claims for indemnification and *respondeat superior* against the City. [Filing No. 120; Filing No. 225.] The EPD Defendants and the City move for summary judgment on all of these claims, arguing that various

Plaintiffs failed to provide timely notice of their state law claims pursuant to the Indiana Tort Claims Act, that the EPD Defendants are not subject to individual liability, and that Plaintiffs' claims for *respondeat superior* and indemnification against the City fail as a matter of law. [Filing No. 258 at 46-49.] Plaintiffs do not respond to any of these arguments in their response brief. [Filing No. 267 (focusing exclusively on responding to the federal claims).] Any responsive argument is waived, and the Court agrees with the EPD Defendants and the City that they are entitled to summary judgment in their favor on Plaintiffs' state law claims.

F. Plaintiffs' State Law Claims against the KSP Defendants[14]

Plaintiffs assert state law claims for false arrest, malicious prosecution, intentional infliction of emotional distress, and defamation against the KSP Defendants. [Filing No. 120; Filing No. 225.] The KSP Defendants move for summary judgment on these claims, arguing that qualified immunity under Kentucky state law applies and that, if it does not, Plaintiffs' state law claims fail for various reasons as a matter of law. [Filing No. 257 at 45-49.] In response, Plaintiffs do not address the Kentucky qualified immunity argument and only challenge the

14. The KSP Defendants raise the timeliness of Plaintiffs' tort claim notices for the first time in their reply brief on summary judgment. [Filing No. 273 at 18-19.] Arguments raised for the first time in a reply brief are waived, *Mendez v. Perla Dental*, 646 F.3d 420, 423-24 (7th Cir. 2011), and the Court will not address the timeliness issue further.

merits of the KSP Defendants' arguments with regard to the intentional infliction of emotional distress and defamation claims. [Filing No. 268 at 52.] Plaintiffs have waived any responsive arguments regarding qualified immunity under Kentucky state law, as well as any responsive arguments to the false arrest and malicious prosecution claims. While Plaintiffs do address the merits of their intentional infliction of emotional distress and defamation claims against the KSP Defendants, the Court finds their failure to address the Kentucky qualified immunity argument dispositive. The Court grants summary judgment in favor of the KSP Defendants on Plaintiffs' state law claims for false arrest, malicious prosecution, intentional infliction of emotional distress, and defamation.

IV.
Conclusion

For the reasons stated herein, the Court **GRANTS** Dr. Burrows-Beckham's Motion for Summary Judgment and enters summary judgment in her favor on all of Plaintiffs' claims against her. [Filing No. 255.]

The Court **GRANTS IN PART AND DENIES IN PART** the EPD Defendants' Motion for Summary Judgment. [Filing No. 254.] Specifically, the Court **GRANTS** the EPD Defendants' request for summary judgment in favor of Sergeant Larry Nelson because Plaintiffs do not oppose that request in their response brief. [*See* Filing No. 267 at 20.] It also **GRANTS** their request for summary judgment on the following

claims: Plaintiffs' § 1983 false arrest claim against EPD Detectives Arbaugh, Pagett, and Spencer; Plaintiffs' § 1983 due process and substantive due process claims against EPD Detectives Arbaugh, Pagett, and Spencer based on the allegedly coerced confessions; Andrea's § 1983 due process and substantive due process claims against EPD Detective Vantlin; Andrea's federal malicious prosecution claims based on allegedly fabricated evidence against the EPD Defendants; Plaintiffs' *Monell* claim against the City; and Plaintiffs' state law claims against the EPD Defendants and the City.

The Court will keep the EPD Defendants' request to strike the testimony of Plaintiffs' expert Steven A. Drizin pursuant to Federal Rule of Evidence 702 **UNDER ADVISEMENT**, [Filing No. 278 at 3-6], to be addressed in conjunction with the KSP Defendants' pending motion to exclude Mr. Drizin's testimony, [Filing No. 284].[15]

The Court **GRANTS IN PART AND DENIES IN PART** the KSP Defendants' Motion for Summary Judgment. [Filing No. 256.] The Court **GRANTS** summary judgment in favor of the KSP Defendants on Plaintiffs' federal malicious prosecution claim, as well as Plaintiffs' state law claims for false arrest, malicious prosecution, intentional infliction of emotional distress, and defamation.

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15. The Clerk may still terminate Filing No. 254 because the Court has ruled on the summary judgment request pending therein.

The Court **DENIES** the EPD and KSP Defendants' requests for summary judgment on the following claims, which will proceed to a jury trial scheduled to begin on **September 6, 2017**:

- William, Deadra, and Andrea's false arrest claims pursuant to § 1983 against EPD Detective Vantlin and KSP Detectives Wise and Jones;

- William and Deadra's Fifth Amendment due process claims and Fourteenth Amendment substantive due process claims against EPD Detective Vantlin and KSP Detectives Wise and Jones based on the allegedly coerced confessions;

- William and Deadra's federal malicious prosecution claims against EPD Detectives Vantlin, Pagett, Arbaugh, and Spencer based on allegedly fabricated evidence;

- Plaintiffs' failure to intervene claim pursuant to § 1983 against the EPD Defendants and the KSP Defendants; and

- Plaintiffs' conspiracy claim pursuant to § 1983 against the EPD Defendants and the KSP Defendants.

Although Plaintiff Debbie Hurt has not been dismissed from this case, it does not appear that Plaintiffs are pursuing any claims on her behalf, [Filing No. 120; Filing No. 225], and the parties do not reference any claims by

Debbie in the extensive summary judgment briefing. The Court **ORDERS** Plaintiffs to **SHOW CAUSE** by **March 31, 2017** why Debbie should not be terminated as a party to this litigation on the Court's docket.

No partial final judgment shall issue at this time.

Date: March 16, 2017

/s/ Jane Magnus-Stinson
Hon. Jane Magnus-Stinson,
Chief Judge
United States District Court
Southern District of Indiana

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Nos. 17-1771 & 17-1777

March 7, 2018

WILLIAM HURT, DEADRA HURT,
AND ANDREA HURT,

Plaintiffs-Appellees,

v.

MATTHEW WISE, *et al.*,

Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Indiana, Evansville Division.
No. 3:14-cv-00092-JMS-MPB
Jane E. Magnus-Stinson, *Chief Judge.*

Before

DIANE P. WOOD, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

Appendix C

ORDER

Defendants-appellants filed petitions for rehearing and rehearing *en banc* on February 6, 2018. No judge in regular active service has requested a vote on the petitions for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petitions for rehearing and rehearing *en banc* are therefore **DENIED.**