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

DANIEL TAYLOR.,	)	
	)	
Plaintiff,	)	No. 14 C 737
	)	
v.	)	Judge John Z. Lee
	)	
CITY OF CHICAGO, *et al.*,	)	JURY TRIAL DEMANDED
	)	
Defendants.	)	

PLAINTIFF DANIEL TAYLOR'S RESPONSE IN OPPOSITION TO THE DEFENDANT OFFICERS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

Plaintiff Daniel Taylor was wrongfully convicted of a double homicide he had nothing to do with. He is completely innocent. Arrested as a minor (he was a 17-year old ward of the State), Mr. Taylor spent the majority of his life incarcerated for a crime he did not commit. By the time he was exonerated and released in 2013, he had served more than 20 years in prison.

Taylor's conviction was the product of egregious police misconduct. Exploiting his youth and vulnerabilities, Defendants managed to coerce his "confession" to a crime that was physically impossible for him to have committed. At the time the murders occurred, Taylor was being held in the custody of the Chicago Police Department at the 23rd District police station. The City of Chicago's own lockup records confirm Plaintiff's innocence. Ironically, that extraordinary fact made it easy for the Defendant Officers to cheat—because they controlled the evidence establishing Plaintiff's innocence, they were in a position to suppress it, which they did.

No doubt recognizing the futility, Defendants have not sought summary judgment on the confession-related claims. There is no merit to their position on the other claims either. When Defendants fabricated his false confession, they did not know that Plaintiff was in police custody at the time of the crime, and thus could not have participated. Once they realized the problem, it was too late. Instead of correcting an injustice, Defendants engaged in a conspiracy of misconduct designed to cover-up their wrongdoing, including not only hiding evidence in their Street File proving Taylor's innocence, but also by fabricating evidence designed to cover-up their own wrongdoing in framing Plaintiff. Were there any doubt, another jury in this District has already determined that these same Defendant detectives violated the constitutional rights of one of the co-defendants in Plaintiff's criminal case (Deon Patrick) during this same investigation. Those Defendants are now estopped from denying that Patrick's rights were violated.

[1] Plaintiff's Rule 56.1 Statement of Additional Facts is abbreviated PSOF, Defendants' Statement of Facts is abbreviated DSOF, and Plaintiff's Response to the Defendant Statement of Facts is abbreviated RDSOF.

Regarding Plaintiff's *Brady* claims, Plaintiff has amassed a mountain of evidence suggesting that the Defendants suppressed exculpatory material in the City's various internal files, documents that were never shared with the prosecution or the defense. Defendants dispute that, urging the Court to conclude as a matter of law that everything in the their files was disclosed, and nothing exculpatory was withheld. According to Defendants, there is not even a dispute of fact with all reasonable inferences drawn in Plaintiff's favor.

There is something deeply troubling about that contention. During discovery, Plaintiff asked the City to produce copies of its Permanent Retention file and Investigative File for this murder investigation so that Plaintiff could compare those file to the documents produced to his criminal defense attorney back in the 1990s. The City responded that it cannot find or even account for its own files, including the "Permanent Retention" file, which is ordinarily kept under lock and key in the City's Records Division. That permanently retained file was apparently last seen sometime around the time Plaintiff filed a post-conviction petition, and no one seems to know when the Detectives' own Investigative File (also subject to permanent retention) was last seen. Even the file control documents by which the City accounts for these types of files have gone missing.

As for the Street File, unlike the missing Permanent Retention File and Investigative File, Defendants deny that any Street File ever existed for this investigation at all. That contention cannot be maintained at this stage given the existence of powerful proof suggesting otherwise. As a matter of custom and practice, CPD detectives routinely buried exculpatory evidence in "Street Files," namely, a parallel set of files that was not turned over to the prosecutors or defense attorneys. Two separate civil juries in this District have recently concluded that the City maintained a Street File practice beyond its official abolition and continuing through the time period at issue here, precluding summary judgment on Plaintiff's *Brady* claim. There is overwhelming evidence in the record that the Defendants did maintain (but suppressed) a Street File in this case. For example, there is a police

report from this investigation expressly referencing important information that was "placed into the street file for future reference," and one detective admitted to placing copies of certain important documents pointing to alternative suspects "in the street file." Neither this information nor the Street File was ever produced in the criminal proceedings, or in this civil litigation for that matter.

Unable to account for any these critical files, nor explain why they are missing, the Defendants ignore the Street File issue in their pleading altogether, and urge this Court to assume for purposes of the present motion that the contents of the missing files would not have been exculpatory. That approach turns summary judgment on its head. In considering Defendants' motion, the Court is required to draw the reasonable inferences against them, not in their favor.

Left with nothing else to argue, Defendants suggest that even if a jury could plainly conclude that they withheld exculpatory information, their misconduct should be excused because Plaintiff's criminal defense attorney should have been more diligent about uncovering Defendants' suppression. However, in sharp contrast to the defense attorneys in the other two companion cases that considered that issue, Plaintiff's counsel in Mr. Taylor's case *did* exercise appropriate diligence, including sending subpoenas and filing a motion that should have prompted the Defendants to disclose contents of their files. Thus, unlike the factual record facing the other courts to have examined that issue, the record in this case (including expert testimony) plainly establishes a clear *Brady* violation, and the matter of requisite diligence remains a jury question. That conclusion is particularly appropriate where there is going to be a jury trial on numerous other claims anyway, and is all the more apt given that the evidence relating to the claims in dispute would be independently admissible at trial on other issues regardless. Defendants' motion should be denied.

SUMMARY OF MATERIAL FACTS THAT PRECLUDE SUMMARY JUDGMENT[2]

On November 16, 1992, Plaintiff Daniel Taylor was involved in scuffle, leading to his arrest on a disorderly conduct charge. PSOF, ¶49. He was taken to the 23rd District Chicago Police Department (CPD) station, where he was held from 7:25 pm. to 10:00 p.m. *Id.* Before being released, Taylor signed an "i-bond" slip, which, with his arrest report, indicated the time he was in custody. *Id.* ¶49. Unbeknownst to Plaintiff, while he was at the 23rd District, Jeffrey Lassiter and Sharon Haugabook were murdered at 8:43 p.m. in Lassiter's apartment, DSOF,¶10, which was inside a U-shaped courtyard building. PSOF, ¶1.

The lone eyewitness, Faye McCoy, saw the perpetrators, four black males aged 24-25 years old, fleeing the scene and recognized that one of them was Dennis Mixon (aka Goldie). McCoy reported these facts to the lead detectives on the case, Defendants Villardita and Johnson. *Id.* ¶¶2-3. Soon after, at Defendants' direction, Officer Renard Foote developed information about Goldie and his associates strongly indicating they were the perpetrators, including: they had had violently beat Lassiter in his apartment (which they planned on "taking over") days before the murder; they had been arrested for criminal trespassing in a different residence a block away a week before; and that one of them was out on bond for a different double homicide at the time. *Id.* ¶¶4-5. Defendants had ample information on the suspects, but failed to follow up in any meaningful way at all. *Id.* ¶¶6-9.

Despite failing to pursue known suspects, Johnson and Villardita got impatient, asking others clear the case by "December 2, 1992" when they would be back from time off. *Id.* ¶10. When they returned to work on the 2nd, the case was not cleared, and Goldie had not been located or arrested (though Defendants knew where he lived). *Id.* ¶¶4,10. Rather than pursue Goldie and his associates, Johnson and Villardita decided to put the case on three teenagers who had been arrested that afternoon on minor drug charges (Lewis Gardner, Paul Phillips, and Akia Phillips). *Id.* ¶¶12-27.

[2] Plaintiff's extensive Local Rule 56.1 statement is incorporated by reference and sets forth Plaintiff's facts, which are summarized below and discussed, as appropriate, within the argument.

They also decided to frame other youth: Rodney Matthews, Joseph Brown, Deon Patrick, and Taylor, a teenager and ward of the state. *Id.* ¶¶28-42. These youth (collectively, the Co-Defendants), were innocent and nothing in the investigation pointed to them before December 2. *Id.* ¶¶10-11.

That did not stop the Defendants: instead, they coerced and fabricated false confessions from Plaintiff and the Co-Defendants throughout December 2nd, overnight on December 3rd, and into the morning of the 4th. *Id.* ¶¶12-43. Given that Goldie's name had already surfaced, the Detectives included him in the false confessions they fabricated. *Id.* These confessions involve a number of inconsistencies (including naming various people who were never arrested) and physically impossible statements such as "lookouts" claiming they observed events of the crime that were impossible to see from their purported vantage (given the U-shape of the building). *E.g.*, *id.* ¶¶22, 27.

The confessions were physically impossible in another way: they all involved Plaintiff Daniel Taylor as one of the shooters, even though it was physically impossible for him to have committed the crime. *Id.* ¶¶33, 49-50. When extracting false confessions from Plaintiff, Defendants did not know he was in custody at the time of the crimes. *Id.* ¶¶50-52. When they learned this fact, rather than admit their misconduct, and free the innocent, they began a cover-up. Defendants obtained key records from the 23rd District showing that Plaintiff was in police custody until 10 p.m. These included (1) a roster of people in the lockup that showed Plaintiff was in custody at the shift change from the 3rd Watch to the 1st Watch, which took place at 9:30 (the Lock-up Roster), *id.* ¶¶52; (2) the 23rd District's records of the visual checkup where officers physically view the detainees every fifteen minutes and record this on a log (the Visual Checkup Logbook), *id.* ¶75, and (3) a list of CPD personnel working the 23rd District the evening of November 16 (CPD Personnel Roster), *id.*¶53. Defendants also obtained arrest reports and bond slips for people in the 23rd district lockup that evening, including a man name James Anderson, who was in the same cell as Taylor, as well as

Eugene Fisher. *Id.* ¶76. Like Taylor, Anderson and Fisher were at the station on municipal disorderly conduct charges and "carried over" from the Third Watch to the First. *See id.*; Ex. 87.

Once Defendants obtained these 23rd-District documents, as part of their cover-up, they hid them in their Street File for the Lassiter-Haugabook investigation. PSOF ¶¶73-77, 105-112. A street file is the place where, as a matter of practice and custom in the City before and after 1992 police officers hide their investigative work from criminal defendants and prosecutors. *Id.* Having elected to pursue the innocent rather than Goldie and his associates, Defendants' placed Foote's Information Report and others about these suspects in the Street File. *Id.* ¶¶93-94, 105-112. Defendants went to great lengths to find Anderson, which they documented. *Id.* ¶53-55. When they found Anderson, he confirmed he was in the lockup with Taylor, an interview they documented. *Id.* Defendants put all of these documents in the Street File. *Id.* ¶53-55.

The misconduct did not stop there. Instead, having already fabricated evidence to get themselves in this situation, Defendants fabricated even more evidence to try to make it appear as if Plaintiff had been released from the lockup earlier than the arrest report and bond slip indicated *i.e.*, 10:00 p.m. *Id.* ¶¶59-66. Among other things, they coerced Adrian Grimes—through physical force, threats, as well as promises of help on another criminal case—into saying he had seen Plaintiff at a park shortly before the murders, though that was false. *Id.* ¶¶61-62. Villardita and Johnson requested that Defendants Berti and Glisnki, who had not been a part of the Lassiter-Haugabook investigation, to falsely claim in a fabricated General Progress Report (GPR) and a Supplementary Report that they interacted with Plaintiff at approximately 9:30 p.m. on November 16. *Id.* ¶¶65-67. These, and other fabricated reports purporting document entirely true events but actually containing fabrications, were used to indict, prosecute, and convict Plaintiff. *Id.* ¶¶59-60, 61, 63, 66, 96-97.

Plaintiff and the Co-Defendants were indicted via a grand jury conducted by Assistant State's Attorney (ASA) David Styler based upon Defendants' fabricated evidence. *Id.* ¶120. Styler

was not given any of the reports from Defendants' investigation that had been placed in the Street File. *Id.* ¶¶80-88, 105-112. Before trial, Plaintiff's defense counsel, Nathan Diamond-Falk, filed a formal motion for discovery of exculpatory evidence, obtained formal and informal representations from the prosecution that there was no favorable evidence to be disclosed and that nothing was being withheld. Even then, defense counsel went further and subpoenaed the CPD directly for 23rd District documents from November 16, but received nothing in response. *Id.* ¶113-15; RDSOF, ¶75. Trial prosecutor ASA Thomas Needham did not disclose any of the conclusive evidence of Plaintiff's innocence, of alternative suspects, or the evidence that would have allowed Plaintiff to impeach witnesses at trial. PSOF, ¶¶80-92, 105-112; RDSOF, ¶75. The reason? Needham did not have the documentary evidence; it was in the Street File. *Id.*

As a result of Defendants' misconduct, Plaintiff was ultimately convicted by a jury in 1995. PSOF. ¶121. The principal evidence was the false confession, bolstered by Grimes' false testimony, and additional testimony from the Defendants telling their fabricated story. *Id.* Plaintiff was in custody from 1993 to 2013, when his conviction was vacated and the charges dropped. *Id.* ¶123. None of the Co-Defendants stand convicted. The charges against two, Akia Phillips and Joseph Brown, were dropped prior to trial, and Rodney Mathews was acquitted. PSOF ¶¶24, 29-30. Plaintiff received a certificate of innocence from the Cook County Circuit Court in 2014, after which Paul Phillips, Lewis Gardner, and Deon Patrick obtained the same. *Id.* ¶124. This action followed. Dkt. 1.

