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

DANIEL TAYLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No.: 14 cv 737**
	)	
CITY OF CHICAGO, ANTHONY VILLARDITA #20849., THOMAS JOHNSON #20820. BRIAN KILLACKY#20748, TERRY O'CONNOR #20831, RICK ABREU #20796, ROBERT DELANEY #20383, SEAN GLINSKI #3122, MICHAEL BERTI #12881, AND UNIDENTIFIED EMPLOYEES OF THE CITY OF CHICAGO,	)	**Judge John Z. Lee**
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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NOW COME defendants, ANTHONY VILLARDITA, THOMAS JOHNSON, BRIAN KILLACKY, TERRY O'CONNER, RICK ABREU, ROBERT DELANEY, SEAN GLINSKI and MICHAEL BERTI (collectively "defendant officers"), by and through their attorneys, Steven B. Borkan, Timothy P. Scahill and Misha Itchhaporia of BORKAN & SCAHILL, LTD., submit this Memorandum of Law in support of their Motion for Summary Judgment. In support thereof, Defendant Officers state as follows:

SUMMARY OF MATERIAL FACTS

On November 16, 1992, at approximately 8:43 p.m., Jeffrey Lassiter ("Lassiter") and Sharon Haugabook ("Haugabook") were shot multiple times inside Lassiter's apartment at 910 W. Agatite Street

in Chicago, Illinois. SMF at ¶ 10[1]. They both died. *Id.* In the days and weeks that followed, the Chicago Police Department ("CPD") conducted an investigation into the Lassiter/Haugabook murders. *Id.* at ¶¶ 12, 15. The police learned that a witness, Faye McCoy ("McCoy"), who lived in the same apartment building as Lassiter, and had seen four men leaving the courtyard of the building shortly after the shooting. *Id.* at ¶ 13.

On December 2, 1992, Lewis Gardner was arrested for possession of drugs. *Id.* at ¶ 16. Two of his friends, Akia Phillips and Paul Phillips, were also arrested at the same time. *Id.* Gardner provided a court reported statement confessing to his involvement in the Lassiter/Haugabook murders to Cook County Assistant State's Attorney Martin Fogarty ("ASA Fogarty") wherein he implicated Plaintiff and Plaintiff's co-defendants. *Id.* at ¶ 17. Thereafter, Akia Phillips also gave a court reported statement confessing to his involvement in the Lassiter/Haugabook murders and implicating others. *Id.* at ¶ 18.

Subsequently, Plaintiff along with seven other individuals, Lewis Gardner, Deon Patrick, Paul Phillips, Joseph Brown, Rodney Matthews, and Dennis Mixon were arrested. *Id.* at ¶ 2. They too provided statements implicating themselves and others in the Lassiter/Haugabook murders. *Id.* at ¶ 21. Plaintiff and his co-defendants were charged for these murders. *Id.* at ¶ 2.

After some point when Plaintiff was in custody, Plaintiff told Detectives Anthony Villardita ("Villardita") and Thomas Johnson ("Johnson") that he was "locked up that night." *Id.* at ¶ 25. Finding this statement odd, Villardita and Johnson examined Plaintiff's criminal history report, but did not see a November 16, 1992 arrest. *Id.* at ¶ 26. Out of an abundance of caution, Villardita also asked 23rd District Chicago Police Officer Steve Caluris ("Officer Caluris") to manually look at the arrest reports at the station to see if their were any arrest reports for Plaintiff from November 16, 1992. *Id.* at ¶ 27.

[1] Citations to Defendants' Statement of Material Facts shall be cited as "SMF at ¶ ____." Citations to exhibits herein shall be those in Defendants' Addendum of Exhibits.

On December 3, 1992, McCoy came to the detective area to view a lineup that contained Plaintiff, some of his co-defendants and others. Detectives Terry O'Connor ("O'Connor) and Villardita were with McCoy when she viewed the lineup while Detectives Robert Delaney and Brian Killacky ("Delaney" and "Killacky") were inside the room with the lineup participants. *Id.* at ¶¶ 22-23. Immediately following the lineup, Villardit and O'Connor relayed to Delaney and Killacky what McCoy had said when she saw the lineup. *Id.* at ¶ 24. Subsequently Delaney and Killacky wrote a supplementary report in which they relayed that when McCoy viewed the lineup she stated that she knew Plaintiff and his co-defendants, but did not know their names and that she had seen them in the area of 910 W. Agatite ("lineup supplementary report") *Id.* .

On December 6, 1992, Officer Caluris informed Villardita that he had located a disorderly conduct arrest report for a Daniel Taylor from November 16, 1992, which appeared to indicate that this individual was arrested at 6:45 p.m. and released on bond at 10:00 p.m. *Id.* at ¶ 28. Villardita and Johnson went to the 23rd District and located a copy of the arrest report and bond slip. *Id.* at ¶ 29. They looked for Plaintiff's fingerprints and mugshot from the arrest, but it turned out that Plaintiff had not been fingerprinted or photographed. *Id.* at ¶ 33. They also looked at the 23rd District personnel roster, which listed the names and assignment of the personnel that worked at the 23rd District on November 16, 1992. *Id.* at ¶ 34.

The next day Villardita and Johnson informed Cook County Assistant State's Attorney David Styler ("ASA Styler") and his supervisor, Garritt Howard, of the conflict between Plaintiff's confession and his November 16, 1992 arrest report and bond slip ("lockup issue"). *Id.* at ¶ 36. ASA Styler decided to interview the 23rd District personnel that worked in the 23rd District on the night in question. *Id.* at ¶ 37. It was further decided that Villardita and Johnson would continue the investigation by trying to find people who had seen Plaintiff and his co-defendants immediately prior to the murders. *Id.* at ¶ 38.

From Plaintiff's November 16, 1992 arrest report and bond slip, Villardita and Johnson drafted a timeline of Plaintiff's whereabouts on November 16, 1992 in a General Progress Report ("Villardita/Johnson timeline GPR"). *Id.* at ¶ 39. Johnson submitted the report to his supervisor for approval. *Id.*

Thereafter, Villardita and Johnson requested that Detectives Robert Elmore ("Elmore") and James Gildea ("Gildea") obtain the arrest reports and bond slips for the other individuals who were in custody at the 23rd District lockup on November 16 1992 and a copy of the lockup roster, which identified all the people in custody that night. *Id.* at ¶ 40. On December 7, 1992, Elmore and Gildea collected the requested documents and provided them to Villardita and Johnson. *Id.* They also attempted to look for a man named James Anderson, who according to police records, had shared a cell with Plaintiff at the 23rd District on the night of the murders and documented their efforts in a General Progress Report ("GPR"). *Id.* at ¶¶ 40-41.

Sometime between December 6 and 8, 1992, Johnson saw the lockup roster. *Id.* at ¶ 42. Around the same time, Villardita and Johnson put together a package of documents for ASA Howard because he had requested the arrest reports of the people that were in custody on the night of the murders. *Id.* at ¶ 43. They attached the package to a GPR. *Id.*. They lockup roster was also provided to the Cook County State's Attorney's Office ("CCSAO"). *Id.* at ¶ 42.

On December 18, 1992, ASA Styler sent grand jury subpoenas to personnel that worked at the 23rd District on the night of the murder. He identified the personnel that he wanted to interview from reviewing Plaintiff's arrest report and the personnel roster. *Id.* at ¶ 44. On December 22 and 23, 1992, ASA Styler interviewed various officers from the 23rd District and took notes during his interviews. *Id.* at ¶ 45. In his notes, he identified the individuals that were on duty and their respective assignments on the night of the murders. *Id.* at ¶ 46. ASA Styler was also aware that Anderson was arrested on

November 16, 1992, that Anderson may have shared a cell with Plaintiff at the 23rd District lockup and that Anderson collected his mail from a particular Salvation Army location. *Id.* at ¶¶ 47-48. He wrote in his notes that the Salvation Army needed to be informed to contact the CCSAO if Anderson picked up his mail and that he needed to get Anderson's arrest report. *Id.* at ¶ 48.

