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

BEN BAKER and CLARISSA GLENN, Plaintiffs v. CITY OF CHICAGO, *et al.* Defendants.	)	Case No. 16-cv-8940 Judge Andrea R. Wood Magistrate Judge Sheila Finnegan JURY TRIAL DEMANDED

PLAINTIFFS' MOTION TO RECONSIDER DISMISSAL OF THEIR PRETRIAL DENTENTION CLAIMS IN COUNT II, OR, IN THE ALTERNATIVE, PERMIT PLAINTIFFS TO AMEND THEIR COMPLAINT

Now come Plaintiffs, Ben Baker and Clarissa Glenn, by and through their undersigned attorneys and pursuant to Federal Rule of Civil Procedure 54(b) and Federal Rule of Civil Procedure 15, move the Court to reconsider dismissal of their pretrial detention claims alleged in Count II of their First Amended Complaint or, in the alternative, seek leave to amend.

Introduction

On August 31, 2020, this Court denied Defendants' motion to dismiss on all counts save for Count II in Plaintiffs' First Amended Complaint. Count II in that Complaint was labeled a "federal malicious prosecution" claim and raised multiple legal bases for challenging Plaintiffs' unlawful seizure and detention, including malicious prosecution (as titled) and pretrial detention claims grounded in both the Fourth and Fourteenth Amendments. Dkt. 230, at 11; Dkt. 24 at 33-35. After Plaintiffs filed the Complaint and responded to Defendants' motion to dismiss, the law regarding pretrial detention claims changed. As this Court noted, the Seventh Circuit has

continued to hold that there is no federal malicious prosecution claim. Dkt. 230, at 11.[1] However, the law related to pretrial detention has continued to evolve, and, as recently as yesterday, the Seventh Circuit explained that the law has been "clarified" to show that plaintiffs may bring federal wrongful pretrial detention claims under the Fourth Amendment. *See Patrick v. City of Chicago*, No. 18-2759, slip op. at 18 (7th Cir. Sept. 8, 2020). Further, the Supreme Court recently considered a statute of limitations issue in a case challenging wrongful pretrial detention under the Fourteenth Amendment. *McDonough v. Smith*, 139 S. Ct. 2149 (2019).

Plaintiffs' allegations challenging their pretrial detention in Count II properly raise pretrial seizure and detention claims under both the Fourth and Fourteenth Amendments. On the basis of this new case law, Plaintiffs respectfully request that this Court reconsider its dismissal and reinstate the pretrial detention and seizure claims pled in Count II or, in the alternative, permit Plaintiffs to amend their complaint to properly label that claim. *See* Fed. R. Civ. Proc. 15(a)(2) ("The Court should freely give leave [to amend] when justice so requires.").

Background

In September 2016, Plaintiffs brought a nine-count complaint stemming from allegations that Defendant Officers planted drugs on Plaintiff Baker in March 2005 and then again on both Plaintiffs in December 2005. Dkt. 230, at 1. Count II of the October 13, 2016 First Amended Complaint alleged a "federal malicious prosecution" claim. *Id.* at 11; Dkt. 24 at 33-35. Within that count, Plaintiffs alleged multiple legal bases in support, including malicious prosecution (as

[1] Plaintiffs note that in *McDonough v. Smith*, the Supreme Court also left open the possibility that a federal malicious prosecution claim might exist. *See* 139 S. Ct. 2149, 2156, n.3 (2019) ("The Second Circuit borrowed the common-law elements of malicious prosecution to govern McDonough's distinct constitutional malicious prosecution claim, which is not before us. *See* 898 F. 3d, at 268, n. 10. This Court has not defined the elements of such a §1983 claim, *see Manuel v. Joliet*, 580 U. S. ___, ___–___ (2017) (slip op., at 14–15), and this case provides no occasion to opine on what the elements of a constitutional malicious prosecution action under §1983 are or how they may or may not differ from those of a fabricated-evidence claim.").

named) and that their pretrial detention violated both the Fourth and Fourteenth Amendments. *Id.* at ¶ 198 (explaining that the Defendants individually and in conspiracy with each other both initiated and continued to "perpetuate judicial proceedings against Plaintiffs without probable cause"); *Id.* at ¶ 199 ("Defendants caused Plaintiffs to be unreasonably seized without probable cause and deprived of his liberty, in violation of Plaintiffs' rights secured by the Fourth and Fourteenth Amendments").