ARGUMENT

Summary judgment is only permitted where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248 (1986). "In making that determination, a court must view the evidence "'in the light most favorable to the opposing party," making all inferences in the non-movant's favor. *Tolan v. Cotton*, 134 S. Ct. 1866 (2014) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S.

144, 157 (1970)). The Supreme Court has emphasized the "importance of drawing inferences in favor of the nonmovant," at this stage. *Tolan*, 134 S. Ct. at 1866. Credibility determinations and weighing of the evidence are for the jury, not summary judgment. *Anderson*, 477 U.S. at 255.

I. A REASONABLE JURY CAN EASILY FIND THAT THE DEFENDANTS SUPPRESSED MATERIAL EVIDENCE

Defendants' motion for summary judgment turns the governing law of *Brady* on its head. Brady requires police officers to disclose all material evidence to the accused. Here, extensive amounts of material evidence was hidden in police files for decades. Defendants want a free pass for their acts by trying to shift the focus to what, in their mind, they believe Plaintiff's defense attorneys should have done differently had they known that the police were hiding evidence. The motion further rests on some sort of unlimited and unrealistic, 20/20-hindsight conception of reasonable diligence whereby due process is not violated if there is some metaphysically possible way for a criminal defendant to obtain evidence related to what the police are intentionally suppressing. The law does not work this way. Instead, due process imposes an affirmative duty on the police to disclose material evidence, even when not requested. Due process therefore does not permit officers to disclose bits and pieces while simultaneously hiding the exculpatory remainder in secret files.

Furthermore, Defendants have ignored facts favorable to Plaintiff and assumed their version of events despite understanding that the facts are well and truly disputed. With the law properly understood and the facts properly construed, it is clear that a reasonable jury could find for Plaintiff.

A. Due Process Imposes an Affirmative Duty to Disclose Material Evidence

Under *Brady v. Maryland*, 373 U.S. 83, 87(1963), and its progeny, due process requires that the government "disclose evidence materially favorable to the accused," including both exculpatory and impeachment evidence. *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam); *Giglio v. United States*, 405 U.S. 150 (1972). *Brady* applies to prosecutors police officers alike. *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). When assessing a *Brady* claim, this Court asks whether: (1) material was suppressed; (2)

any of that suppressed material was favorable to the defense; and (3) the suppressed evidence was "material." *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001).[3]

Suppression focuses on the government actors. Police may not play hide and seek with the evidence—such a rule is "not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 695 (2004). Nor is the obligation to disclose material evidence a game or "mere prophylactic designed to protect a constitutional right"; the obligation "is *itself* a component of the due process owed to criminal defendants under the constitution." *Engle v. Buchan,* 710 F.3d 698, 706 (7th Cir. 2013). Indeed, "the duty to disclose such evidence is applicable even though there has been no request by the accused." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976)). As a consequence, defense attorneys are entitled to rely upon a "representation of full disclosure by" the police. *Banks*, 540 U.S. at 694; *see also Strickler*, 527 U.S. at 283-84 (reasonable for defense to rely on state to produce *Brady* material); *United States v. Bagley,* 473 U.S. 667, 682-83 (1985) (reasonable for defense attorneys to rely upon discovery responses, especially when they state no material evidence exists*)*; *Starns v. Andrews, 5*24 F.3d 612, 619 (5th Cir. 2008) (*Brady* imposes "no requirement [defendant] act diligently to investigate further assuming the state could not be taken at its word"); *Benn v. Lambert,* 283 F.3d 1040, 1062 (9th Cir. 2002) ("A defendant furnished with such inculpatory evidence by the state is not required to assume that the state has concealed material information and has thereby obligated him to ascertain the *Brady* material on his own.").

A further consequence of these rules is that due process requires police "to turn over *all* material exculpatory and impeachment evidence to the defense. It does not require the State to simply turn over *some* evidence, on the assumption that defense counsel will find the cookie from a trail of crumbs." *Barton v. Warden, So. Ohio Corr. Facility*, 786 F.3d 450, 468 (6th Cir. 2016); *Benn,* 283 F.3d at 1062. That is, police "cannot satisfy [their] *Brady* obligation to disclose exculpatory evidence by making

[3] Defendants have not disputed evidence was "favorable to the defense."

some evidence available and claiming the rest would be cumulative. Rather, the [police are] obligated to disclose *all* material information casting a shadow on a government witness's credibility.'" *Mellen v. Winn*, 900 F.3d 1085, 1097-98 (9th Cir. 2018) (quoting *Carriger v. Stewart*, 132 F.3d 463, 481-82 (9th Cir. 1997) (*en banc*)). With this in mind, evidence is considered "suppressed" where it is not disclosed at all; where a disclosure is made "too late for the defendant to make use of the evidence," or, in this Circuit, where the evidence is not available through the exercise of reasonable diligence. *Boss*, 263 F.3d at 740.

Regarding materiality, "'[e]vidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Giglio*, 405 U.S. at 154)). Accordingly, Plaintiff "need not show that he 'more likely than not' would have been acquitted had the evidence been admitted. . . . He must only show that the new evidence is sufficient to 'undermine confidence' in the verdict." *Id.* In addition, it would be error to consider "evidence in isolation rather than cumulatively," *id.,* because whether evidence is material "turns on the cumulative effect of all such evidence suppressed by the government." *Kyles,* 514 U.S. at 421.

In the end, the question at this juncture is limited to whether a reasonable jury could find that Defendants suppressed evidence that, when viewed cumulatively, could have impacted the original verdict. *See, e.g.*, *Rivera v. Guevara*, 319 F.Supp.3d 1004, 1046 (N.D. Ill. 2018) (denying summary judgment on *Brady* claim where whether evidence was suppressed was in dispute and a reasonable jury could find the evidence was suppressed); *Kluppelberg v. Burge*, 2017 WL 3142757, at *7 (N.D. Ill. July 25, 2017) (finding sufficient evidence in the record "from which a reasonable jury could infer a practice of keeping and withholding street files"); *Jimenez v. City of Chicago*, 830 F.Supp.2d 432, 445 (N.D. Ill. 2011)(summary judgment improper due to disputes about whether evidence was suppressed).

B. Defendants Suppressed Mountains of Materially Exculpatory and Impeaching Evidence

There is no chance Defendants are entitled to summary judgment on the suppression claim, given the overwhelming evidence suppressed here, PSOF, ¶¶72-112, categorized as follows:

1. The practice and customs of the City of Chicago in maintaining clandestine street files that are withheld from the defense and prosecutors, which was practiced in the Lassiter-Haguabook investigation. PSOF, ¶¶ 105-112.

2. 23rd District evidence of Plaintiff's being in police custody at the time of the crime, including (1) the 23rd District Lockup Roster, (2) the Lockup Checkup Sheet, (3) the Personnel List for November 16, 1992, (4) the arrest report and bond slip for James Anderson, and (5) the arrest report and bond slip for Eugene Fisher. *Id.*¶¶ 72-77, 80, 83-84, & 86.

3. Defendants own documents concerning Anderson, including (1) handwritten notes of the Detectives' interview, (2) GPRs concerning the Detectives' that have been produced, and (3) the December 30 GPR that has never been produced. *Id.*¶¶78-79, & 85.

4. Evidence related to the fabrication of reports and testimony of Grimes. *Id.* ¶61-63, 95-97

5. The Renard Foote Information Report, pointing to other perpetrators and "alternative suspects" involved in narcotics transactions with Lassiter. *Id.*¶¶ 4, 93-94.

6. Evidence hidden in the Lassiter-Haugabook Street File, including: (1) the items listed above, (2) the Elmore GPR regarding narcotics transactions, (3) arrest reports regarding narcotics transactions, (4) a trespassing report related to Lassiter just before he was murdered, (5) the officer's handwritten notes, and (6) criminal backgrounds of suspects and alternative perpetrators, etc. *Id.*¶¶ 105-112.[4]

1. The City's Unlawful Street Files Practice Alone Precludes Summary Judgment

The Seventh Circuit has been clear: "the maintenance of the 'street files,' police files withheld from the state's attorney and therefore unavailable as a source of exculpatory information" violates due process." *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988). Accordingly, "retaining records in clandestine files deliberately concealed from prosecutors and defense counsel cannot be tolerated." *Id.* In the early 1980s, the City maintained an explicit practice whereby secret files were kept and not turned over to criminal defendants. PSOF, ¶106. The practice was supposed to have stopped via a general order in 1986. *Id.* ¶107. It did not.

Instead, police continued to maintain parallel street files well beyond the late 1980s, the 1990s, and into the 2000s. *Id.* ¶107-08. Tellingly, and absolutely precluding summary judgment here, two juries

[4] Plaintiff does not independently pursue his *Brady* claim on the basis of McCoy's exculpatory statement to the police or Defendants' failure to disclose their *own* misconduct (*e.g.*, the Berti-Glisnki GPR or in extracting the Co-Defendants confessions). However, such facts remain relevant here because the suppression of this additional information is additional evidence from which a jury can infer Defendants' suppressed evidence.

have already found the existence of a street file practice that continued beyond 1986. In the first, *Fields v. City of Chicago,* the jury found a due process violation based upon evidence that the street file in that case was withheld from the criminal defendant from the initial 1984 investigation through the plaintiff's final criminal trial in 2009. *Id.* Likewise, in *Rivera v. Guevara*, the plaintiff prevailed on his due process claim for the suppression of evidence, including his *Monell* claim that was premised on the street files practice extending beyond 1986. *Id.* ¶108.

Additionally, two rulings in another street files case, *Kluppelberg v. Burge*, further confirm that Defendants' cannot obtain summary judgment on Plaintiff's *Brady* claim here given the practice that was at work in the Lassiter-Haugabook investigation. In the first, Judge Lefkow denied a motion for summary judgment concerning the "practice of keeping street files, and that such a practice led to *Brady* materials being withheld from prosecutors and the defense" by pointing to, among other things, evidence that showed the practice remained widespread into the 1990s. *Kluppelberg v. Burge*, 2017 WL 3142757, at *7 (N.D. Ill. July 25, 2017). In the second, Judge Lefkow concluded that the *Fields* jury verdict estops the City from "arguing that it did not have a policy of concealing material exculpatory and/or impeachment evidence contained in so-called 'street files' in the late 1980s." *Kluppelberg v. Burge*, 2017 WL 3381717, at *1 (N.D. Ill. Aug. 7, 2017).

There can be no doubt that the street file practice was at work in the Lassiter-Haugabook murder investigation, and that there was a Street File for this case documents were placed into rather than in the Investigative File where they were supposed to be (permanently) maintained. *Id.* ¶¶105, 107. There is a "smoking gun": Defendants *own* investigative documents refer to the Street File. For example, one GPR indicates documents were put in the "street file," PSOF ¶100, and even describes the *manner* in which the documents were placed in the file. *See* Ex. 12, at City Def 96 ("Left them loose because they are very hard to read"). Plainly, telling colleagues one is going to put something "in the street file" and telling them how you are doing it presupposes the existence of the very file into which

the items are placed. Likewise, a Supplementary Report, itself buried in the Street File, concerns Goldie's associates and their trespass arrest one block from Lassiter's apartment, and indicates a copy of that "case report was obtained and placed into the street file for future reference." *Id.* Moreover, Detective Elmore has admitted that he was ordered to put documents in the Street File. *Id.* ¶100. Defendants cannot possibly challenge the existence of the file at this juncture and on this record.

Indeed, the circumstances here make summary judgment uniquely inappropriate: During discovery, Plaintiff asked the City to produce a copy of its Permanent Retention file for this murder investigation so that Plaintiff could compare that file to the documents produced by the City back in the 1990s. Plaintiff also asked to see the Investigative File for this murder as well as the Street File. There is no reason to have to guess whether Plaintiff is correct that the City held back documents and information, where all of the evidence suggests that is so. All the parties and the Court need to do is compare the disclosed documents to those in the City's files, and see for themselves.