While investigating the lockup issue, Villardita and Johnson interviewed a individual by the name of Adrian Grimes ("Grimes") and documented in a police report that Grimes had seen Plaintiff at a park on the night of the murder at a time when police records indicated that Plaintiff was in custody.*Id.* at ¶ 50. Elmore and Gildea interviewed an individual called Michael Seymore ("Seymore") who relayed that he had seen Plaintiff on the street shortly after the murders. *Id.* at ¶ 51. Villardita and Johnson also followed up on a statement in Plaintiff's court reported confession where he had relayed that on the night of the murders he had gone with the police, at their request, to show them where his friend, Akia Phillips, was located. *Id.* at ¶ 53. Villardita and Johnson found the officers that interacted with Plaintiff that night. *Id.* Thereafter, the officers, Michael Berti ("Berti") and Sean Glinski ("Glinski"), who had seen Plaintiff on the night of the murders, drafted a supplementary report on December 14, 1992 about their interaction with Plaintiff ("Berti and Glinski Supplementary Report"). *Id.* at ¶¶ 53-54

The police also continued to look for Anderson. *Id.* at ¶ 55. On December 29, 1992, Sergeant Fred Bonke ("Sgt. Bonke") wrote a GPR instructing detectives to look for Anderson and he provided some locations where Anderson could be located. *Id.* On December 31, 1992, Detective John Fitzsimmons ("Fitzsimmons") wrote in a GPR that "in regards to the G.P.R. 30 December 1992 from Villardita and Johnson" he had gone to the Salvation Army to find Anderson, but had not been able to find him. *Id.* at ¶ 56. Fitzsimmons' reference to a December 30, 1992 GPR in his report was a mistake because he had actually been referring to the GPR from which he got the assignment, which was Sgt. Bonke's December 29, 1992 GPR. *Id.* at ¶ 56.

Cook County Assistant State's Attorney Thomas Needham ("ASA Needham") was assigned to prosecute the charges against Plaintiff and his co-defendants. *Id.* at ¶ 57. Upon his assignment, ASA Needham was immediately made aware of the conflict between Plaintiff's court reported confession and November 16, 1992 arrest report and bond slip. *Id.* at ¶¶ 57-58. Cook County Assistant State's Attorney Jeanne Bischoff ("ASA Bischoff") was also assigned to prosecute Plaintiff and his co-defendants and like ASA Needham she was immediately made aware of the lockup issue. *Id.* at ¶¶ 67-68

ASA Needham's participated in discovery on behalf of the State, which involved turning over exculpatory material to the defense. *Id.* at ¶ 60. He believed he had all the GPRs that related to the Lassiter/Haugabook investigation *Id.* at ¶ 64. In fact, both ASA Needham and ASA Bischoff recalled seeing the Villardita/Johnson timeline GPR before Plaintiff's criminal trial. *Id.* at ¶ 68. ASA Needham was aware that Anderson may have shared a cell with Taylor on the night of the murders and he had GPRs that documented the detectives' efforts to locate Anderson. *Id.* at ¶ 65.

In March 1993, experienced criminal defense attorney, Nathan Diamond Falk ("Diamond Falk") was appointed to represent Plaintiff during his criminal proceedings. *Id.* at ¶ 70. Diamond Falk knew the attorneys that were representing Plaintiff's co-defendants and he could have asked them if their clients were claiming that they had been coerced. *Id.* at ¶¶ 71-72. He became aware early on in his representation of Plaintiff of the lockup issue and he was provided, along with other documents, Plaintiff's November 16, 1992 arrest report and bond slip, the lineup supplementary report and the Berti and Glinski supplementary report. *Id.* at ¶¶ 78, 92-93, Although Diamond Falk was aware that CPD retained records identifying the people in its custody, he did not believe it was necessary to obtain such documents because he believed the bond slip and arrest report was sufficient to support Plaintiff's alibi defense. *Id.* at ¶¶ 76-77. For the same reasons, Diamond Falk did not think it was necessary to identify the person in the cell with Plaintiff on November 16, 1992. *Id.* at ¶ 95. He also decided not to interview

Grimes, McCoy or Seymore even though he knew they were listed on the prosecution's witness list. *Id.* at ¶¶ 69, 80

At Plaintiff's criminal trial, Plaintiff presented an alibi defense and he called a lockup keeper from the 23rd District to testify in his defense. *Id.* at ¶ 100, 102. McCoy testified at his trial that when she viewed the lineup, she told the police that Plaintiff was not one of the men she had seen leaving Lassiter's building after the shooting. *Id.* at ¶ 108. On September 7, 1995, a jury found Plaintiff guilty of murdering Lassiter and Haugabook, home invasion and armed robbery. *Id* at ¶ 110. On June 28, 2013, his conviction was vacated and he was released from custody. *Id.*

In 2014 Plaintiff filed this civil lawsuit and alleged in his complaint that Berti and Glinski provided a false report fabricating an encounter with him on the night of the murder in order to cast doubt on his lockup alibi. *Id.* at ¶ 111. During discovery in this case, Plaintiff provided sworn statements and testimony that the encounter with Berti and Glinski did not occur. *Id.* at ¶¶ 113-115. However, in March 2017, Plaintiff testified that the encounter with these officers did in fact occur and he admitted to intentionally lying about it during discovery. *Id.* at ¶¶ 116-118. On October 3, 2018, more than four years after he filed his lawsuit, Plaintiff alleged for the first time that Berti and Glinski fabricated the timing of their encounter with him and included the false time in their supplementary report. *Id.* at ¶ 121.

Plaintiff's First Amended Complaint sets forth eleven counts, eight of which appear to be directed to the Defendants Officers: (1) "42 U.S.C. §1983 - Fifth and Fourteenth Amendments" (Count I); (2) "42 U.S.C. § 1983 – Violation of Due Process" (Count II); (3) "42 U.S.C. § 1983 - Fourth Amendment (Count III); (4) "42 U.S.C. § 1983 – Failure to Intervene" (Count IV); (5) "42 U.S.C. § 1983 - Conspiracy to Deprive Constitutional Rights" (Count V); (6) State Law Claim – Malicious Prosecution" (Count VII); (7) "State Law Claim – Intentional Infliction of Emotional Distress" (Count

VIII); (8) "State Law Claim – Civil Conspiracy" (Count IX)[2]. For the reasons set forth below, Defendant Officers move for summary judgment on all of Plaintiff's claims pursuant to the Court's inherent authority under *Chambers v. NASCO, Inc.*, 501 U.S. 32, 48-49 (1991) and further move for summary judgment on Plaintiff's Due Process claim in Count II.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). To determine whether there is a genuine issue of material fact, courts construe the factual record in the light most favorable to the non-movant and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). If it is clear, that a plaintiff will be unable to satisfy the legal requirements necessary to establish his or her case, summary judgment is not only proper, but mandated. *See Celotex*, 477 U.S. at 322; *Padula v Leimback*, 656 F. 3d 595, 600-501 (7th Cir. 2011).

I. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON ALL OF PLAINTIFF'S CLAIMS BASED UPON PLAINTIFF'S PERJURY AND SEVERE DISCOVERY VIOLATIONS.

