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

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

DEFENDANT OFFICERS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiff's Response and voluminous Statement of Additional Facts is replete with blatant misrepresentations of the record, reliance on contentions that have absolutely no evidentiary support, reliance on contentions which directly contradict the actual evidence in this case, reliance on his retained expert's opinions in his unauthenticated report to establish facts, and reliance on inadmissable statements. See DRPSOF at ¶¶ 3, 7, 14, 21, 24, 30, 42-43, 47-48, 52, 56-59, 63-66, 68-69, 71, 76, 80, 86, 93, 96- 98, 104-105, 107, 110-111, 114, 116-117,123, 126-127.[1] These statements should be stricken. *Boyd v. City of Chicago*, 2016 U.S. Dist. LEXIS 170352, at *9 (N.D. Ill. Dec. 2016), *citing Malec v. Sanford*, 191 F.R.D. 581, 584; *Ross v. Cal. Cas. Indem. Exch.*, 2013 WL 2355993, * 1 (N.D.Ill. 2013).

[1] Defendants' Response to Plaintiff's Statement of Additional Facts is referred to as DRPSOF and Plaintiff's Response to Defendants' Statement of Facts is referred to as PRDSOF.

I. Plaintiff's Brady Claim in Count II Fails As a Matter of Law.

Plaintiff claims that the Defendants turned "the governing law of *Brady* on its head," is ironic given Plaintiff's repeated gross mischaracterization of the law. In a pathetic attempt to distract the Court from the overwhelming legal authority that accurately reflects a police officer's duty under *Brady*, Plaintiff improperly misquotes case law by repeatedly inserting the term "police" in the place of state or prosecution. See Resp. at 9-10. As such it bears nothing that the Supreme Court has made clear, the obligation to comply with *Brady* ultimately falls upon the prosecutor and not on police officers, despite the fact that it is the police who are on the front line of gathering evidence, whether it be inculpatory or exculpatory. In order to comply with *Brady*, it is the prosecutor who "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). While the Seventh Circuit has extend the duty to disclose exculpatory evidence to police officers, the obligation upon police officers is to disclose exculpatory evidence to the prosecutor, not to defense counsel directly. See *Beaman v. Freesmeyer*, 776 F.3d 500, 512 (7th Cir. 2015); *Carvajal v. Dominguez,* 542 F.3d 561, 566 (7th Cir. 2008); *Smith v. Burge*; 222 F.Supp.3d 669, 681 (N.D.Ill. 2016). Plaintiff's representation that the police are required to turn all over and exculpatory and impeachment evidence "to the defense" is simply incorrect. Resp. at 9.

Plaintiff's incorrect resuscitation of the law is a useless ploy to distract the Court from the established precedent in this district - the rulings in *Phillips* and *Patrick* granting summary judgment on almost identical *Brady* claims. Plaintiff's attempt to distinguish his *Brady* claim from that of his co-defendants, *Phillips* and *Patrick* borders on the ridiculous. Plaintiff contends that the summary judgment opinions in *Patrick* and *Phillips* dismissing their respective *Brady* claims is distinguishable because "the fact pattern is different" and that Taylor's co-defendants were not "similarly situated with respect to

Taylor being in custody." Resp. at 32. Such an argument completely ignores that the linchpin of the *Brady* claims in *Patrick* and *Phillips* were entirely based on Taylor's alibi defense. See *Phillips*, 2018 WL 1309881, * 21 (N.D.Ill. 2018) ("In this case, evidence of Daniel Taylor's alibi casts doubt on the accuracy of Plaintiffs' own statements to the police, both of which placed Taylor at the gang meeting in Clarendon Park and inside Lassiter's building at the time of the murders."); *Patrick*, 213 F.Supp.3d 1033, 1052 (N.D.Ill. 2016) "if Taylor was in lockup when the murders took place, then his confession could not have been entirely true, and by extension neither could have Plaintiff's."). The fact remains the *Brady* claims in all three cases are almost identical and are based on the same alleged withheld evidence and while Plaintiff put on an alibi defense at his criminal trial, and the others did not put on a defense based on Plaintiff's alibi, this does set Plaintiff's claim apart. Rather, the alibi defense that Plaintiff presented at his criminal trial serves to show that Plaintiff's *Brady* claim absolutely fails because the police are under no *Brady* obligation to tell Plaintiff what he already knows. *See Harris v. Kuba*, 486 F. 3d 1010, 1015 (7th Cir. 2010)(denying a claim under *Brady* because the plaintiff "knew where he was (and was not) at the time," thus his "own alibi was not concealed from him"); *U.S. v. Lee*, 399 F. 3d 864 (7th Cir. 2005) (explaining that there was no basis for a *Brady* claim based on prosecution's failure to produce a pair of pants that the criminal defendant had worn and in which a firearm was recovered because "Lee was aware of his own pants."). In other words, because Plaintiff's co-defendants did not have viable *Brady* claim as they and their defense attorneys already knew about Plaintiff's alibi at the time of their criminal trials, then there can be no question that Plaintiff's *Brady* claim fails because he too knew about his own alibi at the time of his criminal trial.