The response to that request? Defendants cannot find their own files. To be clear, Plaintiff has asked to see the "Permanent" Retention file. The Permanent Retention file is not only missing, according to the City, but for the four years this case has been pending, the City continues to be unable to account for its whereabouts or explain why it cannot be found. *Id.* ¶¶100-04. For context, Plaintiff asked the City to identify a single other example of a time that the Permanent Retention file (which by rule is kept under lock and key in the City's Records Division) has gone missing. The City and all of its witnesses were unable to do so. This is literally the only instance that anyone has ever heard of where the CPD cannot account for its own Permanent Retention file. *Id.* ¶104.

Equally problematic, Defendants have also been unable to produce the original Investigative File for this murder, nor even provide any explanation for why they cannot do so, to say nothing of the still-missing Street File. *Id.* ¶¶101-02, 105-112. With respect to the latter, unlike the first two files, the defendants deny that a Street File ever existed, but that contention is impossible to square for

summary judgment purposes with (a) the substantial evidence in the record just discussed that there was a Street File; and (b) the two jury verdicts finding that the City had a policy and practice of maintaining Street Files for investigations such as this one during this time period.[5]

Under these circumstances, Defendants' argument that Plaintiff supposedly cannot prove that they failed to produce documents from their files to the criminal defense is a nonstarter. There is powerful circumstantial evidence that the Defendants had possession of exculpatory information that was not documented in the reports disclosed to the Plaintiff, and the Defendants' failure to account for the critical files on which the case turns leaves them in no position to prove otherwise. Indeed, Defendants are basically turning summary judgment on its head, urging the Court to simply assume that the missing Permanent Retention, Investigative, and Street Files would have borne out their position. *Cf. S.C. Johnson & Son, Inc. v. Louisville & Nashville R.R. Co.*, 695 F.2d 253, 258 (7th Cir. 1982) ("'It is elementary that if a party has evidence ... in its control and fails to produce it, an inference may be warranted that the document would have been unfavorable.'") (quoting *Commercial Insurance Co. of Newark v. Gonzalez*, 512 F.2d 1307, 1314 (1st Cir. 1975)); *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002) (violation of a record retention regulation creates a presumption that the missing records contained evidence adverse to the violator). The motion should be denied.

2. Evidence Concerning Plaintiff Being in Police Custody At the Time of the Crimes

Powerful evidence about what happened inside the 23rd District while Plaintiff was held there was suppressed. First, the Lock-up Roster confirms that Plaintiff's time as a detainee spanned two shifts

[5] To the extent Defendants may argue that "practices" of the department are not relevant to their individual liability, they are plainly mistaken. The City's ongoing street files practice bear directly on the question of whether a reasonable jury could find that, by maintaining a street file in this case, the Defendants' did the same here, particularly given the fact the Street File has never been produced, PSOF, ¶105-112, the files subject to permanent retention have gone missing, *id.*¶98-104, and Defendants own files refer to putting things in the Street File. *Id.* ¶¶109-10. Defendants may offer "spin" as to the documents means at trial (though they cannot do so here) and so the practices further relate directly to a fact question of their state of mind when it comes to how a jury should interpret what it means for a CPD detective in 1992 to tell another something was put "in the street file." *Cf. Jimenez v. City of Chicago,* 732 F.3d 710, 719-22 (7th Cir. 2013) (governing practices relevant circumstantial evidence of officer's state of mind*); Delgado v. Mak*, 2008 WL 4367458, at *8 (N.D. Ill. March 31, 2008) (similar).

and that he was "carried over" at 9:30 p.m. from one to the next. PSOF, ¶52. Second, pursuant to CPD practices, the Visual Check Logbook recorded the visual check that 23rd District officers did roughly every 15 minutes to check on the health and status of detainees. *Id.* ¶75. Such checks were conducted when Plaintiff was in custody on November 16. *Id.* Third, the CPD Personnel List, indicates who worked at the 23rd District on November 16, indicating who was on Third Watch and who was on First Watch, as well as other officers on duty. Defendants went to the 23rd District and obtained, these three documents (collectively, the Withheld Lockup Evidence), but did not produce them to defense attorneys or the prosecutors. PSOF, ¶¶ 73-75, 77-79, 80-92, & 105-112. Instead, they put them in the Street File. *Id.* ¶112.

The Withheld Lockup Evidence was obviously favorable to the defense: it is exculpatory evidence that proves Plaintiff could not have committed the crime because he was in custody at the time of the murders. *Id.* ¶¶ 49-58. The Lock-Up Roster is particularly important not only because it shows that Plaintiff could not have committed the crimes, but because of how it powerfully subverts the sorts of challenges that were only able to be made in its absence. For example, in this litigation as originally and by the prosecutors at trial, Defendants have attempted to undermine the fact that the bond slip actually means Taylor was released at 10:00 p.m.; on the notion that disorderly conduct arrestees were in and out of the station in under an hour, or by contending that the officers signed the slip as being 10:00 p.m. though Taylor was actually released hours earlier. *Id.* ¶¶60-61. In fact, this was also the principal implication of the fabricated Grimes and Berti/Glinski reports. *Id.* ¶¶61-66. The Lock-up Roster completely undermines these arguments and instead proves not only that it was physically impossible for Plaintiff to have committed the murders, but also that the testimony provided by Grimes and Glinski at trial was incorrect (whether it be "false" or, less accurately, simply mistaken) because it shows that Plaintiff was actually "carried over" from one shift to the next at 9:30 p.m., something that would not have happened if he were not there. *Id.* ¶¶52, 72.

The Lock-up Roster thus illustrates that Plaintiff was *absolutely* in custody when the crimes occurred. The Visual Check Logbook, which has never been produced, is in the same category. *Id.* Both documents constitute contemporaneously-created records of Plaintiff's actual *custody* during the time he was *in* the lockup. These documents are thus different in kind than the bond slip and arrest report, and whatever sort of testimony Plaintiff would have been (or was) able to get years later (and without these documents) at trial when memories would have faded. The withheld *Brady* material "would have given defense counsel unique ability . . . [to] bolster his alibi defense using objective documentary support from a disinterested party." *Dennis v. Sec'y, Pennsylvania Dep't of Corr.*, 834 F.3d 263, 312 (3d Cir. 2016).

Moreover, for related reasons, the Personnel List establishes who the 23rd District officers were that carried Taylor over, all of whom could have been potential exculpatory witnesses on Plaintiff's behalf. Perhaps more importantly, the Personnel List confirms and corroborates that the evidence Defendants sought to undermine (e.g., the bond slip) was correct and is thus exculpatory. In addition, while some of the identities of the officers who worked at the 23rd District on November 16 might have been discernable from the arrest report and bond slip, the actual contemporaneously-generated CPD document—a complete roster from the City—is again something fundamentally more powerful than just whatever witness memories might have existed at the time of trial. *Dennis*, 834 F.3d at 288. Indeed, at trial, the suppression of these records handicapped Plaintiff's efforts to put on the officers who did testify—Gillespie and Meindl—by making them subject to cross-examination and possible mistakes in testimony that would have not been possible had the records been produced. *Cf. id.* (finding that documentary evidence could have aided the witness in providing accurate exculpatory testimony).

The same is true of the 23rd District records concerning Anderson, the cellmate, and Fisher that were also suppressed in the Street File, PSOF, ¶¶76-77, 105-112. These documents have provided further, and unique, corroboration of Plaintiff's innocence, particularly because they were both held on city disorderly conduct charges and "carried over" between the two watches. Ex. 87. (Thus rebutting

the notion that detainees on municipal disorderly conduct charges are in and out in as little as 45 minutes as falsely reported in Villardita's GPR, PSOF, ¶60.) Moreover, these documents would have served to corroborate the manner that the arrest report and bond slip for Plaintiff should have be interpreted, given the sequential filing system used at the time. PSOF, ¶76.

Finally, all of the documents from the 23rd District suppressed by Defendants would have been strong impeachment of their "investigative" efforts after they confirmed Plaintiff was in custody, and particularly of Glinski's false claim about seeing Plaintiff at 9:30 that evening as well as Defendants' claims that Grimes truthfully (as opposed to with police incentives) saw Taylor on the street just before the crime. *See Kyles*, 513 U.S. at 446 (evidence known to police and decisions in light of that evidence can be used to impeach and must be disclosed); *see also Bowen v. Maynard*, 799 F.3d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation"). In short, all of this was evidence that would have allowed Plaintiff to challenge the "thoroughness and even the good faith of the investigation" and was undoubtedly favorable and material. *Kyles*, 513 U.S. at 445.

3. Evidence Concerning The Search For, And Interview of, James Anderson

Recognizing that Anderson was important, Defendants generated their own records concerning Anderson, which they documented in a number of reports, some of which have been now disclosed. *Id.* ¶54. However, one of these—the December 30 GPR—has never been produced. We know the December 30 GPR exists, that it was written by Villardita and Johnson, and that it concerned Anderson because of a December 31 GPR that specifically refers to this document. PSOF, ¶79.[6] Eventually,

[6] Defendants' arguments about the December 30 GPR only affirm that summary judgment is inappropriate. They ask this Court to accept that the documents do not say what they say, and instead the reference to a December 30 GPR authored Villardita and Johnson was a reference to an extant document but, instead was a "mistake." Instead, they argue, the author of the December 31 GPR was referring to a *different* GPR, written by a *different* author, and on a *different* date than the one that has never been produced. How convenient. But,

Defendants were able to locate Anderson, whom they interviewed and confirmed that he had been with Taylor in the lock-up on November 16, 1992, including at the time of the murders. *Id.* ¶55. Defendants took notes of this exculpatory interview. *Id.* None of the Defendants' own documents (like those from the 23rd District) that related to Anderson were produced to Plaintiff's defense attorneys or the prosecutors. *Id.* ¶¶ 77-79, 80, 86-92. They were put in the Street File. *Id.* ¶¶105-112.

Like the Withheld Lockup Evidence, the investigating officers' own evidence concerning Anderson was favorable to the defense. It was exculpatory in the sense that Mr. Anderson was an additional witness who could have testified about Plaintiff being in police custody, as he did when the police found him. *Id.* ¶55. Further, that these are Defendants *own* documents makes their value even stronger as it concerns their impeachment value. The great lengths Defendants went through to find Anderson after learning of his role contradistinguished against Defendants failure to pursue Goldie and his associates would be damning. *See Kyles*, 513 U.S. at 446. In addition, the impeachment would be compounded when further juxtaposed against the other "investigative" steps going on at the time; namely "discovering" evidence that Plaintiff was not in custody at 8:43 or released from custody at the 10 p.m., *i.e.*, the testimony of Grimes, Glinski, Villardita, and Johnson. PSOF, ¶¶121.

For example, Glinski testified to the report he fabricated, purporting to see Plaintiff before he 10 p.m., *id.*, ¶¶67, 70, and the documents about not just of the fact of that Taylor was custody but also of the search for Anderson would have provided further impeachment to show that he was lying, and had a reason to lie about this issue (as he has done since then, *id.*, ¶65-71). To be sure, Glinski's original report about November 16, 1992 says nothing about Plaintiff. *Id.* ¶65. It was not until interacting with Villardita and Johnson, who had been searching for Anderson, that the fabricated Berti/Glinski Reports emerged and came about at the direction of Villardita and Johnson (and in a manner that departed from

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asking this Court to ignore the plain reading of the documents, and to even infer the opposite of what they say against the non-movant is anathema to summary judgment.

CPD policy, *id.*¶66). This evidence devastatingly impeaches Villardita and Johnson , given the manner in which the Berti/Glisnki report was requested, written, and reviewed. *Kyles,* 513 U.S. at 445.

4. Unconscionable Misconduct Related to Grimes

While witness tampering, coercion, or incentives, standing alone, do not encompass a violation of *Plaintiff's* due process rights, when such statements are used to deprive a criminal defendant of their liberty, the failure to disclose the tactics amounts to a "violation of the *Brady* duty to disclose facts about the coercive tactics." *Avery v. City of Milwaukee,* 847 F.3d 433, 439 (7th Cir. 2017). The reason for the distinction is that that because due process demands impeachment evidence be turned over, its allows for cross-examination of tactics to impeach not just the witness but also the law enforcement officers obtained the evidence when used at a proceeding. *See Giglio*, 405 U.S. 150 at 154-55 (finding a due process violation where the prosecution failed to disclose evidence of a key witness' "agreement as to a future prosecution" because such an agreement would have been relevant to the witness' credibility and "the jury was entitled to know of it"); *Avery*, 847 F.34d at 439 ("Armed with the *Brady* disclosure, the accused can impeach the coerced testimony by pointing to the tactics the officers used to extract it, and the jury has a fair opportunity to find the truth."); *Fields v. Wharrie,* 672 F.3d 505, 517 (7th Cir. 2012) (The constitutional violation occurs when the means by which the testimony was acquired are not disclosed at trial—or when other information that impeach the testimony's reliability are not shared with the defense."); *Newsome v. McCabe*, 319 F.3d 301, 304-05 (7th Cir. 2003) (holding that the "details of how" police "induced the witnesses" was "vital to probe whether manipulation occurred," and their suppression violated due process).