On January 3, 2017, the Defendants moved to dismiss all claims. Dkt. 67. On February 2, 2017, Plaintiffs responded. Dkt. 78. As to the Fourth Amendment pretrial detention claim, Plaintiffs acknowledged *Manuel v. City of Joliet*, 590 F. App'x 641, 642 (7th Cir. 2015) (*Manuel I*), barred the claim at the time but noted that the U.S. Supreme Court had granted certiorari; Plaintiffs sought to preserve the claim in the event *Manuel I* was overruled. Dkt. 78 at 20.

On August 31, 2020, this Court denied the Defendants' Motion to Dismiss on all counts save for Count II. Dkt. 230. As to Count II, this Court held that "federal claims that sound in malicious prosecution" are barred where there is an adequate state law remedy. *Id.* at 11. Plaintiffs' instant Motion to Reconsider concerns only this Court's dismissal of Count II.

New Precedent Arises After the Parties Complete Briefing on the Motion to Dismiss

After both Plaintiffs' February 2017 submission to this Court and the Defendants' March 17, 2017 reply, Dkt. 89, the Supreme Court decided *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (decided March 21, 2017). The Supreme Court held that just like wrongful arrest claims pre-legal process, pretrial detention claims are grounded in the Fourth Amendment after the legal process has begun. *Id.* at 919. The Supreme Court remanded *Manuel* to the Seventh Circuit for consideration on statute of limitations issues related to accrual. *Id.* at 921-22. The parties in this case filed supplemental briefs addressing the Supreme Court's *Manuel* decision and addressing

district court decisions applying *Manuel* in other cases that are now part of the *In re Watts Coordinated Pretrial Proceedings*. *See* Dkt. Nos. 98, 99, 130, 136, 141.

On remand in *Manuel*, the Seventh Circuit explained that while a "federal malicious prosecution claim" is the wrong characterization, a Fourth Amendment claim for wrongful pretrial detention does exist. *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) (*Manuel II*). The Seventh Circuit in *Lewis v. City of Chicago*, 914 F.3d 472, 476-78 (7th Cir. 2019), later recognized the same. And yesterday, the Seventh Circuit explained that it has "recently clarified the contours of constitutional claims based on allegations of evidence fabrication," and that "pretrial detention [claim] based on fabricated evidence sounds in the Fourth Amendment right to be free from seizure without probable cause." *Patrick v. City of Chicago*, --- F.3d ----, 18-2759, 2020 WL 5362160, at *8 (7th Cir. Sept. 8, 2020).

Both *Manuel II* and *Lewis* also held that the Fourth Amendment pretrial detention claims do not accrue until the potential plaintiff is entitled to sue. *Manuel II* at 670; *Lewis* at 478.

Even more recently than *Manuel II* and *Lewis*, the Supreme Court has suggested that there likewise remains a Fourteenth Amendment due process pretrial detention claim (in addition to the Fourth Amendment claim based on the same factual predicate). In *McDonough*, 139 S. Ct. at 2155, the plaintiff alleged that he was arrested, deprived of his liberty, and prosecuted based on fabricated evidence in violation of the Fourteenth Amendment. The *McDonough* court considered the question of when the claim accrued but, in doing so, accepted the Second Circuit's assumption that the plaintiff's pretrial deprivation of liberty was governed by the Fourteenth Amendment due process clause while leaving open the possibility that other constitutional provisions—like the Fourth Amendment—might provide additional safeguards against fabricated evidence. *McDonough* at 2155 n. 2 ("In accepting the Court of Appeals'

treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what *other* constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. §1983 action.") (emphasis added). Earlier this year, Judge Feinerman, citing to *McDonough* and in recognition that the law on this issue remains fluid, refused to dismiss a Fourteenth Amendment pretrial detention claim on the pleadings where it shared the same factual predicate as the Fourth Amendment pretrial detention claim. *See Culp v. Flores*, No. 17 C 252, 2020 WL 1874075, at *3 (N.D. Ill. Apr. 15, 2020).