A. The Allegedly Withheld Brady Material Was Not Exculpatory or Impeaching and Was Not Suppressed.

At the outset, Plaintiff concedes that he received his arrest report and bond slip, was represented by counsel during his criminal proceedings, was aware that he was presenting an alibi defense at trial and

recalled being in the lockup on November 16, 1992 with other individuals. See DSOF at ¶¶ 93-94, 97, 100. Despite the overwhelming information Plaintiff had regarding his own whereabouts on the night of the murder, Plaintiff claims that Defendant Officers withheld evidence that was material to the outcome of his criminal trial. Resp. at 23. Plaintiff claims six categories of allegedly withheld documents, which Defendants' will discuss in turn.

As for the alleged City's street file practice in category one, Plaintiff argues that "The City's Unlawful Street Files Practice Alone Precludes Summary Judgment." (Response at 11). Although he devotes a significant portion of his brief to this subject, plaintiff fails to apprise the Court he unsuccessfully raised this same issue before Magistrate Judge Finnegan. Specifically, during the briefing on plaintiff's motion to commence *Monell* policy and practice discovery, Plaintiff argued: "Discovery concerning the City's street file practice is independently probative of the individual defendants liability – so much so, in fact, that plaintiff would likely respond to any summary judgment motion brought by the individual defendants with a Rule 56(f) motion to complete this policy and practice discovery before responding."[1] (Dkt. 331, at 4). In response, the City explained plaintiff has it backward. (Dkt. 340 at 6-8). Plaintiff cannot use an alleged illegal policy and practice to prove his underlying claim. Rather, the first step a plaintiff must take in proving a *Monell* claim is to establish that he suffered a constitutional injury. *Thompson v. Boggs*, 33 F.3d 847, 859 (7th Cir. 1994). And then, if a constitutional violation is established, plaintiff must prove a series of similar unconstitutional conduct in order to establish an illegal practice. *Okla. City v. Tuttle*, 471 U.S. 808, 823-24 (1985); *Connick v. Thompson*, 563 U.S. 51, 62-63 (2011); *Estate of Novack v. County of Wood*, 226 F.3d 525, 531 (7th Cir. 2000).

[1] Plaintiff did not file a Rule 72 objection to Magistrate Judge Finnegan's ruling.

Plaintiff's proposed reverse approach is legally unsound and logically flawed. If accepted, such a strategy would allow plaintiffs in Section 1983 cases to routinely inject allegations of unrelated wrongful conduct committed by non-parties into a trial for the sole purpose of improperly prejudicing the individual defendants. Plaintiff claims that because the defendant officers denied withholding exculpatory material in street files, he wants to prove they did so in this case by introducing evidence that the CPD had a practice of withholding exculpatory material in other cases. Under plaintiff's logic, every time a police officer denies an allegation of unconstitutional conduct (*i.e.* excessive force, false arrest, *Brady*, *etc.*), the plaintiff would be allowed to introduce misconduct committed by other police officers in other cases to establish the defendant police officers acted in conformity therewith. Plaintiff's position is absurd and unabashedly relies on propensity evidence barred by Federal Rule of Evidence 404(b). *See United States v. Hicks*, 635 F.3d 1063, 1069 (7th Cir. 2011). But it even goes one step further. Instead of a defendant officer's own alleged propensity, plaintiff seeks to rely on the alleged propensities of *other non-party* CPD employees to establish that the individual defendants acted in conformity with these non-parties' actions. Plaintiff's attempt to rely on such highly prejudicial "other acts" evidence (by actors other that the defendants, no less), should be rejected outright.[2]

Not surprisingly, plaintiff cites no law to support his proposed use of unrelated policy and practice evidence as propensity evidence to prove the alleged actions of the individual defendants. And as noted above, plaintiff fails to acknowledge he already raised this issue before Judge Finnegan, who