Indeed, failing to disclose the tactics behind the testimony explicitly includes inducements and incentives—like favorable treatment on other pending cases—violates due process. *See Wearry*, 136 S. Ct. at 1006-07 (finding *Brady* violation where, among other things, evidence of inducement was suppressed because "any juror who found" witness the credible "might have thought differently had

she learned that [the witness] may have been motivated to come forward . . . by the possibility of a reduced sentence on an existing conviction"); *Giglio*, 405 U.S. 150 at 154-55 (finding a due process violation where the prosecution failed to disclose evidence of a key witness' "agreement as to a future prosecution" because such an agreement would have been relevant to the witness' credibility and "the jury was entitled to know of it"); *Collier v. Davis*, 301 F.3d 843, 849 (7th Cir. 2002)(explaining that "when the government has entered into an agreement or understanding with a key witness regarding [a defendant's] prosecution, the credibility of the witness is at issue and failure to disclose details of the deal may deny the accused due process"); *cf. Toliver v. McCaughtry*, 539 F.3d 766, 781-82 (7th Cir. 2008).

Here, when Defendants set out to attempt to undermine the fact of Plaintiff being in custody at the time of the crimes, they used Grimes to do so by getting him to falsely claim that he had seen Plaintiff in the park before the murders (meaning he was not in custody). *Id.*¶¶61-62. Defendants do not seek summary judgment on the question of whether the reports and testimony relating to Grimes was fabricated. And for good reason: Grimes was physically abused, threatened and promised leniency on an unrelated drug charge he was facing, all of which was done to have Grimes falsely testify at trial that he had seen Taylor out of custody before the murders took place. PSOF, ¶¶61-62. In addition, Grimes testified to the false information in the fabricated report at trial. PSOF, ¶61.

Due process demanded that the physical and psychological coercion and inducements—the "corrupt origins" of the testimony—to Grimes be disclosed. *Newsome*, 319 F.3d at 302-05 ("the details about how [the police] induced the witnesses to finger Newsome" was "information vital to probe whether manipulation occurred" and thus supported the jury's *Brady* verdict). But the Defendants failed to disclose these facts. PSOF, ¶¶95-97. Accordingly, Plaintiff's *Brady* claim should proceed to trial. To be sure, evidence of the misconduct with Grimes would have allowed Plaintiff to impeach Grimes. More significantly, though, is the fact that the Defendants engaged in such misconduct after they obtained records showing Plaintiff was in custody at the time of the murders(and before when Grimes

claims he saw Taylor), and then immediately set out to unconscionably fabricate evidence designed to undermine *other* police records. Such facts would have been absolutely devastating to the credibility of the testifying Defendants, a fact particularly significant since the only evidence against plaintiff was a false confession wrung out of him in the middle of the night after pulling him out of a DCFS shelter. *Kyles*, 514 U.S. at 445. In short, disclosing this conduct "would have cast a shadow across the entire police investigation." *Atkins v. City of Riverside*, 151 F. App'x 501, 505 (9th Cir. 2005).

5. Evidence of Alternative Suspects: the Foote Information Report

Defendants' fabrication of evidence in this case is particularly egregious on its own terms. It is even more egregious, however, when one views that evidence against the fact that the Defendants decided to let actual perpetrators go free in order to frame a group of innocent youth and a teenager in police custody. Defendants learned early on in the investigation that Goldie was likely involved in the murders. This is what Faye McCoy told them. PSOF, ¶3. The Foote Information Report documents and confirms that Goldie was involved and provides that he, with others (and not Plaintiff or the Co-Defendants), had been violent with Lassiter just before the murders where Goldie pulled a firearm on Lassiter and beat him severely. *Id.* ¶3-4. More evidence of Goldie's associates was obtained, but—by the face of the GPRs and Supp. Reports alone—it was buried in the Street File. *Id.* ¶¶5-9, 93-94, & 112.

There can be no doubt that this evidence of alternative suspects was exculpatory and independently material. "[E]vidence suggesting an alternate perpetrator is 'classic *Brady* material.'" *Williams v. Ryan*, 623 F.3d 1258, 1265 (9th Cir. 2010) (quoting *Boyette v. Lefevre*, 246 F.3d 76, 91 (2d Cir. 2001)), which is actually the square holding of *Brady* itself. 373 U.S. at 87-88; *see also Carrillo v. City of Los Angeles*, 798 F.3d 1210, 1224 (9th Cir. 2015) (alternative suspect evidence falls within *Brady*); *Bies v. Sheldon*, 775 F.3d 386, 400 (6th Cir. 2014) ("On its face, the nondisclosure of the identities of the other suspects . . . was an egregious breach of the State's *Brady* obligation.").

Disclosure of the Foote Information Report and other evidence related to Goldie and his associates would have allowed the defense to argue that there was a different motive for the crime—taking over Lassiter's home, as had been reported, rather than some sort of debt to the gang. *Cf. Wolfe v. Clarke,* 691 F.3d 410, 418 n.7 (4th Cir. 2012) (alternate motive evidence is *Brady* material). This evidence plainly has impeachment value as it relates to the officers' investigation. As described above under *Kyles*, 514 U.S. at 44, and other authorities. *E.g. Atkins*, 151 F. App'x at 505; *Bowen*, 799 F.3d at 613.

6. Evidence Hidden in the Street File

Pursuant to an ongoing practice and custom, Defendants in this case maintained a Street File despite the fact that *all* reports were supposed to go into the Investigative File, PSOF, ¶¶98-99, and then on to the Permanent Retention File. *Id.* ¶100. All of these documents are supposed to be subject to permanent retention. *Id.* ¶¶99-100. Unfortunately, we will never know what was in the *entire* Investigative File, and we will apparently never know what was in the *entire* Street File—the former has been lost, and the latter (if not in the Investigative File) has never been produced. *Id.* ¶¶101-02, 105.

All of the foregoing documents just discussed were placed in the Street File. PSOF, ¶¶11-79, 93, & 110. It bears emphasizing that the documents that the police reports themselves indicate were in the Street File are exculpatory because they relate to alternative suspects and were independently and materially impeaching because the officers did not search for these suspects. *Id.* ¶¶109-112. Yet another independently dispositive fact at this juncture about the Street File is that none of the underlying documents relating to alternative suspects that were specifically referred to as having been placed in the "Street File" by Defendants' own documents have ever been produced. *Id.*¶111. As a consequence, it would take little effort, viewing the admissions in police documents about the existence of a Street File, for a reasonable jury to find that police officers brazen (or careless) enough to actually document the suppression of evidence related to alternate suspects, might also have also set out to suppress other

powerful evidence in their custody—e.g., from the 23rd District; of their efforts to find, and their interactions with Anderson, etc.—from the defense and the prosecution. *Id.* ¶111.

C. A Reasonable Jury Can Find The Suppressed Evidence Was Material

"'Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury," an inquiry that must be made based upon the cumulative effect of all of the suppressed evidence. *Wearry*, 136 S. Ct. at 1006 (quoting *Giglio*, 405 U.S. at 154). Also, whether evidence is material depends on the strength of other evidence used in the criminal case, so in cases where, as here, there is scant evidence of guilt, it takes less for the suppressed or fabricated evidence to be deemed material. *United States v. Agurs*, 427 U.S. 97, 113 (1976).

Here, the withheld evidence was material to the outcome of Plaintiff's criminal trial. The only evidence admitted at trial directly implicating Plaintiff in the crimes was the false confession. PSOF, ¶121. No physical evidence linked him to the crime, despite the fact that extensive fingerprint testing had been done. *Id.* The one eyewitness, Faye McCoy, did *not* identify Plaintiff as one of those leaving the scene soon after the shooting. *Id.* None of the actual participants in the crime testified against Plaintiff. *Id.* The remaining State testimony, which relates directly to Plaintiff's *Brady* claims, was the fabricated testimony of Grimes (Plaintiff's alleged presence before the crime) and the fabricated story provided in the Berti/Glinski report, both of which were designed to undermine the fact that Plaintiff was in custody at the time of the crime. *Id.* In short, it would not take much *Brady* evidence here to be "material," given the weakness of the State's case—which rested almost entirely on a physically impossible and false confession. *Agurs*, 427 U.S. at 113.

Defendants suppressed a variety of categories of materially exculpatory and impeaching evidence, any portion of which could have changed the result. Indeed, just one of these categories alone would be sufficient to permit a reasonable jury to find for Plaintiff. *Wearry*, 136 S. Ct. at 1006 (one impeachment witness in a case of the witness versus the alibi); *Newsome*, 319 F.3d at 302-05

(evidence of manipulation one witness was material); *Williams*, 623 F.3d at 1265 (suppressing alternative suspect is a *Brady* violation). Taking all reasonable inferences in Plaintiff's favor, and considering the suppressed evidence cumulatively, the record overwhelmingly establishes that a reasonable jury could find the suppressed evidence could have "affected the judgment of the jury," *Giglio*, 405 U.S. at154, as two other juries have recently found. PSOF, ¶108.[7]

D. Defendants' Lack of Suppression Arguments Fail

1. Reasonable Diligence Is A Limited Concept

The legal concept that evidence is not suppressed within the meaning of *Brady* if it was available to a criminal defendant, in the sense that a reasonably diligent defense attorney could have obtained it, is not a limitless rule. The obligation of criminal defense attorneys to discover evidence requires them to obtain available evidence, it does not require them to engage in a game of hide and seek to obtain records exclusively in the possession of the police. *Banks,* 540 U.S. at 696. The standard is thus confined to reasonable things counsel had access to and the steps counsel could have been expected to take in the context of their case, and prevailing law, at the time. *See Strickler,* 527 U.S. at 283-84 (limiting the concept of reasonable diligence); *Boss*, 263 F.3d at 741 (rejecting an argument that "rests on far too expansive an understanding of what sort of evidence should be considered available to a defendant through the exercise of reasonable diligence"); *Jimenez*, 830 F.Supp.2d at 444-45 (rejecting the same).

Reasonable diligence is also directly linked to, and must be construed in light of, the state's affirmative obligation to disclose material evidence. The Supreme Court has made clear time and again

[7] Defendants' cursory paragraph materiality deserves little mention—their Rule 56.1 statements and brief have not addressed the fact that much of the evidence at trial was weak, given that it was fabricated. Their argument also rests on a factual assertion that is incorrect—that Plaintiff's defense attorneys had not sought the documents about Taylor being in police custody at the time of the crime, which is not the case. PSOF, ¶113-19. Moreover, the idea that Defendants did not have an obligation to disclose everything is contrary to the law. *Banks*, 540 U.S. at 696 (rejecting a rule police "may hide, defendant must seek"); *Mellen*, 900 F.3d at 1097-98 (due process requires disclosure of *all* material evidence); *Barton*, 786 F.3d at 468 (same). Moreover, there is no way to find, consistent with the law and facts of this case that the evidence was "cumulative"; the documentary evidence was different in significant ways. *See Strickler*, 527 U.S. at 284.

that suppression occurs when the state fails to produce evidence in circumstances when it was obligated to do so. The disclosure obligation is so fundamental that a specific request need not be made for materially exculpatory and impeaching evidence. *Strickler*, 527 U.S. at 280. As a consequence, the defense attorneys are entitled to reasonably rely upon the state's disclosures, and assurances that material evidence has been disclosed. Thus, it is "reasonable for trial counsel to rely on, not just the presumption that the prosecutor would fully perform his duty to disclose all exculpatory materials, but also the implicit representation that such materials would be included in the … files tendered to defense counsel for their examination." *Id.* at 284; *cf. Bracy v. Gramley*, 520 U.S. 899, 908 (1997) ("Ordinarily, we presume that public officials have properly discharged their official duties."). This is why the Supreme Court has specifically rejected the rule that the police "may hide, defendant must seek" as incompatible with the constitution. *Banks*, 540 U.S. at 696. And, the Court's decisions "lend no support for the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed." *Id.* at 695; *see also Jefferson v. United States*, 730 F.3d 537, 541 (6th Cir. 2013) ("Reasonable diligence does not require a [criminal defendant] repeatedly to scavenge for facts that the prosecution is unconstitutionally hiding from him."); *Benn v. Lambert,* 283 F.3d 1040, 1062 (9th Cir. 2002) (defendant given "inculpatory evidence by the state is not required to assume that the state has concealed material information" and "obligated him to ascertain the *Brady* material on his own").