As this Court is aware, Plaintiff has pursued this case for years against Defendants on a key factual theory that has been revealed to be an intentional fraud perpetrated by Plaintiff. SMF at ¶¶ 112-116. Specifically, Plaintiff had alleged that Berti and Glinski fabricated an encounter between themselves and Plaintiff on the night of the murders to cast doubt on the validity of Plaintiff's lockup alibi and then

[2] On February 9, 2015, this Court dismissed Counts II (Brady claim), III (failure to intervene) and IV (§ 1983 conspiracy of Plaintiff's Complaint to the extent that these counts were based on alleged due process violations resulting from the Defendants' alleged coercion of Plaintiff's co-defendants and Grimes. Dckt. 163. The Court also dismissed Plaintiff's state law claim for intentional infliction of emotional distress. *Id*.

memorialized this false encounter in a fraudulent police report. *Id.* at ¶ 111. To bolster this theory, Plaintiff lied about this encounter during written discovery in this case and at his September 2014 deposition. *Id.* at ¶ 113-115. However, in March 2017, when Plaintiff testified as a key witness in a parallel civil trial involving his co-defendant, Deon Patrick and the same Defendants in this case, Plaintiff testified that *he did* interact with Berti and Glinski on the night of the murders and that he went with these officers to show them where his co-defendant Akia Phillips was located. *Id.* at ¶ 116.

When confronted with his deposition testimony, Plaintiff first admitted that he intentionally lied about this encounter because he did not remember it, but when pressed further, he testified that he lied because he was ashamed for "snitching" on his friend. *Id.* at ¶ 117. Indeed, Plaintiff admitted during cross examination that his deposition testimony denying that he had such an encounter with these officers was an intentional lie and that he had been motivated to lie because he placed his loyalty to his street gang over his sworn oath to tell the truth. *Id.* at ¶ 118. Plaintiff changed his story yet again in May 2018 when he testified he had never forgotten about his interaction with Berti and Glinski and that he was motivated to intentionally lie at his September 2014 deposition because he was in fear. *Id.* at ¶ 119-120. Plaintiff's repeated perjury, disregard for the rules of this Court, and gamesmanship in a lawsuit with serious allegations should not be tolerated; therefore, this Court should dismiss Plaintiff's claims with prejudice.

Rather than rehashing their arguments, Defendants incorporate by reference and adopt Defendants' Combined Motion for Sanctions and to Dismiss (Dckt. No. 358)**,** Defendants' Supplemental Brief in Support of Combined Motion for Sanctions and to Dismiss (Dckt. No. 431) and Defendants' Combined Response to Plaintiff's Filings in Dckt. Nos. 432, 433, and 440 relating to Defendants' Motion for Sanctions and to Dismiss (Dckt. No. 447). Accordingly, pursuant to the inherent powers of this Court under *Chambers v. NASCO, Inc.*, 111 S. Ct. 2121 (1991) and Fed. R. Civ.

P. 37(c) and 56, this Court should enter judgment against Plaintiff on all claims.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S DUE PROCESS CLAIM IN COUNT II.

In Plaintiff's Fourteenth Amendment Due Process claim, Plaintiff contends that the Defendant Officers violated his due process rights by: 1) fabricating false evidence and other evidence; and 2) deliberately withholding exculpatory evidence ("*Brady* claim."). Taking each claim in turn, Defendants establish that Plaintiff's due process claim cannot survive summary judgment.

A. Defendants are entitled to summary judgment on Plaintiff's *Brady* Claim.

Plaintiff claims the Defendant Officers failed to disclose the following exculpatory evidence:

- the officers' alleged misconduct in coercing several of his co-defendants into making false statements implicating him in the murders (Ex. 2 at ¶¶ 26-27, Ex. 39 at 7, 10-11; Ex. 40 at 10-12);
- the defendant officers' alleged attempt to coerce McCoy into falsely identifying Plaintiff from a lineup and then failing to inform the prosecutors that they allegedly prepared a false and misleading report about the lineup concealing the fact that McCoy denied seeing Plaintiff or his co-defendants leaving the murder scene (Ex. 2 at ¶ 35, Ex. 39 at 7, 10-11);
- the defendant officers' alleged coercion of Adrian Grimes by use of threats and offers of leniency with respect to unrelated charges and that he was enticed into giving perjured testimony at the grand jury and at Plaintiff's criminal trial (Ex. 2 at ¶ 34, Ex. 39 at 7, 13; Ex. 40 at 12-13);
- the identity of James Anderson (Ex. 2 at ¶ 36);
- an interview of James Anderson, who allegedly corroborated that Taylor was in police custody at the time of the murders and the officers' notes of this alleged interview (Ex. 2 at ¶ 36, Ex. 39 at 7, 10-11; Ex. 40 at 11-12);
- the defendant officers' alleged perjured testimony during Plaintiff's hearing and trials for the homicides (Ex. 39 at 7-8, 10-11)[3] ;
- the allegedly fabricated Berti and Glinski supplementary report that placed Plaintiff near the scene of the murders when he had not yet been released from the lockup (Ex. 2 at ¶ 33; Ex. 39 at 6-7, 10-11; Ex. 40);

[3] It is well established that Plaintiff cannot maintain a due process claim based on the officers' alleged perjured testimony as they would be entitled to absolutely immunity. See *Briscoe v. Lahue*, 460 U.S. 325, 326 (1983).

- documents allegedly contained in the "street file" which were not in the investigative file (Ex. 2 at ¶ 48; Ex. 40 at 10-13);
- documents contained in the official "Records Division file" pertaining to the Lassiter-Haugabook homicide (Ex. 40 at 10-13);
- the alleged coercion of Michael Seymore (Ex. 40 at 11-13);
- GPRs, other handwritten notes and original handwritten notes that the detectives used to prepare their GPRs, including a December 30, 1992, GPR. (Ex. 40 at 11-13);
- information regarding the deficiencies associated with the investigation conducted by the Defendant Officers (Ex. 40 at 11-13);
- James Anderson's arrest report (Ex. 39 at 8, 10-11);
- the Villardita/Johnson timeline GPR that provided a timeline of Plaintiff's movement on November 16, 1992 (Ex. 39 at 8, 10-11);
- the lockup roster that showed the names of the arrestees who were in custody at the 23rd Chicago Police District lockup on November 16 and 17, 1992 (Ex. 39 at 8, 10-11);
- the personnel roster that identified the personnel scheduled to be on duty at the 23rd Chicago Police District during on November 16 and 17, 1992 (Ex. 39 at 8, 10-11).

To establish a *Brady* due process claim, Plaintiffs must show three elements: "(1) the evidence at issue is favorable to the accused because it is either exculpatory or impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) the evidence must have been material, meaning that there is reasonable probability that the result of the proceeding would have been different. *Carvajal v. Dominguez,* 542 F.3d 561, 566-567 (7th Cir. 2008).

The record in this case firmly establishes that Defendant Officers are entitled to summary judgment on Plaintiff's *Brady* claim in Count II because a); the allegedly withheld "*Brady* material" either did not exist in the first instance, or was known to the CCSAO and/or Plaintiff (or his trial attorneys), or could have been easily ascertained by either the CCSAO or Plaintiff's defense attorneys had they made the effort to do so; b) the evidence the Defendant Officers produced that was allegedly fabricated or otherwise secured by misconduct is an inappropriate recasting of Plaintiff's fabrication of evidence

and malicious prosecution claims as a *Brady* claim; and c) the allegedly withheld evidence was not material to Plaintiff's defense at trial.

i. The Allegedly Suppressed Evidence Did Not Exist Or Was Known To The CCSAO And Plaintiff's Criminal Defense Attorneys Or Was Easily Obtained Through Reasonable Diligence.