Legal Standard

A court has inherent authority to reconsider any order "that adjudicates fewer than all the claims . . . at any time before the entry of judgment adjudicating all the claims." Fed. R. Civ. P. 54; *see also Moses H. Cone Mem. Hosp. v Mercury Const. Corp.*, 460 U.S. 1, 12 (1983) ("[E]very order short of a final decree is subject to reopening at the discretion of the district judge"). A Rule 54(b) motion should be granted "where there has been a controlling or significant change in the law since the submission of the issue to the Court." *Canon v. Burge*, 897 F. Supp. 2d 714, 716 (N.D. Ill. 2012) (Kendall, J.). *See also Hill v. City of Chicago*, 19 C 6080, 2020 WL 4226672, at *1-2 (N.D. Ill. July 23, 2020) (granting Plaintiffs' motions reconsider and reinstating the pretrial detention claim after noting that "Seventh Circuit law governing Fourth Amendment pretrial detention claims has changed in recent years"). Moreover, the "Court freely grants leave to amend when justice so requires." *SFG, Inc. v. Musk*, 19-CV-02198, 2020 WL 1646632, at *1 (N.D. Ill. Feb. 4, 2020) (internal quotation marks omitted) (Wood, J.).

Argument

Since Plaintiffs filed their amended complaint and their response to the Defendants' motion to dismiss, the Seventh Circuit has held that there is no federal malicious prosecution

claim. *See Manuel II* at 670; Dkt. 230, at 11. The decisions in *Manuel II* and *Lewis*, however, make equally clear that Fourth Amendment pretrial detention claims do exist. *Manuel II* at 670; *Lewis* at 476-77. These claims are timely brought only when the plaintiff has the opportunity to sue. *Manuel II* at 670; *Lewis* at 478. *See also Okoro v. Callaghan,* 324 F.3d 488, 489 (7th Cir. 2003) (noting that *Heck v. Humphrey*, 512 U.S. 477 (1994), barred Plaintiff from suing under the Fourth Amendment because his conviction had never been invalidated); *Sanders v. St. Joseph Cty., Indiana*, No. 19-3066, 2020 WL 1531354 at *2, n. 2 (7th Cir. Mar. 31, 2020) (same). Plaintiffs only had the opportunity to sue in early 2016 after their convictions were overturned, and accordingly, the pretrial detention claim in the September 2016 complaint was timely filed.

As this Court recognized, Plaintiffs' allegations in Count II are grounded in part on the Fourth Amendment. Dkt. 230, at 11. Indeed, Plaintiffs' First Amended Complaint contends that their arrests and subsequent pretrial detention violated the Fourth Amendment and Fourteenth Amendment. *See* Dkt. 24, at ¶198 (Count II of First Amended Complaint alleging "Defendants … accused Plaintiffs of criminal activity and exerted influence to initiate, continue, and perpetuate judicial proceedings against Plaintiffs without any probable cause for doing so."); *Id.* at ¶199 (Count II alleging that "Defendants caused Plaintiffs to be unreasonably seized without probable cause and deprived of [] liberty, in violation of Plaintiffs' rights secured by the Fourth and Fourteenth Amendments").

Although Plaintiffs perhaps mislabeled Count II by identifying it as a federal malicious prosecution claim alone, it is the substance of the allegations, not the label, that controls. *Hurt v. Wise*, 880 F.3d 831, 843 (7th Cir. 2018), *overruled in part by Lewis v. City of Chicago*, 914 F.3d 472 (7th Cir. 2019) ("[I]n 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."). *See also Manuel I*, 590 Fed. Appx at 641-43 & *Manuel I*, 137 S.Ct. 911 (read together, allowing the Plaintiff's Fourth Amendment pretrial detention claim to go forward even where it was labeled incorrectly as a "federal malicious prosecution" claim).