Defendants' arguments turn this law on its head. To Defendants, evidence is not suppressed where police refuse to disclose multiple pieces of exceptionally powerful material evidence they are hiding in secret files if they elect to disclose a small portion of the evidence (*e.g*, the bond slip and arrest report) and require defense counsel to guess its true significance. This is perfectly compatible with due process, Defendants' argument goes, because the defense should be able to sleuth out the remainder of the withheld evidence (or a secondary substitute), even when it was specifically sought not turned over

and even when that was followed a representation that there was nothing else to give. The Supreme Court explicitly rejected such a rule in *Banks* as a plain and simple application of its body due process law. 540 U.S. at 694-96 (discussing *Strickler* and other authorities). Defendants' concept of suppression is contrary to these principles requiring affirmative disclosure of *all* material evidence.

2. Reasonable Diligence Was Easily Satisfied Here And, At Best, Presents A Jury Question

The record in this case shows that, a reasonable jury could find that evidence was suppressed, and that the suppressed evidence was not obtained despite reasonable diligence. Plaintiff's defense counsel filed a formal motion for discovery that sought, among other things, all of the evidence that might or would be favorable to the defense. PSOF, ¶113. In its Answer the state responded: "The People are unaware of any evidence or witnesses which may be favorable to the defense in this case." *Id.* Given the law discussed above, the prevailing practices at the time, and the Illinois Supreme Court's mandatory disclosure rule, Plaintiff's expert opines: this "motion satisfied the reasonable standard of care with respect to discovery applicable for defense attorneys at the time of Taylor's case." *Id.* ¶114.

Given the affirmative motion for discovery and subsequent Answer from the state indicating there was no material evidence to disclose, it was beyond reasonable for Plaintiff's defense attorneys to rely upon the state—including the police—to produce all of the favorable evidence in their files. *Strickler v. Greene*, 527 U.S. 263, 284 (1999); *Banks*, 540 U.S. at 696; *Bracy*, 520 U.S. at 908; *Bagley,* 473 U.S. at 682-83; *Starns,* 524 F.3d at 619; *Benn,* 283 F.3d at 1062 (9th Cir. 2002); *see also* PSOF, ¶116 ("It is reasonable—and expected—for defense attorneys to rely on the State's obligation to provide material information to them, and defense attorneys do not have an obligation to 'turn over every stone in every case just to determine whether the State has refused to turn over evidence it was required to disclose.'" (quoting Exhibit 49 at 6)). It was equally reasonable for Plaintiff's defense attorneys to rely upon the state's response that everything available had been disclosed. *Id.* ¶113.

All of this is sufficient to deny the Defendants' motion. But, there is more. Specifically, Plaintiff's criminal defense counsel sent a subpoena to CPD requesting records from the 23rd District, not just for the night of the murders but also days nearby (which could have allowed the defense to learn about general practices at the District). *Id.* ¶115; RDSOF, ¶73. The fact that this subpoena was additionally sent—when the CPD *already* had an obligation to give Plaintiff the records—went, in the opinion of Plaintiff's expert, "'well beyond the lengths he was required to take under the standard of care and prevailing law upon which defense attorneys relied in the early 1990s.'" *Id.* Thereafter, Diamond-Falk inquired about the subpoena in court (where criminal subpoenas are returned) multiple times but nothing was ever produced. RDSOF, ¶75. Plaintiff's attorneys also spoke with the trial prosecutors about discovery even after getting the People's Answer and were assured that nothing in their possession had been withheld. *Id.* (This was a true statement from the trial prosecutor at the time because he did not have the Withheld Lockup Records either, *Id.*, ¶¶57-58, & 75.)

Moreover, that a reasonable jury could find that the Defendants suppressed evidence that was hidden from the prosecution and Plaintiff is further compelled by the existence of the City's street files practice, and the fact that that practice was undoubtedly at work in this case. *See supra,* at p. 11-14. That practice routinely involves police officers withholding evidence from the criminal justice system in order to prevent Defendants from having fair trials. *Id.* Put differently, if asked to determine whether evidence from the CPD was suppressed even after Plaintiff's defense attorney filed a motion for discovery and sent a subpoena for records to police officers operating under a practice where they would routinely refuse to disclose material evidence to the criminal justice system, a reasonable jury would have absolutely no problem finding—as others already have multiple times—that the evidence was in fact suppressed in violation of due process.

All of these steps well exceed the threshold for concluding that a reasonable jury could find that the Defendants' suppressed material evidence and that the narrow "reasonable diligence" threshold was

far exceeded here. *Cf. Holland v. Florida.,* 560 U.S. 631, 653 (2010) (distinguishing between "reasonable diligence" and "maximum feasible diligence" and recognizing the limits on the former). An analogous situation was presented in *Jefferson v. United States*, where the Sixth Circuit emphasized that reasonable diligence does not require a criminal defendant to "repeatedly to seek out information that the government unconstitutionally failed to disclose despite having notice that petitioner sought the very information suppressed," which is precisely what happened here 730 F.3d 537, 545 (6th Cir. 2013). Plaintiff's defense attorney filed a motion for discovery, *and* was told that there was no *Brady* material by the state, *and* nonetheless sent a subsequent subpoena directly to the police, *and* spoke with the trial counsel, *and* inquired with the court about whether the subpoena had been returned. That suffices.

The summary judgment ruling in *Rivera,* another street file case, is also instructive. There, the defendants similarly sought summary judgment by claiming evidence was not suppressed on the basis that the defense was not reasonably diligent. 319 F.Supp.3d at 1045. The Court properly denied the motion on this point on the basis that the defense attorney had filed a motion requesting *Brady* material and had received an informal assurance from the prosecutors that all material evidence had been disclosed. *Id.* The issue of diligence was also a fact question for the jury, just as it is here—a case where the defense did more than the counsel in *Rivera. Id* .

3. Defendants' Arguments That Documentary Evidence Was Not Suppressed Because Others Knew "About" Issues Related to the Suppressed Evidence Fail

Some of Defendants' arguments are premised on the fact that Plaintiff and his defense attorneys were "aware of Plaintiff's lockup alibi." Dkt. 487, at 15; *see also id.* (defense attorneys testifying they were "aware of the Taylor lockup issue"). It is certainly the case that evidence is not suppressed if was "already known to the defendant." *Avery v. City of Milwaukee,* 847 F.3d 433, 442 (7th Cir. 2017) (citing *Gauger v. Hendle*, 349 F.3d 354, 360 (7th Cir. 2003)). But, the fact that Plaintiff and his Plaintiff's defense attorneys were aware of the fact that Taylor was innocent and further could not have committed the crime because he was in police custody is beside the point in at least two ways.

First, regardless of what Plaintiff knew *about* the fact he was in custody that was no substitute for the CPD documents and other tangible evidence that corroborated this fact. Put differently, there is a monumental distinction between suppressing documentary evidence— and in particular contemporaneously created documentary evidence from a disinterested witness—and just the identity of a person or the fact that a witness might have information.[8] Thus, regardless of what Plaintiff knew about his own situation, nothing excuses or otherwise undermines the importance of the fact that CPD suppressed evidence and documents—*e.g.*, the Lock-up Roster, the Visual Check Lock-up Log Book, GPRs, arrest reports, and the list goes on—confirming Plaintiff was in police custody at the time of the crimes, pointing to alternative perpetrators, and impeaching the Defendants' flawed and misconduct-laden investigation. The fact that Plaintiff might have known he was in custody absolutely does not excuse or eliminate the fact that Defendants' suppressed documentary evidence within police files here.

The Supreme Court has recognized the difference between things a defendant arguably *knows* and the suppression of actual police paperwork and other documentation would enable the defendant to *prove* or cross-examine witnesses about what he knows to be true. In *Strickler v. Greene*, for example, the Court rejected the argument that the existence of multiple statements by a witness were not suppressed even though the trial testimony and newspaper articles could have arguably led to the conclusion that multiple statements had been made. 527 U.S. 263, 284 (1999). Instead, even if defense might have known about multiple interviews, "it by no means follows that they would have known that *records* pertaining to those interviews," or that "the *notes* that [the witness] sent to the detective, existed

[8] This fact underscores the unique nature of this case. Most of the times when a criminal defendant puts on an alibi defense, they point to evidence held by third parties who, themselves, do not have a *Brady* obligation—*e.g*, a grocery receipt, timecard from an employer, security footage, a movie ticket, etc. In such cases, it is possible to imagine that the prosecution might not have the *Brady* evidence, and the state is not required to seek out exculpatory evidence it does not possess when it is unaware of such evidence. *United States v. Earnest*, 129 F.3d 906, 910 (7th Cir. 1997). Here, by contrast, the critical evidence was always in the hands of the police and the City of Chicago, making it all the more powerful, its suppression all the more egregious, and this case distinguishable from others involving alibi issues where *Brady* was not violated. *See, e.g.*, *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007) (referencing employment records and where no subpoena was sent to the location of the defendant's alibi location).

and had been suppressed." *Id.* (emphasis added). As here, the Defendants' suppression of "notes" and "records" violates due process, regardless of whether Plaintiff knew he was in custody or was familiar with the topics addressed in those documents.

Applying this law to a case involving a suppressed store receipt, the Third Circuit recognized that withheld documents that "would have given defense counsel unique ability . . . bolster his alibi defense using objective documentary support from a disinterested party," was fundamentally different than merely relying on witness testimony in the absence of that objective evidence. *Dennis*, 834 F.3d at 312. *Dennis* is quite analogous to the situation here. There, the Third Circuit took the exemplary step of granting federal *habeas corpus* based upon the failure to disclose *Brady* material, including a receipt that corroborated the defendants' alibi defense. *Id.* at 286-87. The Court confirmed that contemporaneously made, objective evidence from disinterested witnesses was different in kind than witness testimony and, importantly, might have been used to (1) as exculpatory on its own right, (2) to rebut a challenge to an alibi, and (3) to prevent a witness incorrect testimony a witnesses' interactions with the defendant. *Id.* Thus, *Dennis* recognized that being "armed with" the disinterested, objectively made records would have allowed the defendant to prove his alibi in a fundamentally different way than without the records.

Moreover, same argument Defendants now make was likewise rejected in *Rivera* where part of the suppression claim included a lineup in which the plaintiff participated and was not selected (exculpatory evidence), but the Defendants failed to disclose. The *Rivera* defendants argued that because the plaintiff knew he was in the lineup, evidence related to that lineup could not have been *Brady* material. 319 F.Supp.3d at 1046-47.Aas in *Strickler,* the *Rivera* Court rejected this claim: the fact that the plaintiff knew about being in a line-up was no substitute for the "for the withheld arrest reports, GPRS, and police paperwork." *Id.* Instead, the police had an obligation to produce such documentary evidence. *Id. Strickler, Dennis,* and *Rivera* are controlling here.

Second, the Seventh Circuit likewise placed limits on the idea that the information was "already known." In *Avery*, for example, the suppressed evidence concerned jailhouse informants who had been pressured and induced to make false statements at trial. The district court granted summary judgment because the defendant "knew what he said (or didn't say) to the jailhouse informants." 847 F.3d at 443. The Seventh Circuit reversed because that was beside the point; "the material question is whether [the criminal defendant] was aware of the *impeachment evidence*." *Id.* "In other words, [the criminal defendant] did not have the evidence that could help him *prove* that the informants' statements were false." *Id.* The same is true here as it concerns the suppression of the reports related to Anderson and the 23rd District lock-up (as well as Grimes): Plaintiff did not have the evidence that could help *prove* the informants' statements were false. *Id.*; *see also Sanders v. City of Chicago Heights,* No. 13 C 0221, 2016 WL 2866097, at *6 (N.D. Ill. May 17, 2016) (denying motion for summary judgment on *Brady* claim and rejecting argument that the plaintiff "knew at the time of his trial that" a witness was telling a fabricated story as "misplaced because [the plaintiff's] argument is that he did not know *how* Defendant Officers induced Haslett to testify against him").[9] Defendants' argument is meritless.

4. Defendants' Cannot Obtain Summary Judgment Given The Pervasive Disputes of Material Fact

Defendants' arguments about Plaintiff's defense attorneys, about the disclosure of documents, and about what was known to others fail to credit Plaintiff's facts and construe them in the light most favorable to Plaintiff. Beyond that, these arguments illustrate that "[w]hat was available through reasonable diligence . . .is very much in dispute," making the issue of suppression one for the jury. *Jimenez*, 830 F. Supp. 2d at 436; *see also Cottrell v. Clemons*, 2014 WL 3649185, at *2 (W.D. Ky. July 23,

[9] This Court has also already rejected part of the premise behind Defendants argument as follows: "Taylor's knowledge of his innocence does not mean he was aware of the various methods employed by the police to ensure his conviction." Dkt. 163, at 15. Indeed, this Court recognized, the logical conclusion of this argument "would preclude any innocent criminal defendant from bringing a *Brady* claim because he would already know that any incriminating evidence was false." *Id.* The argument is as mistaken now as it was then.