To establish a *Brady* violation claim against police officers, a plaintiff must prove that the exculpatory evidence was actually suppressed. Evidence is suppressed "if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of the evidence, and (2) the evidence *was not otherwise available* to the defendant through the exercise of reasonable diligence." *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007)(emphasis added).

A *Brady* claim cannot be based on information that could have been reasonably obtained from other sources. *See Harris*, 486 F.3d at 1015; *U.S. v. Kimoto*, 588 F.3d 464, 492 (7th Cir. 2009)(materials that could have been located could not form basis for *Brady* violation); *Ienco v. Angarone,* 429 F.3d 680, 683 (7th Cir. 2005)(no *Brady* claim based on suppression of law enforcement records that could have been located by defendant); *U.S. v. Gonzalez*, 319 F.3d 291, 297-98 (7th Cir. 2003)(failure to disclose existence of evidence that "could have...and should have" been located by defense attorney through exercise of reasonable diligence foreclosed *Brady* claim); *U.S. v. White*, 970 F.2d 328, 337 (7th Cir. 1992)("Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim."). In this regard, a defendant in a criminal case that goes to trial has the "responsibility to probe the witnesses and investigate their versions of the relevant events" and failure to discover the information held by such persons by failing to do this does not amount to a *Brady* violation. *Carvajal*, 542 F.3d at 567; *Holland v. City of Chicago*, 643 F.3d 248, 256 (7th Cir. 2011).

Under *Brady*, a police officer is obligated to turn over exculpatory or impeaching evidence to the prosecutor, who then has a duty to disclose that evidence to the defense. *Carvajal*, 542 F.3d at 566. The police can only be liable for a *Brady* violation if they conceal exculpatory evidence from the prosecution, thereby depriving the prosecution of the ability to disclose the information. *Id.* In other words, once a police officer furnishes exculpatory or impeaching evidence to the prosecutor, the police officer has discharged his duty and it remains the responsibility of the prosecutor to provide this evidence to the defense. *Beaman v. Freesmeyer*, 776 F.3d 500, 512 (7th Cir. 2015)*; Whitlock v. Brueggemann*, 682 F.3d 567, 583 (7th Cir. 2012).

1. McCoy's alleged exculpatory statement during the lineup.

Plaintiff claims that the Defendant Officers concealed McCoy's statement that Plaintiff was not one of the men she witnessed leaving the murder scene - a statement she allegedly made when she viewed the lineup. SMF at ¶¶ 33-37. It is undisputed that McCoy viewed a lineup on December 3, 1992 and that Plaintiff was provided with the lineup supplementary report. *Id.* at ¶¶33,77. Armed with this evidence, as well as the prosecution's disclosure of McCoy as a possible trial witness (and her contact information), Plaintiff's criminal defense attorneys, with little effort, could have contacted McCoy. *Id.* at ¶ 86. Because Plaintiff's trial attorneys could have interviewed McCoy regarding what she said during the lineup, her statement could have been obtained through the exercise of due diligence. See *Patrick v. City of Chicago*, 103 F.Supp.3d 907, 915–16 ("A criminal defendant may not be expected to ask an alibi witness for evidence unrelated to the alibi issue, but reasonable diligence certainly entails questioning available fact witnesses regarding what they saw."); *Holland*, 643 F.3d at 256 ("A defendant in a criminal case that actually goes to trial has the responsibility to probe the witnesses and investigate their versions of the relevant events."). Rather, Plaintiff's attorney, Diamond Falk, chose not to interview McCoy because he believed he knew what she was going to say. SMF at ¶ 76. Thus, there is no evidence that

McCoy's alleged exculpatory statement was suppressed.

Furthermore, McCoy testified at Plaintiff's criminal trial that she told the detectives during the lineup that "it was none of the fellows in the first lineup that came out of the courtway" on the night of the murder. SMF at ¶ 108. As such, because the allegedly exculpatory statement made by McCoy was actually disclosed during Plaintiff's trial, his *Brady* claim fails. Indeed, "delayed disclosure of evidence does not in and of itself constitute a *Brady* violation." *U. S. v. O'Hara*, 301 F.3d 563, 569 (7th Cir.2002). In the *O'Hara* case, for example, the evidence was discovered during trial, and the court nonetheless determined that the defendant "had sufficient time to make use of the material disclosed." *Id.* Moreover, under *Brady*, " 'disclosure even in mid-trial suffices if time remains for the defendant to make effective use of the exculpatory material.' " *U.S. v. Gray*, 648 F.3d 562, 567 (7th Cir.2011)(quoting *U.S. v. Higgins*, 75 F.3d 332, 335 (7th Cir.1996)).

2. James Anderson's identity, arrest report, alleged interview and interview notes.

Plaintiff contends that the Defendant Officers failed to disclose to the prosecutors the following evidence: 1) James Anderson's identity; 2) James Anderson's November 16, 1992 arrest report; 3) a supposed interview of James Anderson during which Anderson confirmed that Planitiff was in the lockup at the time of the murders; and 4) notes from the interview of James Anderson. Given the record in this, there is no evidence to support the contention that this evidence was suppressed.

First, Plaintiff, who knew he was asserting an alibi defense, possessed information about the people that were placed in the same cell as him during his time at the lockup. SMF at ¶¶ 97, 100. As such, Plaintiff cannot base his *Brady* claim on information that was known to him. See *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1045 (N.D.Ill. 2015)(finding that plaintiff's alibi evidence that included a red bag identified by the victim that had been robbed from defendant earlier that night and scratches on his body that had occurred during that robbery was known to plaintiff during his trial and therefore

not suppressed.); *Harris*, 486 F.3d at 1015 ("finding the fact that Harris had an alibi for the Mexico City Café shooting was otherwise available to him.").

Second, it is undisputed that Diamond Falk became aware of Plaintiff's lockup alibi shortly after he was appointed to represent Plaintiff and that he had Plaintiff's arrest report, including his exact cell location, and bond slip. SMF at ¶¶ 92-93. With the information available to him and through conversations with Plaintiff, Diamond Falk could have easily ascertained Anderson's identity with relative ease. To that end, Diamond Falk was aware that the Chicago Police Department kept records of people that were arrested and even issued a subpoena to obtain lockup records. SMF at ¶ 76. See *U.S. v. Rodriguez-Andrade*, 62 F.3d 948, 952 (7th Cir. 1995)(finding no *Brady* violation where the evidence is available to the defendant and his counsel through subpoena). Rubin, on the other hand, made no attempts whatsoever to ascertain the identity of Anderson even though she, like Diamond Falk, was aware that the Chicago Police Department maintained records identifying the people in its custody. SMF at ¶¶ 85-88 . Furthermore, Rubin did not even ask Plaintiff if there were other people in the same cell with him when in was in lockup let alone ask him to describe any of those people even though she assumed, based on her experience, that it was likely that there were multiple people in the lockup with Plaintiff. *Id.* With reasonable diligence, Rubin and Diamond Falk could have determined Anderson's identity; rather, they made a strategic decision not to determine the identity of Plaintiff's cell mate. *Id.* at ¶ 95. Indeed, Diamond Falk decided that it was not necessary to identify Plaintiff's cell mate because he believed that the evidence he had, i.e. Plaintiff's arrest report and bond slip, were sufficient to support Plaintiff's alibi defense at trial. *Id.* Furthermore, he was concerned that even if he were able to identify Plaintiff's cell mate there was a possibility that the cell mate would not be able to identify Plaintiff. *Id.*

As such, evidence of Anderson's identity was available to Plaintiff and his attorneys, but they

simply chose to pursue it; therefore, this evidence was not suppressed. See *U.S. v. Shields*, 789 F.3d 733, 747 (7th Cir. 2015); *Boss v. Pierce*, 263 F.3d 734, 741 (7th Cir. 2001)("in the typical reasonable diligence case, the question is whether defense counsel had access to the document containing the *Brady* material."). Two other courts in this District granted summary judgment for Defendants on Plaintiff's *Brady* claim based on allegations that Defendants withheld some of the same evidence at issue in this case because the criminal defense attorneys for those plaintiffs testified that they were aware of the Taylor lockup issue at the time of the plaintiffs' criminal trials. See *Patrick v. City of Chicago*, 103 F.Supp.3d 907, 915 (N.D.Ill. 2015); *Phillips v. City of Chicago*, 2018 WL 1309881, * 22 (N.D.Ill. 2018). Given Diamond Falk's and Rubin's awareness of the lockup issue, this Court, like the *Patrick* and *Phillips* courts should grant summary judgment in favor of Defendants on this claim.