To that end, Count II of Plaintiffs' First Amended Complaint is not foreclosed by *Newsome v. McCabe*, or the other case law highlighted by this Court that precludes "claims that sound in malicious prosecution" or have "an adequate state law remedy." Dkt. 230, at 11 (citing *Newsome v. McCabe*, 256 F.3d 747, 749 (7th Cir. 2001)). As this Court recognized, "the Supreme Court in *Manuel* partially abrogated *Newsome* in finding that the Fourth Amendment can support a claim for unlawful pretrial detention beyond the start of legal process." Dkt. 230, at 11. The Court then dismissed Plaintiffs' "federal malicious prosecution claims in Count II." *Id.* at 12. Because Count II of Plaintiffs' amended complaint properly alleges a Fourth Amendment pretrial detention or unlawful seizure claim as described in *Manuel*, *Lewis*, and other cases, Count II should proceed even if Plaintiffs cannot ultimately proceed on the "malicious prosecution" legal theory. *See, e.g.*, *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) ("A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief."); *see also KFC Corp. v. Iron Horse of Metairie Rd., LLC*, 18 C 5294, 2020 WL 3892989, at *3 (N.D. Ill. July 10, 2020) ("As long as the plaintiff can, in response to a motion to dismiss, identify some plausible theory that would entitle it to relief on its claim, that claim may move forward and a motion to dismiss other legal theories must be denied."). Alternatively, Plaintiffs request leave to amend their complaint to allege a pretrial detention claim pursuant to Federal Rule of Civil Procedure 15.

In addition, the Fourteenth Amendment pretrial detention legal theory provides another basis for the Court to reinstate Count II because the Supreme Court's decision in *McDonough* suggests that a pretrial detention claim may rest on both the Fourth and Fourteenth Amendments. *McDonough* at 2155 n. 2 ("In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what *other* constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. §1983 action.") (italics added). This Court should follow the procedure adopted by Judge Feinerman in *Culp* and refuse to dismiss this claim on the pleadings. *See* 2020 WL 1874075, at *3 (because Seventh Circuit case law did not conclusively answer whether plaintiff had a viable Fourteenth Amendment pretrial detention claim and because discovery on the Fourth and Fourteenth Amendment claims would be coextensive, the Court declined to dismiss the Fourteenth Amendment pretrial detention claim on the pleadings).

For purposes of clarity, Plaintiffs highlight two final points. *First*, Plaintiffs recognize that prior to *McDonough*, the Seventh Circuit ruled that there was no Fourteenth Amendment pretrial detention claim in *Lewis*, 914 F.3d at 479, which is the same *Lewis* decision that Plaintiff relies upon in support of his pretrial detention claim grounded in the Fourth Amendment. Plaintiffs simply note that their position on *Lewis* is as follows: *Lewis* correctly applies *Manuel II* in addressing the Fourth Amendment pre-trial detention claim. However, the Supreme Court's subsequent decision in *McDonough* calls into question the holding in *Lewis* that there is no Fourteenth Amendment pre-trial detention claim, and the safest course of action is to decline to dismiss the claim on the pleadings at this time, as Judge Feinerman proceeded in *Culp*. That result is particularly appropriate here given that Plaintiffs have also properly alleged an independent legal basis for that claim under the Fourth Amendment, and any issues regarding the

exact contours of the legal basis for the claim can be addressed later (for example, when determining the appropriate jury instructions). *See, e.g., KFC Corp. v. Iron Horse of Metairie Rd., LLC*, 18 C 5294, 2020 WL 3892989, at *3 (denying motion to dismiss when party sought dismissal of certain legal theories underpinning claim).

Second, Plaintiffs note that their Fourteenth Amendment due process fabrication of evidence and *Brady v. Maryland* claims in Count I, which this Court correctly refused to dismiss, Dkt. 230, at 5-10, are distinct from the Fourteenth Amendment pretrial detention claims highlighted in this Motion. The Count I claims stem from Plaintiffs' wrongful *convictions*, not their wrongful *detentions*. *See Lewis*, 914 F.3d at 479-80 (quoting *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017) (highlighting this precise distinction and explaining that "'*convictions* premised on deliberatively fabricated evidence'" or on violations of *Brady* "'will always violate the defendant's right to due process'") (other citations excluded). Plaintiffs' request to reinstate Count II—based on the argument that both the Fourth Amendment and Fourteenth Amendment provide a legal basis for their pretrial detention claims—should have no bearing on this Court's correctly decided ruling pertaining to Plaintiffs' Fourteenth Amendment wrongful conviction claims in Count I.

WHEREFORE, for the reasons stated herein, Plaintiffs respectfully request that this Court reconsider its dismissal of Count II and either reinstate that claim or allow Plaintiffs to amend their complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Joshua Tepfer, an attorney, certify that on September 10, 2020, I filed a copy of the foregoing motion via the Court's electronic filing system and thereby served a copy on all counsel of record.

/s/ Joshua A. Tepfer