2014) (whether defense counsel exercised reasonable diligence is a question for the jury). Indeed, in a case like this one—where the CPD has lost its own official records and the Street File has never been produced—it should be unremarkable that the question of suppression is for the jury. *E.g. Rivera*, 319 F.Supp.3d at 1046 ("Facts material to whether [the criminal defense attorney] acted with reasonable diligence are genuinely disputed.").

Indeed, the question of what could be discovered through reasonable diligence—which is really a type of causation question—is nearly always inappropriate for summary judgment and, instead, a question for the jury. *See, e.g.*, *Cathedral of Joy Baptist Church v. Village of Hazel Crest*, 22 F.3d 713, 719 (7th Cir. 1994) (issue of diligence in discovering an injury is a question of fact for the jury unless "the relevant facts are undisputed and only one conclusion may be drawn from them"); *Weber v. Seterus*, Inc., 2018 WL 1519163, at *10 (N.D. Ill. Mar. 28, 2018) (issue of causation and whether plaintiff exercised "reasonable diligence" was a "fact issue for the jury"); *Pippenger v. McQuik's Oilube, Inc.*, 854 F. Supp. 1411, 1427 (S.D.Ind.1994) ("[G]enerally speaking, the questions of reasonable diligence and reasonable reliance are questions of fact for the jury to decide."); *Koski v. Gainer*, No. 92 C 3293, 1997 WL 159530, at *5 (N.D. Ill. Mar. 27, 1997) ("[I]t is a question for the jury to determine whether [plaintiff] acted with reasonable diligence to obtain information that would have supported his claim.").

Nor do the summary judgment opinions in *Patrick* and *Phillips* dictate a different result. This is because the fact pattern is different. First, Taylor and the Co-Defendants were not similarly situated with respect to *Taylor* being in custody. For the others, considering whether a co-defendant's alibi could be an aspect of the case was not a necessary or central part of the defense, it was a mere possibility. And, a possibility fraught with potential ethical issues, *see* PSOF, ¶117; the risk that it might open the door to having Taylor's (false) confession introduced; and the problem of also not having the right to compel Taylor to testify. *Bruton v. United States*, 391 U.S. 123 (1968). By contrast, the fact Taylor was in custody was about *his* case, especially given the evidence fabricated specifically to address *his* custody.

Thus, unlike Mr. Patrick's defense who "chose not to pursue" this issue, *Patrick v. City of Chicago*, 213 F.Supp.3d 1033, 1052 (N.D. Ill. 2016), Taylor's defense absolutely did. *See* PSOF, ¶¶113-115, & 119. In addition, the record concerning diligence is completely different. Here Plaintiff's defense counsel were beyond diligent. The notion that, for Taylor's counsel simply "could have obtained" the records "if he so desired" is belied by the record. *Phillips v. City of Chicago*, 2018 WL 1309881, at *22 (N.D. Ill. Mar. 13, 2018). Counsel tried, but his efforts were stymied by Defendants' suppression of evidence.

a. Defendants Arguments About the Suppression of Anderson, Beyond The Documents, Are Based On Highly-Disputed Facts

Defendants claim that Plaintiff's defense attorneys "could have easily ascertained Anderson's identify with relative ease." Dkt. 487 at 15. The record is the opposite: Plaintiff's defense attorneys sent a subpoena for this information, and received nothing. PSOF, ¶105. The Defendant Officers affirmatively withheld evidence about Anderson's existence. *Id.,* ¶¶76-79. Plaintiff did not know Mr. Anderson, *Id.* ¶54, and there is absolutely no evidence illustrating that Mr. Anderson's identify, let alone Anderson himself, could have been "easily ascertained." Thus, the only reason that Plaintiff's defense attorneys did not look for Anderson was due to the fact that his identity was unknown. *Id.* ¶78.

Moreover, and it bears repeating: even if Plaintiff learned who Anderson was or was even able to find him, that would not be a substitute for the suppression of the actual documentary evidence and would have been crucial to use at trial. Such evidence would have assisted in possibly putting on Mr. Anderson, in refreshing the recollection or testimony of the police officers who arrested him, and impeaching the officers (Defendants here) who falsely suggested Plaintiff was not in custody at the time of the crime. *Strickler*, 527 U.S. at 284; *Dennis*, 834 F.3d at 286-87; *Rivera*, 319 F.Supp.3d at 1047.

Finally, Defendants have also distorted the record in suggesting that the defense attorneys made a "strategic decision" to avoid looking for Anderson or other people in the lock-up. The facts support the opposite conclusion—the defense took clear steps to seek out such information. RDSOF, ¶95, 107. To the extent Defendants contend otherwise, this is a disputed issue of fact.

b. Defendants' Arguments About What was In the Heads of Witnesses But Unknown to Defense Counsel Rests on Disputed Facts and Inferences Drawn Improperly Against Plaintiff

Defendants advance meritless arguments suggesting that Plaintiff could have obtained more material evidence Plaintiff's innocence or from certain witnesses, including from Grimes, Meindl, and other CPD officers (e.g., officers from the 23rd District identified on the bond slip) if he or his counsel had only interviewed those individuals or done so more effectively. As an initial matter, and again, this argument cannot apply to the withheld documents in the case, see *supra* at p. 28-31, which were required to be disclosed and are different in kind from a witnesses comment or testimony.

Further, Defendants' argument misunderstands the manner in which the law treats evidence that exists solely witnesses' heads. *See Boss*, 263 F.3d at 740. As *Boss* explained, "a defense witness's knowledge is quite different from the type of evidence typically found to be available to defense counsel through the exercise of reasonable diligence," and, "[b]ecause mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document." *Id.* at 741. Thus, *Boss* rejected as "untenable a broad rule that any information possessed by a defense witness must be considered available to the defense for *Brady* purposes." *Id.* The Court rejected such a rule because of the myriad reasons a witness might not tell everything they know to a defense attorney, finding it "simply not true that a reasonably diligent defense counsel will always be able to extract all the favorable evidence a defense witness possesses." *Id.* Instead, witnesses may be uncooperative or reluctant; they might have forgotten or inadvertently omitted some important piece of evidence previously related to the police; or the witness might learn new facts between interviews. *Id.* *Jimenez* likewise rejected an argument that assumed the "existence of a Perry Mason-like world in which prosecution witnesses readily give up impeaching information when interviewed or questioned by defense counsel," because "[r]eal life does not work that way, or at least the governing legal rule cannot realistically be premised on the assumption that it works that way" 830 F. Supp. 2d at 445.

Defendants' arguments about the defense interviewing possible witnesses who were themselves members of CPD and hoping to elicit all of the information that they did not even know was being unconstitutionally hidden from them by the Defendants is akin to that "Perry Mason" world described by Judge Kennelly in *Jimenez*. That is simply not how the real world works (and it remains no substitute for the State disclosing the actual documents that were withheld). Moreover, Defendants cannot establish that, at the time of trial, any of the 23rd District witnesses would have independently recalled sufficient information about Plaintiff, much less that he was in custody the time of the murders, that he was bound over from the Third Watch to the First Watch, or that he was celled with James Anderson, etc. Without the records to assist, such an assumption is implausible given the size of CPD, the volume of people passing through, and the passage of three years between when Plaintiff was in lock-up custody for three hours in 1992 and when he went to trial in 1995. Additionally, Defendants certainly cannot persuasively claim that the recollection of such witnesses, whatever it might be, about Plaintiff's misdemeanor arrest three years prior to trial would not have been greatly advanced by review of the suppressed documents maintained by CPD.

To put a finer point on it: Defendants' suggestion that interviewing Meindl should have allowed them to somehow learn that scores of records were being hidden from them is based upon disputed facts they have not proved, as well as inferences drawn in their favor, all of which run contrary to *Boss* and other precedent. *See* RDSOF, ¶102. Such an assumption is also contrary to due process. *Cf. Floyd v. Vannoy,* 894 F.3d 143, 162-63 (5th Cir. 2018) ("The State does not demonstrate compliance with *Brady's* disclosure requirement by asserting a possibility Floyd could deduce that, based on the general evidence provided to him, additional evidence likely existed. To the contrary, the State's nondisclosure may have reasonably led the defense to conclude no additional evidence existed.") (citing *Bagley*, 473 U.S. at 682-83 (1985), and *Starns v. Andrews*, 524 F.3d 612, 619 (5th Cir. 2008)). Even assuming Meindl was interviewed by defense counsel, which is disputed, *Boss* counsels and *Jimenez* confirms that it would be

inappropriate to find, as a matter of law no less, that any CPD employee interviewed by defense attorneys in a double murder case would have not only disclosed certain records that had been suppressed but then also obtained those already subpoenaed records and turned them over to the defense. If Defendants are going to rely on a contention, they should have to persuade a jury.

As it relates to Grimes, Defendants' assertion that evidence of his coercion and lies was not suppressed is easily dispatched. The evidence in the case does not support the notion that Grimes would have revealed the Defendants' misconduct that motivated his testimony if for no other reason than doing so would have undermined his deal on the pending drug charges and subjected him to additional police abuse. PSOF, ¶ 62. Indeed, it is reasonable to assume Grimes would have lied when faced with such questioning by the defense, just as he did when asked at trial. *See Crivens v. Ro*th, 172 F.3d 991, 996-97 (7th Cir. 1999) (holding that evidence in a prosecution witness's head is not discoverable through the exercise of reasonable diligence when a witness would have lied about it); *Jimenez*, 830 F. Supp. 2d at 445 ("Witnesses coerced or persuaded to testify in a particular way often tend to identify with, and to ally themselves with, their persuaders. A legal rule that assumes that such a witness will readily describe the circumstances of the coercion or persuasion simply because the other side's lawyer asks the witness the right question would defy common sense."). Moreover, that Grimes was coerced should itself preclude defendants from obtaining summary judgment. *See Hampton v. City of Chicago*, 2017 WL 2985743, at *22 (N.D. Ill. July 13, 2017) (summary judgment should not be granted in circumstances where prosecution witness has been misled or subject to other misconduct).

c. Factual Disputes Pervade What Was Disclosed to the CCSAO, Precluding Summary Judgment

Equally unavailing are Defendants' arguments that evidence was supposedly disclosed to the prosecutors. For one thing, Defendants' arguments are premised on their self-serving view of the evidence, as opposed to that of the nonmovant. Viewed more properly in Plaintiff's favor, the relevant material facts are as follows.

ASA David Styler presented the Lassiter-Haugabook case to the grand jury as part of the "felony review unit," and the lead trial attorney was Thomas Needham, who was responsible for producing evidence to the defense. Neither Styler nor Needham had the Lockup Roster, the CPD Personnel List, or the reports concerning James Anderson, including his arrest report and bond slip from November 16, 1992, the reports about finding him, or the handwritten notes of the officers' interview with him. PSOF, ¶¶80-88. Had Needham received any of this evidence, he would have tendered it to Plaintiff's defense team. *Id.* ¶¶83-86. And, none of that evidence was in Diamond-Falk's trial file. *Id.*72-79. Moreover, at the time, the CPD officers were operating according to the City's street files practice, which entailed "insufficient instructions on producing materials to prosecutors," *Fields v. City of Chicago*, 2017 WL 4553411, at *3 (N.D. Ill. Oct. 12, 2017), and they maintained a (still) undisclosed Street File in this case. PSOF, ¶¶105-112. All of this is sufficient to allow a reasonable jury to conclude that the Withheld Lockup Documents, and the other 23rd District evidence, was suppressed. *Cf. Rivera*, 319 F.Supp.3d at 1045 (absence of documents in criminal defense file, with other evidence, illustrated "the jury could reasonably find that [the defense] did not have, and the prosecution never produced, several investigative documents").

None of Defendants' arguments about Styler or the CCSAO justify a different conclusion. Defendants' argue that the CCSAO had all of the foregoing. However, what was and was not disclosed to the prosecutors, and when it was given to them, is hotly disputed. RDSOF, ¶¶36-48, 57-58, 60-61, 64-65, & 67. This is a classic dispute of material fact that precludes summary judgment. To be sure, the core of Defendants' argument about disclosure requires the Court to assume facts and make inferences *against* plaintiff based upon ASA Styler's notes of some of the 23rd District personnel. But, there is no evidence—and nothing in the files and records—to confirm that the Defendants actually turned over documents from their Street File to Styler. Indeed, the fact that Needham did not have the documents, and could not identify them as having previously been in the

"felony review" folder he received from Styler, is powerful evidence that the Defendants did *not* disclose the actual reports to Styler. PSOF,¶¶83-86. All of that is certainly sufficient to allow a reasonable jury to infer that the documents themselves were suppressed.