Second, Villardita and Johnson provided the arrest reports and bond slips for the arrestees in custody on November 16 and 17, 1992 to the CCSAO (SMF at ¶¶ 40-43), which discharged their *Brady* obligations and triggered the prosecutor's disclosure obligation. Indeed, the record in this case demonstrates that the prosecution was aware of Anderson's identity and was in possession of GPRs that specifically referenced Anderson, and the police's attempts to find him. SMF at ¶¶ 47, 65. In fact, as early as December 1992, ASA Styler was aware that Anderson was arrested on November 16, 1992, that he shared a cell with Taylor and that an arrest report existed documenting Anderson's arrest. *Id.* at ¶ 67. Similarly, ASA Needham was also aware of Anderson's identity and that Anderson was possibly Plaintiff's cell mate. *Id.* at ¶ 47.

Third, as for the police's supposed interview of Anderson during which he allegedly corroborated Plaintiff's alibi defense, and notes of this interview, these allegations are based on nothing more than mere speculation and unsupported assertions. *U.S. v. Jumah*, 599 F.3d 799, 811 (7th Cir. 2010)("unsupported assertions that the Government has suppressed evidence are insufficient to make

out a *Brady* or *Giglio* violation"). Even if such an interview took place, it is undisputed that Plaintiff had available to him evidence of his alibi, including, but not limited to, his arrest report and bond slip. SMF at ¶ 77. As discussed above, Plaintiff cannot based his due process claim upon the suppression of cumulative evidence that merely tends to further support facts of which he already is generally aware. See *Sornberger* v. *City of Knoxville*, 434 F.3d 1006, 1029 (7th Cir. 2006)(no *Brady* violation based on defendant officer's failure to tell prosecution they coerced plaintiff's confession when plaintiff was aware of what occurred during her interrogation); *Pruitt v. McAdory*, 337 F.3d 921, 926-27 (7th Cir. 2003)(favorable evidence that is cumulative of available evidence not sufficient to establish materiality under *Brady*).

3. The allegedly withheld Villardita/Johnson timeline GPR, lockup roster and personnel roster.

With respect to Villardita/Johnson timeline GPR, it is undisputed that CCSAO was in possession of this report. SMF at ¶ 68. Indeed, both ASAs Needham and Bischoff testified that they reviewed this document prior to Plaintiff's criminal trial. *Id.* Moreover, as recognized by the *Phillips*' court, the information in the Villardita/Johnson timeline GPR is "largely cumulative" because it came from Plaintiff's arrest report and bond slip--documents in Plaintiff's possession--and did not independently verify the accuracy of Plaintiff's arrest report and bond slip. *Phillips*, 2018 WL 1309881, * 23.

Regarding the lockup roster, it is unequivocal that the Villardita and Johnson provided this document to the CCSAO. SMF at ¶¶ 42-43. Indeed, ASA Styler referenced a "log book" in his notes, which he believes referred to a police log book that documented the individuals who were in the lockup and the time they were in lockup. *Id.* at ¶ 49. At a minimum, CCSAO was aware of a CPD document that logged the times and identities of the people in the lockup. *Id.* As the CCSAO was in possession of the lockup roster, the Defendant Officers discharged their duty under *Brady* and cannot be liable for

the alleged non-disclosure of this document. Furthermore, as outlined above, with reasonable diligence, Plaintiff's attorneys could have determined the identities of the people allegedly in the lockup with Plaintiff, but chose not do so. In fact, at Plaintiff's trial, a defense witness, Officer Meindl, specifically referenced a lockup report that documented the number of people in lock up with Plaintiff on November 16, 1992, but Plaintiff's attorneys took no steps to obtain the document. *Id.* at ¶¶ 102-107. *Armstrong v. Daily*, 786 F.3d 529, 552 (7th Cir. 2015) (recognizing that *Brady* disclosure obligations can be met "in the time leading up to or even during trial."); *U.S. v. Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001)(explaining that "*Brady* does not require pretrial disclosure" and demands only that disclosure come with enough time for a defendant to make use of evidence). Not only did Plaintiff's attorneys fail to take any affirmative steps to obtain this document, Diamond Falk did not believe he needed it because he thought that the evidence he had was sufficient to prove Plaintiff's alibi. SMF. at ¶ 49.

The same holds true for the personnel roster because the undisputed evidence shows ASA Styler determined the names, star numbers and assignments of the officers and civilian aides that worked in the 23rd District lockup on November 16 and 17, 1992 from Plaintiff's arrest report, bond slip and log records of 23rd District personnel. *Id.* at ¶¶ 44-46. Likewise, Diamond Falk, who also had access to Plaintiff's arrest repot and bond slip, identified in a motion to set bail some of the personnel that were involved in processing Plaintiff at the 23rd District on the night of the murders. *Id.* at ¶ 83. Nothing prevented Diamond Falk from interviewing these individuals, and in fact, Rubin did interview Meindl prior to Plaintiff's trial. *Id.* at ¶ 102. They were clearly on notice that officers at the 23rd District may have information about Plaintiff's whereabouts on November 16, 1992 and they could have readily discovered the names of any other officers not explicitly referenced on Plaintiff's arrest report and bond slip simply by asking who else was working on the night in question. See *Phillips*, 2018 WL 1309881, * 23 (finding that the "names of the 23rd District personnel and of persons who were locked up there on

November 16 could have been obtained with reasonable diligence). Accordingly, Defendant Officers could not have "suppressed" this evidence within the meaning of *Brady*.

4. Documents allegedly contained in the "street file" which were not in the investigative file, documents contained in the official "Records Division file" pertaining to the Lassiter/Haugabook homicide, GPRs, other handwritten notes and original handwritten notes that the detectives used to prepare their GPRs, including a December 30, 1992, GPR.

Plaintiff makes broad sweeping allegations that the Defendant Officers withheld documents that were only contained in a "street file," GPRS, handwritten notes and original handwritten notes, but fails to identify any specific document with the exception of a December 30 1992 GPR. Plaintiff's mere speculation that these documents may have existed cannot be the basis of a B*rady* violation. See *Hill v. City of Chicago,* 2009 WL 174994, * 4 (N.D.Ill. 2009)(no *Brady* violation based on plaintiff's mere speculation that a report may have existed); *U.S. v. Roberts*, 534 F.3d 560, 572 (7th Cir. 2008)("defendant must provide some evidence other than mere speculation or conjecture that evidence was exculpatory and suppressed by the Government"); *U.S. v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996)("speculation is not enough to establish that Government has hidden evidence").