At best, Defendants' contention boils down to the idea that because Styler apparently knew a little bit about the case (perhaps from conversations with the Defendants), and even though he did not have the reports, Defendants are automatically absolved of liability. Not so. Instead, as explained above, there is a fundamental difference between disclosing the powerful documents and records and other evidence. *See supra* at 28-31 (discussing *Strickler*, 527 U.S. at 284; *Dennis*, 834 F.3d at 286-87; *Rivera*, 319 F.Supp.3d at 1047). To be sure, Styler's limited information about the 23rd District officers, even from his notes, does not negate the fact that the other Withheld Lockup Evidence and 23rd District Records were suppressed. *Id.; see also Walker v. Kelly*, 195 Fed. App'x 169, 173-74 (4th Cir. 2006) (rejecting argument that Brady had not been violated because "the autopsy and pre-sentence reports, both of which were provided to Walker, contain the same information found in the withheld reports, because the reports provided additional impeachment evidence); *Gonzalez v. Wong*, 667 F.3d 965, 984 (9th Cir. 2011) (finding failure to turn over psychology reports violated Brady because the reports provided additional impeachment evidence).

A further problem with finding no jury could find for Plaintiff on this issue is that, as with the missing Permanent Retention File, and Investigative File from the Defendants, the original State's Attorney's file is missing, too. PSOF, ¶92. Also missing is the original document that Needham would have had documenting the discovery in the case. *Id.*¶90-91. It would be truly upside down to hold that, as a matter of law, Plaintiff cannot prevail on his *Brady* claim that the police withheld evidence from him causing his wrongful conviction because all of the public authorities involved in his wrongful conviction have lost their original files that are subject to permanent retention, especially where we know the police were maintaining their own Street File. Summary

judgment—where the evidence and inferences therefrom are construed in plaintiff's favor—works in the exact opposite manner. *Tolan*, 134 S. Ct. at 1866.

This case analogous to *Dominguez v. Hendley,* 545 F.3d 585, 589–90 (7th Cir. 2008). There, the Seventh Circuit rejected the argument that an officer could not be liable for a *Brady* violation by claiming that some information had been provided to a prosecutor. Dominguez submitted evidence that the police officers were not forthcoming with the prosecution, and suppressed evidence of their misdeeds even though some information about the case had been disclosed. The Court explained:

> Dominguez submitted sufficient evidence at trial to allow the jury to find that Hendley did not provide truthful information to subsequent decisionmakers, and that he did mislead the official who could be expected to exercise independent judgment. For example, the criminal prosecutor testified that he was never told about any showup used in Kraus's identification of Dominguez. Dominguez also proved that Hendley received an exculpatory document, known to the parties as the "Navy Report," but that this report was missing from the official file that had been provided to the prosecutor during the criminal trial, and was not part of the materials furnished to Dominguez in discovery. The Navy Report would have provided valuable exculpatory evidence for Dominguez.

Id. Thus, *Dominguez* held, the jury must "decide who was telling the truth on these points, and ultimately whether [the police] misled the prosecution and caused [Plaintiff] to receive an unfair criminal trial." *Id.*

The same is true here: the record shows that the Defendants deprived the prosecutors of more than just a report or two, but a myriad of materially exculpatory and impeaching evidence they had hidden in their street file. The record also shows that Defendants did not ever disclose their efforts and misconduct in fabricating evidence against Plaintiff, including the false confession, Grimes, and the Glinski-Berti report. Nor did Defendants ever disclose that McCoy had actually told Defendants Plaintiff was not involved but that Goldie was, as evident from the fact that Needham used this bogus report to attempt to falsely impeach McCoy at trial. PSOF, ¶48, 121. Moreover, by suppressing evidence of the actual perpetrators and the fabrication of the co-defendants' statements, the defendants mislead Styler and Needham in fundamental ways,

successfully getting them to secure the indictment of 7 innocent people, and the wrongful conviction of Plaintiff, Deon Patrick Paul Phillips, and Lewis Gardner. The record also reveals that there is a Street File in this case, and that the practice with respect to these files was to hide them from the prosecutors, additional evidence that the prosecutors in this case were misled as well.

In short, given the facts here are far more egregious than those presented in *Dominguez*, and keeping in mind that the Defendants bear the burden while inferences flow toward Plaintiff, it should be plain that a reasonable jury could conclude that the Defendant Officers continued to suppress evidence from the prosecutors. The jury must determine where the facts lie.

d. Meindl's Passing Comment Was Not a *Brady* Disclosure

Defendants suggest, but do not directly state, that Meindl's passing comment about a "lockup intake report" on redirect examination when asked about the *number* of people in lockup was some sort of *Brady* disclosure. This argument fails. For one, Meindl did not produce this document. PSOF, ¶119. Second, to the extent the Defendants claim that Meindl was referring to the Lockup Roster, the fact is disputed. RDSOF, ¶105. Third, such a passing reference could not trigger some sort of obligation for the defense, on the very last day of trial after the state had rested its case, to infer that some piece of *Brady* material had been suppressed, particularly in light of counsel's prior efforts that should have resulted the disclosure of any applicable 23rd District documents. PSOF, ¶113-16, 118-19. Fourth, the argument rests on an assumption not just that Meindl disclosed something (though he did not) but also the idea that the defense would have been able to make full use of that document. *Boss*, 263 F.3d at 740. Given the facts of this case, this requirement cannot be met. *See* RDOF, ¶106. At any rate, Defendants have not met their burden of showing that no reasonable jury could conclude that this passing comment was insignificant and that the Defendants suppressed this evidence, particularly given the failure to respond to the subpoena sent. Summary judgment is inappropriate on this ground (to the extent that is Defendants' implication).

II. PLAINTIFF'S FABRICATION CLAIM MUST GO TO THE JURY

Defendants' fabricated evidence that was used to deprive Plaintiff of his liberty, before and after trial. Defendants have not contested the viability of Plaintiff's fabrication claim related to the false confession, and the fabrication of Adrian of Grimes, or four fabricated police reports relating to Gillespie, Grimes, and Seymore. *See* PSOF, ¶65. Instead, their claim is limited to three categories of evidence: (1) the false confessions of Plaintiff's co-defendants, (2) the false Berti-Glinski GPR, and (3) the McCoy Lineup Report.[10] As it relates to these categories, Defendants make only one argument: that because the evidence was not actually admitted *as evidence* at trial it cannot support a fabrication claim. The argument is contrary to controlling law.

The Seventh Circuit "'ha[s] 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 (quoting *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012) (emphasis added)).

Applying this law, the Seventh Circuit has already rejected the argument that evidence need to be admitted as evidence in a proceeding to state a due process claim for fabrication. *See Hurt v. Wise*, 880 F.3d 831, 843 (7th Cir. 2018). In *Hurt*, the Seventh Circuit recognized that a fabrication claim "can be based on false police reports," and that the due process clause does not require every piece of fabricated evidence be introduced at trial for it to be actionable. *Hurt*, 880 F.3d at 844. Instead, if a plaintiff "can show that the fabricated police reports furthered the prosecution, they have done enough." *Id.* Indeed, by recognizing that a fabrication claim can be based upon detention

[10] In addition to not addressing the Gillespie, Seymore and Grimes reports, Defendants do not argue that Plaintiff has not adduced enough evidence to create a triable issue of fact on any of the fabrication claims. Defendants obviously cannot switch things up for the first time in reply. *See Sublett v. John Wiley & Sons, Inc.*, 463 F.3d 731, 736 (7th Cir. 2006) ("[I]f the moving party does not raise an issue in support of its motion for summary judgment, the nonmoving party is not required to present evidence on that point, and the district court should not rely on that ground in its decision."); *Costello v. Grundon*, 651 F.3d 614, 635 (7th Cir. 2011) (reversing summary judgment granted on issue first raised in a reply).

that happens *before* trial, the Seventh Circuit, like others, has long embraced this conclusion. *See Whitlock*, 880 F.3d at 843 ("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."); *Fields v. Wharrie,* 740 F.3d 1107, 1112 (7th Cir. 2014) ("[T]he fabrication of evidence harmed the defendant before and not just during the trial, because it was used to help indict him."); *Julian v. Hanna*, 732 F.3d 842, 847 (7th Cir. 2013) (fabrications of evidence affect liberty interests both before and after conviction); *Jones v. City of Chicago*, 856 F.2d 985, 993-94 (7th Cir. 1988) (police officers can be liable when they "deliberately supplied misleading information that influenced the decision" of the prosecutor to pursue the case); *see also Halsey v. Pfeiffer*, 750 F.3d 273, 289, 294 n.19 (3d Cir. 2014) (defendant has suffered an injury when fabricated evidence is used to initiate a prosecution or obtain criminal charges); *Gregory v. City of Louisville*, 444 F.3d 725, 741 (6th Cir. 2006) (holding that officer's investigatory notes "were the result of pretrial fabrication efforts by [the officers]," and "comprise[d] part of the documentary record before the prosecution and defense and affected the course of the criminal proceedings independent of any testimony to the notes' contents. … Their very existence, even if not introduced as evidence at trial, affected Plaintiff's criminal prosecution independent of the officers' testimony.").

Here, all three categories of the evidence at issue undoubtedly influenced or furthered the prosecution. *See* RDSPF, ¶109. First, the co-defendants' statements were used as grounds for Plaintiff's arrest and indictment, PSOF, ¶120. Second, Glinski did testify to the facts of the Berti/Glinski report at trial, and used it to bolster Glinski's trial testimony, thereby preventing Plaintiff from impeaching Glinski on the false evidence that was fabricated to make it appear Plaintiff was not in custody at the time of the murders when, in fact, he was. *Id.*¶¶67, 70. The fabricated report was also marked for identification at trial. RDSOF, ¶109. Third, there can be no doubt that the issue of the lineup with Faye McCoy influenced the prosecution; McCoy testified at

trial and was asked about the lineup and the McCoy Line-up Report was used by both the trial prosecutor and then Defendant Villardita to attempt to impeach Faye McCoy's non-identification of Plaintiff as a perpetrator of the double homicide. *Id.*; *see also* PSOF, ¶48.

In short, whether this evidence was admitted into evidence at trial is totally irrelevant for present purposes because the facts illustrate that the evidence influenced the prosecution in profound and important ways. Under all of the law cited above, that suffices. *See Hurt*, 880 F.2d at 844; *Avery*, 847 F.3d at 441-43; *Whitlock*, 682 F.3d at 582-84; *Fields II*, 740 F.3d at 1112, 1114.[11]

At most, there is a question of what role the fabricated evidence played in depriving plaintiff of his liberty—a fact-specific inquiry into causation where "multiple proximate causes are often present" and "an actor's tortious conduct need not be close in space or time to the plaintiff's harm to be a proximate cause." *Whitlock*, 682 F.3d at 583 (citing Rest.3d Torts § 29 cmt. b.)); *see also id.* (explaining that "the actions of an official who fabricates evidence that later is used to deprive someone of liberty can be both a but-for and proximate cause of the due process violation" and that causation requires courts to "analyze the relation between an official's conduct and a resulting injury; when, where, and exactly how that injury occurs is part of the proximate cause question."); *Jones,* 856 F.2d at 994 (similar).

Construing the facts in the light most favorable to Plaintiff, the foregoing is beyond sufficient to allow a reasonable jury to infer that the co-defendants confessions, the McCoy Lineup Report, and the Berti/Glinski GPR "furthered the prosecution" and therefore caused Plaintiff' to be deprived of his liberty. At the least, Plaintiff has raised a fact question as it relates to the causal role that these reports played in depriving Plaintiff of his liberty through his conviction at trial. And in any event, Defendants have forfeited the causation argument by not raising it in their motion. *See*

[11] Given *Hurt*, *Fields II, Whitlock*, and *Jones*, the Defendants' citation to *Boyd v. City of Chicago,* 225 F.Supp.3d 708, 725 (N.D. Ill. 2016) and *Mack v. City of Chicago*, 723 F. App'x 374 (7th Cir. 2018) (unpublished) is unhelpful. Neither of these non-binding cases stand for the proposition that fabricated evidence *must* be submitted at trial be to be actionable, and neither can overrule the published authorities cited above.

Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994). Even had they not forfeited the issue, causation is a classic question for the jury, not the court at summary judgment. *See Ortiz v. City of Chicago*, 656 F.3d 523, 534-35 (7th Cir. 2011) (emphasizing that "'[p]roximate cause is a question to be decided by a jury, and only in the rare instance … should summary judgment be granted on the issue of causation.'") (quoting *Gayton v. McCoy*, 593 F.3d 610, 624 (7th Cir. 2010)).