With respect to the alleged withholding of a GPR dated December 30, 1992, Plaintiff fails to establish that this report actually existed in the first instance and presumably relies on a mere reference to this report to prove that it exists, which is insufficient to survive summary judgment. See *U.S. v. Warren,* 454 F.3d 752, 759 (7th Cir. 2006)(finding no *Brady* violation because defendant was "unable to point to any specific evidence, exculpatory or otherwise, withheld by the government."); *U.S. v. Price*, 418 F.3d 771, 785 (7th Cir. 2005)(*Brady* violation did not occur where no document existed corroborating defendant's claim). Rather, the evidence shows that no such document ever existed. Fitzsimmons, the author of the report that made reference "to a GPR December 30, 1992 from Villardita and Johnson" testified that he was actually referring to a GPR dated December 29, 1992 from

Sgt. Bonke because Sgt. Bonke's GPR is the report from which he got his assignment to look for Anderson. SMF at ¶¶ 56-57. Indeed, the December 29, 1992 GPR of Sgt. Bonke instructed detectives to locate Anderson. *Id.* at ¶ 55. Because there is no proof of this document's existence, Defendant Officers' cannot be liable under *Brady*.

Even if these documents did exist, there is no evidence that these documents would be exculpatory or impeaching. See *Warren,* 454 F.3d at 759; see also *Carvajal*, 542, F.3d at 566. Without any evidence whatsoever of these reports and their contents, Plaintiff's *Brady* claim fails.

ii. Plaintiff's *Brady* Claim That is Premised On The Defendant Officers' Failure to Disclose Their Own Alleged Wrongdoing Fails To State a Viable *Brady* Claim.

Plaintiff contends that his due process rights were also violated when the Defendant Officers failed to disclose the following: 1) their alleged coercion of his co–defendants McCoy, Grimes and Seymore, 2) enticing Grimes to give perjured testimony at the grand jury and at Plaintiff's criminal trial; 3) their alleged fabrication of the lineup supplementary report and the Berti and Glinski Supplementary Report; 4) information regarding the deficiencies associated with the Lassiter/Haugabook investigation; and 5) their alleged perjury at Plaintiff's criminal proceedings. These allegations, which are devoid of any assertions that the Defendant Officers *suppressed then existing exculpatory evidence*, are nothing more than an impermissible recasting of Plaintiff's fabrication of evidence and malicious prosecution claims.

The Seventh Circuit has foreclosed an extension of *Brady* to encompass the theory that a police officer is "suppressing" evidence by failing to disclose his own alleged wrongdoing. *Saunders-El v. Rhode*,778 F.3d 556, 562 (7th Cir. 2015). Plaintiff "seeks to charge the Defendant Officers with a *Brady* violation for allegedly concealing their wrongdoing, not for failing to disclose an existing piece of evidence to the prosecution" but Seventh Circuit case law "makes clear that *Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution." *Id.* See also *Brooks v. City of Chicago*, 564 F.3d

830, 833 (7th Cir. 2009)(finding that plaintiff's allegations that criminal proceedings were instituted against him based on false evidence or *testimony* was, in essence, a claim for malicious prosecution rather than a due process claim."); *Myvett v. Heerdt,* 2015 WL 12745087, * 6 (N.D.Ill. 2015)(granting summary judgment on plaintiff's *Brady* violation where plaintiff failed to identify any evidence that was withheld from him, but instead claimed that defendants withheld that they fabricated witnesses' statement); *Alvarado v. Hudak,* 2015 WL 4978683, * 3 (N.D.Ill. 2015)(dismissing plaintiff's *Brady* claim that the officers failed to admit their misdeeds to the prosecution because a police officer's silence following his alleged fabrication of evidence does not result in a *Brady* violation).

Similarly, the Seventh Circuit has rejected *Brady* claims premised on false or "deceptive police report" because "police generally discharge their *Brady* duty by turning over exculpatory evidence to the prosecutor." *Beaman v. Freesmeyer*, 776 F.3d at 511-12; *Carvajal* , 542 F.3d at 567; *Harris*, 486 F.3d at 1016-17; *Boyd v City of Chicago*, 225 F.Supp.3d 708, 720-721 (N.D.Ill. 2016).

With respect to the above allegations, Plaintiff does not point to an "existing piece of evidence" that the Defendant Officers withheld; rather, he seeks to hold Defendant Officers responsible for suppressing their alleged misconduct, i.e. failing to disclose that they allegedly coerced witnesses and fabricated evidence. Such conduct claim cannot give rise to a *Brady* violation. See *Patrick*, 103 F.Supp. 3d at 915 (finding that "Plaintiff's objection to Defendants' conduct appears to be not so much that they suppressed evidence as that the evidence they ultimately produced was fabricated or otherwise secured by misconduct and is more appropriately characterized as a claim for malicious prosecution); *Phillips v. City of Chicago*, 2015 WL 5675529, * 5-6 (N.D.Ill. 2015)(finding that the officers' non-disclosure of their alleged treatment of Plaintiffs' co-defendants' and Adrian Grimes does not amount to a *Brady* violation). Consequently, Plaintiff's *Brady* claim that is premised on the Defendant Officers' non-disclosure of their alleged fabrication of evidence and coercion of witnesses fails to state a plausible *Brady* claim.

Alternatively, even if the above allegations were sufficient to support a *Brady* claim, the record shows that the alleged evidence was easily obtained through reasonable diligence and was not suppressed. With respect to the Defendant Officers' non disclosure of their alleged coercion of Plaintiff's co-defendants, Plaintiff himself spoke to some of his co-defendants (Deon Patrick and Rodney Matthews) about their respective interactions with police and their whereabouts on the night of the murder well before his criminal trial started. SMF at ¶ 98. Further, Diamond Falk could have easily asked the attorneys that represented Plaintiff's co-defendants if their respective clients were making allegations that their incriminating statements were coerced or he could have reviewed the court files of the criminal cases of Plaintiff's co-defendants to see if any such allegations were made. *Id.* at ¶ 72. In fact, Rubin reviewed transcripts from the hearings of motions to suppress filed by Plaintiff's co-defendants, and therefore, she knew or should have known that some of Plaintiff's co-defendants were claiming that they had been coerced. *Id.* at ¶ 84. Finally, Plaintiff's attorneys could have interviewed McCoy, Grimes and Seymore - witnesses that Plaintiff personally knew prior to November 16, 1992 - nothing prevented them from doing so. *Id.* at ¶¶ 19, 79, 80, 82.

iii. The Alleged Withheld Evidence Was Not Material to Plaintiff's Defense At His Criminal Trial.

Even if the allegedly suppressed evidence was not discoverable with the exercise of reasonable diligence, such evidence is not *Brady* material in the first place. An obligation to produce evidence is not triggered unless it is "material to either guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 85-86 (1963). Evidence is "material" under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Carvajal*, 542 F.3d at 567. With respect to materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Bielanski v. County of Kane*, 550 F.3d

632, 643-45 (7th Cir. 2008). Evidence that merely creates additional "credibility issues for the trier of fact to resolve" and "weaken[s] parts of the prosecution's case" is "not the type of evidence that would have precluded the charges entirely" and, thus, insufficient to establish a *Brady* claim. *Id.* Accordingly, the Seventh Circuit has explained that "police need not spontaneously reveal to prosecutors every tidbit that with the benefit of hindsight (and the context of other evidence) could be said to assist the defendant." *Newsome v. McCabe*, 260 F.3d 824, 825 (7th Cir. 2001).

The allegedly suppressed evidence was not material because Plaintiff had documents relating to his alibi (bond slip and arrest report) and none of the alleged suppressed documents independently corroborated that Plaintiff was in (or out of) lockup at the time of the murder. SMF at ¶ 93. In light of the fact that Plaintiff had a bond slip and arrest report that showed he was in custody at the time of the murder, Plaintiff's attorneys did not see a need to obtain any additional documents to verify Plaintiff's whereabouts on the night of the murder. As such, these allegedly suppressed documents were not material.

B. Plaintiff's Fabrication of Evidence Claim Fails Because None of the Alleged Fabricated Evidence Was Introduced Against Plaintiff as His Criminal Trial.

Plaintiff's Fabrication of Evidence claim is premised on a variety of evidence including: 1) Plaintiff's confession; 2) the confession of Plaintiff's co-defendants; 3) the lineup supplementary report; 4) the Berti and Glinski supplementary eport; 5) testimony of Adrian Grimes. Ex. 2 at ¶¶ 32-33, 35, Ex. 39 at 2-3, 7-8, 13. With the exception of Plaintiff's own confession and Grimes' testimony, it is undisputed that none of this remaining evidence was ever introduced against Plaintiff at his criminal trial, which is fatal to his claim. SMF at ¶ 109.

A wealth of case law supports the notion that allegedly fabricated evidence must actually be introduced at a plaintiff's underlying criminal trial in order to establish a viable Fourteenth Amendment Due Process claim. See *Manuel v. City of Joliet*, 137 S. Ct. 911, 913 (2017) (pre-trial fabrication of evidence

is not a Fourteenth Amendment violation); *Avery v. City of Milwaukee*, 847 F.3d 433, 442 (7th Cir. 2017) ("A § 1983 claim requires a constitutional violation, and the due-process violation wasn't complete until the false confession was introduced at Avery's trial, resulting in his conviction and imprisonment for a murder he did not commit. After all, it was the admission of the false confession that made Avery's trial unfair."); *Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016): *Whitlock*, 682 F.3d at 582 (pre-trial fabrication of witness statements could form the basis for liability under the Fourteenth Amendment and specifically held that a Due Process claim based upon pre-trial fabrication of evidence is "not complete until trial" when the fabricated evidence "was introduced against" the plaintiff); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994); *Boyd*, 225 F.Supp.3d at 725 (evidence fabrication claim could not be sustained when allegedly fabricated evidence was not used at plaintiff's trial).

Indeed, the Seventh Circuit recently weighed in on this issue once again in *Mack v. City of Chicago*, 723 Fed. Appx. 374 (7th Cir. May 23, 2018). In *Mack*, the court affirmed dismissal of a Fourteenth Amendment claim premised on allegations that defendant detectives "physically coerced [plaintiff's] co-defendant into signing a statement that falsely incriminated [plaintiff]." *Id.* at 374. In holding such allegations did not set forth a viable Fourteenth Amendment violation , the court held that:

> We agree with the appellees that [plaintiff's] original complaint failed to state a constitutional claim. He originally alleged only that police coerced his codefendant into giving a false statement that incriminated him. But to have asserted a violation of his own rights, instead of just his codefendant's, [plaintiff] needed to assert, at a minimum, that the coerced statement was admitted at his trial. *Id.* at 376.Simply stated, the allegations in *Mack* are virtually identical to those being presented by Plaintiff in the present case. There is no valid legal basis for admissibility of any evidence or argument pertaining to allegedly fabricating evidence never introduced at Plaintiff's criminal trial.

Simply stated, the allegations in *Mack* are virtually identical to those presented by Plaintiff in this case. Plaintiff cannot maintain his claim when the allegedly fabricated evidence was never introduced at Plaintiff's criminal trial; thus, Defendants are entitled to summary judgment on this claim.

III. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S FOURTH AMENDMENT CLAIM IN COUNT III.

In Count III of his First Amended Complaint, Plaintiff alleges for the first time that his Fourth Amendment rights were violated when he was "continuously detained and wrongfully imprisoned in state custody from the date of his arrest in 1992 until his exoneration and release in June 2013." Ex. 2 at ¶ 81. Plaintiff further contends that the Defendants caused him to be "unreasonably seized" because there "was no probable cause for his detention." *Id.* at ¶ 82. Plaintiff seeks to extend Fourth Amendment liability under § 1983 far beyond the post-legal-process pretrial detention Fourth Amendment claim recognized by the Supreme Court in *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017). Moreover, any such putative Fourth Amendment claim is barred by the applicable two year statute of limitations. Accordingly, Defendants are entitled to summary judgment on this claim.

First, Plaintiff's assertion that his Fourth Amendment claim implicates his being "continuously detained and wrongfully imprisoned in state custody from the date of his arrest in 1992 *until his exoneration and release in June 2013*" (see Ex. 2 at ¶ 81) totally misses the mark. The Fourth Amendment addresses "the matter of *pretrial* deprivations of liberty" *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (emphasis added) and provides the "standards and procedures" for "detention of suspects pending trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). The Fourth Amendment prohibits government officials from detaining a person without probable cause and continues to govern claims for unlawful pretrial detention even beyond the start of legal process. *Manuel*, 137 S. Ct. at 920. *Manuel* clarified that the Fourth Amendment is the source of a claim for unlawful pretrial detention based on fabricated evidence, even where such detention continues through the eventual trial. *Id* at 919 n.6 & 7. After *Manuel*, a plaintiff may bring a pretrial detention claim under the Fourth Amendment for the entire time spent in *pretrial custody* up until the time of trial. *Williams v. City of Chicago*, 315 F.Supp.3d 1060, 1071 (N.D.Ill. 2018); *Telfair v. Post*, 2018 WL 3054679, * 11 (D.N.J. 2018). However, "once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuring incarceration does so under the Due Process Clause of the Fourteenth Amendment." *Manuel*, 137 S. Ct.

at 920 n.8.

In the case at bar, Plaintiff's *pretrial* detention occurred from the time of his arrest and continued (on and off) until the end of his trial on September 7, 1995. Thus, his Fourth Amendment post-legal-process pretrial detention claim is expressly limited to the time he spent in pretrial custody. *See Manuel,* 137 S. Ct. at 915-916 (plaintiff seeking damages for 48 days spent in pretrial detention). According to the Supreme Court's decision in *Manuel* any claim that Plaintiff has for his ensuing incarceration following his trial falls under the Due Process Clause of the Fourteenth Amendment and not the Fourth Amendment. *See Moore v. Bullard,* 2018 WL 4409964, * 3 (S.D.Ill. 2018)(in dismissing plaintiff's federal malicious prosecution claim the court recognized that because plaintiff's detention occurred prior to and during his trial, his claim arose under the Fourth Amendment. The court noted that because plaintiff "was not convicted of the murder charges and appears to have been released upon his acquittal, *Manuel* indicates that he does not have a Fourteenth Amendment due process claim."). Plaintiff's claim that he was "unreasonably seized" without probable cause from the time of his December 1992 arrest to his release from the Illinois Department of Corrections in June 2013 in violation of his Fourth Amendment right stretches "the concept of a seizure much too far" and well beyond the pretrial detention period recognized by the Supreme Court in *Manuel.* 137 S. Ct. at 923 (Alito, J. Dissenting). As such, Plaintiff's Fourth Amendment claim for prolonged detention without probable cause that extends well past the end of his criminal trial on September 7, 1995 fails to state a claim upon which relief may be granted and Defendants are entitled to summary judgment.

Second, Plaintiff's Fourth Amendment pretrial detention claim is clearly barred by the applicable statute of limitations. Because § 1983 does not contain a statute of limitations, the law of the state where the injury occurred determines the length of the statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 276-80 (1985). In Illinois the relevant period is two years. *See* 735 ILCS 5/13-202. The accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law. *Wallace*

v. Kato, 549 U.S. 384, 388 (2007). In *Manuel II*, the Seventh Circuit ruled that such a claim accrues "when the detention ends." 903 F.Supp.667, 670 (7th Cir. 2018) (holding that "the wrong of detention without probable cause continues for the duration of the detention. That's the principal reason why the claim accrues when the detention ends.").