III. PLAINTIFF'S FOURTH AMENDMENT CLAIM IS TIMELY

The Defendants argue next that Plaintiff's Fourth Amendment claim should be dismissed as time barred. In their view, the clock began to run on these claims, at the latest, in September of 1995—the moment Plaintiff was wrongfully convicted. The Defendants reach this conclusion through a contorted and impossible reading of the applicable law, most significantly the Seventh Circuit's remand decision in *Manuel v. City of Joliet*, 903 F.3d 667 (7th Cir. 2018) (*Manuel II)*, which followed *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (*Manuel*)

In so doing, Defendants—as they did at the motion to dismiss phase—again propose that a criminal defendant in custody and attempting to challenge their confinement under a criminal prosecution must file a lawsuit while confined and during the pendency of those criminal proceedings, rather than pursuing such a challenge in via direct appeal and post-conviction litigation like federal *habeas corpus*. This reasoning runs contrary to the Supreme Court's repeated admonishments in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), *Heck v. Humphrey*, 512 U.S. 477 (1993), *Edwards v. Balisok*, 520 U.S. 641 (1997) (*Balisok*), and other authorities, all of which provide that § 1983 "cannot be used to contest ongoing custody" that has been authorized by the judicial process in some way, *Manuel II*, 903 F.3d at 670. Indeed, the Seventh Circuit even more recently affirmed that "*Heck*'s underlying principle" is that "in any case in which *habeas corpus* is available, it is the prisoner's exclusive remedy," and that "*habeas corpus* is available to anyone in custody." *Huber v. Anderson*, No. 17-1302, ___ F.3d ___, 2018 WL 6166624, at *4 (7th Cir. Nov. 26, 2018).

A. *Manuel II* Squarely Controls, and Provides that Plaintiff's Fourth Amendment Claim is Timely

A Fourth Amendment claim alleging that post-process pretrial detention was wrongful does not accrue until two things happen: (1) the prisoner is released from custody, and (2) the prisoner is entitled to sue. Here, Plaintiff was not released from custody until 2013, which was also the same year in which he obtained the right to sue. This suit was filed months later, in early 2014. Dkt.1 Accordingly, the claim is well within the two-year statute of limitations.

First, as it relates to custody, *Manuel II* provides: "We hold that Manuel's claim accrued . . . when he was *released from custody*." 903 F.3d at 669 (emphasis added). In stressing the importance of custody to the analysis, *Manuel II* explained that the Supreme Court's decision in *Manuel* held that "wrongful pretrial custody violates the Fourth Amendment 'not only when it precedes, but also when it follows, the start of legal process in a criminal case.'" *Id.* (quoting *Manuel*, 137 S. Ct. at 918). Thus, *Manuel II* held: the "wrong of detention without probable cause continues for the length of the unjustified detention," which is the "principal reason why the claim accrues when the detention ends." *Id.* at 669-70. In the wake of *Manuel II*, other courts in this District have recognized that a plaintiff must be *released* from custody for their claim to accrue. *See Brzowski v. Baldwin*, No. 17 C 9339, 2018 WL 4917084, at *3 (N.D. Ill. Oct. 9, 2018) (applying *Manuel II* that a claim accrues when the plaintiff "was released from custody"); *McWilliams v. City of Chicago*, No. 14 C 3902, 2018 WL 4404653, at *2 (N.D. Ill. Sept. 17, 2018) ("The accrual date for a Fourth Amendment claim involving wrongful detention without probable cause accrues on the day the individual is released from custody."). All of this is sufficient to deny Defendants' motion.

The Court did not stop there. Turning to a "further consideration" beyond just custody, *Manuel II* explained that a "claim cannot accrue until the would-be plaintiff is entitled to sue, yet the existence of detention forbids a suit for damages contesting that detention's validity." 903 F.3d at 670. As Defendants concede, *Manuel II* extended *Heck's* delayed accrual to pre-trial confinement

claims on the basis of *Presier*, *Heck,* and other precedent. Dkt. 487, at 28 (noting that "the Seventh Circuit in *Manuel II* extended *Heck* to instances of pretrial detention where no conviction has yet occurred"). To be sure, as *Manuel II* explains, the logic of these cases demands that a claim alleging pretrial confinement was wrongful falls under the *Heck* accrual rule.

Presier "holds that the right way to contest ongoing state custody is by a petition for a writ of *habeas corpus* . . . not by an action under § 1983"; *Heck* adds that § 1983 "cannot be used to obtain to damages for custody based on a criminal conviction" until the "conviction has been set aside." *Manuel II*, 903 F.3d at 670; *see also Preiser*, 411 U.S. at 467-77 ("[W]hether the petitioner's challenge to his custody is . . . that he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall*, 117 U.S. 241 (1886); . . . his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement."); *Wilkinson v. Dotson*, 544 U.S. 74, 78-89 (2005) ("[C]onsiderations of linguistic specificity, history, and comity" dictate that "a prisoner in state custody cannot use a § 1983 action to challenge 'the fact or duration of his confinement.' . . . He must seek federal habeas corpus relief (or appropriate state relief) instead.").

In *Dotson*, the Supreme Court summarized the line of cases discussed in *Manuel II*, as follows:

> Throughout the legal journey from *Preiser* to *Balisok*, the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody.
>
> * * *
>
> These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief) . . . —if success in that action would necessarily demonstrate the invalidity of confinement or its duration.

544 U.S. at 81-82.

The upshot of these authorities is: "After *Preiser*, *Heck*, and [*Balisok*], § 1983 cannot be used to contest ongoing custody that has been properly authorized." *Id.* at 670. Proper authorization does not mean actual probable cause, but detention following a "judicial decision that probable cause existed to show that" the plaintiff has committed a crime. *Id.* Thus, if Mr. Manuel wanted to contend "that the police hoodwinked the judge by falsely asserting that the pills he possessed had tested positive for an unlawful drug," the fact that his "detention was judicially authorized" meant that his "§ 1983 suit had to wait until his release." *Id.* In short, *Manuell II* concluded: *Heck* tells us that a claim does not accrue before it is possible to sue on it. *Once he was out of custody and could sue*, and only then, Manuel's claim accrued. *Id.* (citing *Heck*, 512 U.S. at 489-90).

Applying *Manuel* here is straightforward: Plaintiff was held in custody for nearly all of the almost three years before his trial, and the entirety of the time after his 1995 conviction until his release from custody in 2013. PSOF, ¶123. Plaintiff did not have a right to sue until he was released from custody in 2013 and the conviction was overturned. That is, Plaintiff could not have sued on his Fourth Amendment claim until he was able to show that he was no longer in his custody for the Lassiter-Haugabook murders, and that he was entitled to sue. In this situation, that was when Plaintiff's conviction was overturned. *See, e.g.*, *Powell v. City of* Chicago, 2018 WL 1211576, at *2-3 (recognizing before *Manuel II* was decided that "the legal theory underlying" *Manuel* "requires this Court to conclude that Plaintiff's claim did not accrue until his conviction was set aside"). Indeed, as a matter of law, the conviction would have prevented him from making that challenge. *Heck,* 512 U.S. 477. In short, the claim is timely.

Defendants' contrary theory is at odds with *Manuel II* and the entire rationale underling the Supreme Court's precedent. The premise of Defendants' argument seems to be that Plaintiff was constructively "released" when he was convicted and then later transferred from Cook County Jail to the Illinois Department of Corrections after his conviction in 1995. But clearly Plaintiff was not

released after he was convicted conviction; he remained incarcerated for nearly two more decades before being released in 2013. PSOF, ¶123. Before his release, Plaintiff's sole federal remedy was federal *habeas corpus*. *Dotson*, 544 U.S. at 78-89; *Preiser*, 411 U.S. at 467-77; *Manuel II*, 903 F.3d at 670.

In fact, at the time Defendants claim the clock ran, Plaintiff was in prison pursuing his direct appeal—which the intermediate court of appeals rejected in 1998, and the direct appellate process did not conclude until 1999. PSOF, ¶122. Plaintiff filed a timely *pro* se *habeas* petition in 2000. *Id.* Defendants' argument thus provides that Plaintiff was required to sue for a deprivation of his custody without probable cause while challenging that decision, and in fact do so *before* he exhausted his state-court remedies, and, thus, before even having the opportunity to pursue federal *habeas corpus* as a remedy. That cannot be, and is not, the law. *See Picard v. Connor,* 404 U.S. 270, 275, (1971) ("It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."). Such a theory is plainly at odds with *Manuel II* and other cases—Plaintiff had not been released from state custody until 2013 and was not permitted to sue arguing that his confinement was invalid until that time.

In sum, Defendants' suggestion that Plaintiff had to challenge his pretrial confinement by filing a § 1983 suit in 1995 (or by 1997, two years after his conviction), when he was in custody runs contrary to all of the authorities above. Taylor's exclusive federal remedy in 1995, 1996, and 1997—and throughout his incarceration—was *habeas corpus.* Plaintiff could not (and, under precedent should not) have filed a § 1983 action at that same time.

B. Plaintiff's Fourth Amendment Claim Relates Back to the Time the Original Complaint Was Filed

Defendants end their brief with a short argument that Plaintiff's Fourth Amendment claim is untimely because it was filed in 2018, as an amended claim to this action. This argument is so cursory that it should not require a response. See *Smith v. Northeastern Ill. Univ.*, 388 F.3d 559, 569

(7th Cir. 2004) (holding that an undeveloped argument is forfeited); *Otto v. Variable Annuity Life Ins. Co.*, 134 F.3d 841, 854 (7th Cir. 1998) (refusing to consider unsupported or cursory arguments).

Nonetheless, as explained in the motion for leave to file the Amended Complaint, Dkt. 476, at 10-11, Plaintiff's Fourth Amendment claim clearly relates back to the time that this action was commenced under Rule 15. *See* FED. R. CIV. P. 15(c)(1)(B) ("An amendment to a pleading relates back to the date of the original pleading when: . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."). Here, there is no doubt that plaintiff's fourth Amendment claim arises out of the same conduct, transaction, or occurrence at issue in the original complaint: his wrongful conviction for the a double homicide that he did not commit.

As the Seventh Circuit recently emphasized, the "central inquiry under Rule 15(c) is whether the original complaint 'gave the defendant enough notice of the nature and scope of the plaintiff's claim that he shouldn't have been surprised by the amplification of the allegations of the original complaint in the amended one.'" *Supreme Auto Transp., LLC v. Arcelor Mittal USA, Inc.*, 902 F.3d 735, 741 (7th Cir. 2018) (quoting *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 573 (7th Cir. 2006) (citing *Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 581, (1945)).

It is undisputed (and Defendants do not contend otherwise) that Defendants had sufficient notice of Plaintiff's claim that he was wrongfully convicted, and detained in the absence of probable cause—this is the same thing he alleged in his state law malicious prosecution (upon which Defendants have not sought summary judgment as a substantive matter). *See* PSOF, ¶¶125-26. The amendment plainly relates back under Rule 15(c).

IV. INCONSISTENT TESTMONY IS NOT A BASIS FOR SUMMARY JUDGMENT

Defendants seek to dismiss this entire action on the basis of this Court's "inherent power" to sanction, an action that is entirely unwarranted and an improper distraction into an extreme

position that has already been extensively briefed, Dkt. 381-1, Dkt. 432, Dkt. 433, Dkt. 475, & Dkt. 481, and that has already been rejected. *See* Ex. 86. Attempting to re-package the "sanctions issue" as one for summary judgment is a complete non-starter particularly because the issue of witness credibility—whom to believe and what parts of testimony to believe—is for the jury, not the Court at summary judgment. *See Kadia v. Gonzales*, 501 F.3d 817, 821 (7th Cir. 2007) (noting that the judicial system could not function if it adopted the discredited doctrine that a witness who testifies incorrectly about one thing must be disbelieved on all things); *Newsome v. James*, *Kotarski v. Binks Mfg. Co.*, 837 F. Supp. 247, 252 (N.D. Ill. 1992) ("[F]or purposes of summary judgment, ambiguities in a witness' testimony must be resolved against the moving party."). As the Magistrate Judge already recognized in denying Defendants' extreme "Hail Mary" request for dismissal, the ultimate credibility of Taylor and Glinski is for the jury at trial. Ex. 86, at 27-28. Moreover, the Magistrate Judge already recognized: "this case does not rise or fall on" on Plaintiff's inconsistent statement so the issue is immaterial for present purposes too. *Id.* at 22.

Defendants' inclusion of the sanctions issue into their brief is a distraction for the question before the Court at summary judgment. Indeed, Defendants seem to acknowledge by not wanting to be "rehashing" the issue. Dkt. 487, at 9. They should have omitted it altogether. The question currently before the Court is whether a reasonable jury can find for Plaintiff on his claims when construing the facts in the light most favorable to him as the non-moving party. *Tolan*, 134 S. Ct. at 1866. As explained above, that the answer to that question is "yes" is not a close call.

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully submits that this Court should deny the Defendants motions for summary judgment.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, David B. Owens, an attorney, hereby certify that on December 7, 2018, I filed the foregoing Plaintiff's Consolidated Response to the Defendants' Motions for Summary Judgment using the Court's CM/ECF system, which effected service on all counsel of record listed below.

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