Here, Plaintiff was arrested on December 2, 1992 and his pretrial detention ended when he was convicted and found guilty of murder and armed robbery on September 7, 1995. As such, his Fourth Amendment claim accrued upon the termination of his pretrial detention. Thus, any claim Plaintiff had under the Fourth Amendment became time barred as of September 7, 1997 at the very latest, well before he filed his initial complaint in federal court in February 2014.

To the extent that Plaintiff can be heard to suggest that his Fourth Amendment claim would have implicated *Heck v. Humphrey*, 512 U.S. 477 (1994) and likely would have barred his claim until his conviction was set aside in 2013 (Ex. 2 at ¶ 40), Plaintiff is incorrect. *Heck* holds that a cause of action under § 1983 that necessarily implies the invalidity of a criminal conviction does not accrue and cannot be sued upon until the criminal conviction is reversed, vacated or otherwise set aside. *Id.* at 489. However, when there is no conviction, *Heck's* accrual rules do not apply. *Wallace*, 549 U.S. at 393-394. As such, *Heck* has no application in the pre-conviction context. *Fox v. DeSoto*, 489 F.3d 228, 237 (6th Cir. 2007); *Hoskins v. Knox County*, 2018 WL 1352163, * 13 (E.D.Ky 2018). Indeed, the absence of a *Heck* bar to seeking relief for pretrial seizures under the Fourth Amendment based on lack of probable cause *notwithstanding the existence of a conviction* has been well-recognized for many years. *See Reynolds v. Jamison*, 488 F.3d 756, 767 (7th Cir. 2007)("In the present case, Reynolds' § 1983 claim for false arrest does not impugn the validity of his underlying conviction for the offense of telephone harassment. Whether Officer Darr had probable cause to arrest Reynolds has no bearing on the validity of his subsequent guilty plea and criminal conviction."); *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996)("Booker contends that success on his unlawful arrest claim would necessarily imply the invalidity of his

conviction, and that therefore under Heck he could not bring his § 1983 unlawful arrest claim until October 1994, when the trial court vacated his conviction. We disagree, because a wrongful arrest claim, like a number of other Fourth Amendment claims, does not inevitably undermine a conviction; one can have a successful wrongful arrest claim and still have a perfectly valid conviction."); *Gonzales v. Entress*, 133 F.3d 551, 553 (7th Cir. 1998) (because an unlawful arrest for lack of probable cause may be followed by a valid conviction, a successful § 1983 suit for a Fourth Amendment seizure violation, e.g. pretrial detention, does not necessarily implicate the validity of the subsequent conviction).

Manuel II is not to the contrary. Although the Seventh Circuit in *Manuel II* extended *Heck* to instances of pretrial detention where no conviction has yet occurred, a logical application of that extension simply means that a Plaintiff that brings a Fourth Amendment claim while still experiencing the continuing seizure occasioned by a judicially authorized period of pretrial detention may be *Heck* barred. *See Manuel II*, 903 F.Supp. at 670. However, *Manuel II* did not go so far as to extend the *Heck* bar to civil claims involving pretrial detention that involve a subsequent conviction. *Id.* Nor could it have done so. *Manuel II*, of course, did not involve the effect of a conviction on pursuing a claim for a seizure based on unlawful pretrial detention because the plaintiff in *Manuel II* was never convicted in the first place. *Id.*

In fact, to the contrary, *Manuel II* strongly suggested the opposite. Specifically, in holding that the claim at issue did not accrue until the plaintiff's release from pretrial detention, the court in *Manuel II* specifically rejected the notion that the vacating of an underlying conviction was the triggering event for accural of a Fourth Amendment claim under *Manuel*. *See* 903 F. 3d at 667 ("Manuel's position, which relies on an analogy to the tort of malicious prosecution—in which the claim does not accrue until the plaintiff has prevailed ('been vindicated') in the criminal case—might have seemed sensible before the Supreme Court spoke...But the Justices deprecated the analogy to malicious prosecution. After Manuel, "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth

Amendment claim—the absence of probable cause that would justify the detention. The problem is the wrongful custody."). Instead, the issue is the detention itself. *Id.*

In this regard, the court in *Manuel II* strongly implied that the detention at issue is not any period of detention whatsoever but rather only the specific period of *pretrial detention* resulting from the seizure in the absence of probable cause. *Id.* at 670. On this point, the court relied upon *Edwards v. Balisok,* 520 U.S. 641 (1997) for the proposition that *Heck* applies beyond deprivations occasioned by criminal conviction and requires specific reference to the procedural mechanism which has caused the alleged deprivation itself. Specifically, *Edwards* involved claims of a convicted prisoner that he was held in isolation and segregation based on prison infractions. *Id.* The Court held that the proper reference point for determining whether such action was *Heck* barred was simply whether the claim would imply the invalidity of the underlying disciplinary actions. *Id.*

This construction is further supported by the *Manuel II* court's explicit recognition that a cause of action accrues once the "discrete" wrong at issue ends even if the harm from such wrong continues into the future. *Id.* at 669 ("When a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends. Notice that we speak of a continuing wrong, not of continuing harm; once the wrong ends, the claim accrues even if that wrong has caused a lingering injury."). Again, by definition, the only "wrong" for which the Fourth Amendment is concerned is that of pretrial detention in the absence of probable cause. After that period of detention ceases, the Fourth Amendment is entirely irrelevant. In fact, on this point, this Court need not even resort to *Manuel II* to resolve this issue because the Supreme Court addressed it explicitly in *Manuel* itself: "once a trial has occurred, the Fourth Amendment drops out: A person challenging the sufficiency of the evidence to support both a conviction and any ensuring incarceration does so under the Due Process Clause of the Fourteenth Amendment." *Manuel*, 137 S. Ct. at 920 n.8. Accordingly, under *Manuel*, Plaintiff's Fourth Amendment pretrial detention claim accrued on September 7, 1995 after his pretrial detention ended and

the Fourth Amendment "drop[ped] out." Plaintiff had two years from that date within which to bring a claim and failed to do so. Accordingly, his Fourth Amendment claim is untimely and this Court should grant summary judgment in favor of Defendants.

Third, even if *Heck* delayed accrual of Plaintiff's Fourth Amendment claim until his conviction was set aside on June 28, 2013, Plaintiff's claim is still time barred by the two year statute of limitations, which ran on June 28, 2015. Plaintiff filed his Fourth Amendment Claim on October 3, 2018, well beyond the limitations period, which makes his claim untimely. See *Harris v. City of Chicago*, 2018 WL 835350, *4 (N.D.Ill. 2018)(finding plaintiff's Fourth and Fifth Amendment rights were untimely even where *Heck* deferred accrual of those claims because they were filed more than two years after the *Heck* bar was removed and the two year statute of limitations had run). As a result, Defendants are entitled to summary judgment on Count III.

CONCLUSION

WHEREFORE, defendants, ANTHONY VILLARDITA, THOMAS JOHNSON, BRIAN KILLACKY, TERRY O'CONNER, RICK ABREU, ROBERT DELANEY, SEAN GLINSKI and MICHAEL BERTI, by and through their attorneys of BORKAN & SCAHILL, LTD., respectfully request that this Court grant their motion for summary judgment in its entirety and any other relief the Court deems proper.

Respectfully submitted,
BORKAN & SCAHILL, LTD.

By: /s/Misha Itchhaporia
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