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[2] Indeed, one of the reasons the City sought bifurcation of *Monell* in this case was the risk of unfair prejudice to the individual defendants. (Dkt. 98, at 7-8). The City supported its reasoning with a quote from Judge Aspen in *Ojeda-Beltran v. Lucio*, 2008 WL 2782815, *3 (N.D. Ill. 2008), wherein he concluded the plaintiff's proposed introduction of evidence of misconduct committed by non-party officers to prove the *Monell* claim posed a "substantial risk" of unfair prejudice to the defendant officers. *Id.* The City's concern (and the merits of bifurcation) have proven to be justified in this case. Here, the prejudice to the individual defendants will not arise solely as a by-product of plaintiff attempting to prove his *Monell* claim, like in *Ojeda-Beltran*. Rather, plaintiff has expressly stated his intention to affirmatively present evidence of other non-party officers' misconduct in an attempt to prove his constitutional claims against the individual defendants.

correctly concluded, "it didn't seem likely that the plaintiff could offer other acts evidence against the individual defendant officers if those other bad acts – here, the withholding of exculpatory evidence in street files – was done by other officers rather than by the defendant officers." (Dkt. 417, 11/29/17 Tr. at 8-9).[3] Judge Finnegan devoted significant time and effort in evaluating the issue, and her conclusion is sound. Now at the summary judgment stage, plaintiff has failed to provide this Court with any legal, factual, or logical reason that would undermine Judge Finnegan's analysis.

Plaintiff next offers a misguided argument in suggesting "Defendants deny that any Street File ever existed for this investigation at all." (Resp. at 2, 13). Although Plaintiff spends an inordinate amount of time quoting from police reports he admittedly possessed during the criminal proceedings that reference the detectives' "street file" (Resp. at 12-14), it gets him nowhere because his entire argument is based on an incorrect premise. Defendants have acknowledged they used a "street file" (*i.e.*, a working file) during this investigation. Plaintiff's misstatement of Defendants' position is even more curious in light of the aforementioned proceedings before Judge Finnegan, wherein Plaintiff's counsel demonstrated a clear understanding of defendants' actual position concerning "street files." (Dkt. 364, 7/28/17 Tr. at 17-18: "And the way [defendants] described the procedure is we had a street file. We used it in this investigation, and we threw it away. But … it was merely a duplicate of what was produced to the defense lawyers.") Even if Plaintiff wished to disregard his previous acknowledgment, he would have been reminded by reference to Judge Finnegan's prior order, in which she noted a street

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[3] In a further effort to distract this Court from the facts pertinent to this Motion, plaintiff posits that the jury verdicts in *Fields* (arising from a 1984 double homicide investigated by Area 1) and *Rivera* (arising from a 1988 homicide investigated by Area 5) "absolutely preclude summary judgment." (Resp. at 11). Those verdicts do no such thing. Again, the verdicts relate to *Monell* evidence that would not properly be admissible or against the individual defendants. Nor are they relevant. As recognized by Magistrate Finnegan, "I don't see why you would use the Fields case. I mean, that's going to be a different area, a different time period." (Dkt. 364, July 28, 2017 Tr. at 42). The same rationale applies to *Rivera*, which was investigated five years before this case out of a different detective division area. *Kluppelberg*, a 1984 case from Area 3, is similarly irrelevant.

file/working file should contain copies of documents the detectives submitted for inclusion in the Investigative File. (Dkt. 221 at 5). Of course, there is nothing wrong with keeping a street file/working file on an investigation so long as any exculpatory or impeaching information is produced to the CCSAO, and that is exactly what happened here. Plaintiff's contrived "street files" argument provides no basis for the denial of summary judgment.

Resurrecting yet another topic addressed by Magistrate Judge Finnegan, plaintiff next offers a provocative accusation alluding to the "missing" original Permanent Retention File and Investigative File. (Response at 13). As Judge Finnegan explained, there were a "Permanent Retention File," an "Investigative File," and a working file/street file for the Lassiter/Haugabook investigation. (Dkt. 221 at 2-6). Defendants concede CPD's Records Division cannot currently locate the original of the Permanent Retention File. However, the Permanent Retention File was produced during the criminal proceedings, and (as explained by Judge Finnegan) intact copies of the Permanent Retention File are still in possession of plaintiff's criminal defense attorney (Dkt. 115-7) and one of his co-defendant's criminal defense attorneys (Dkt. 156-2). *Id.* at 6, 13. The fact the original Permanent Retention File is missing today is irrelevant; during the relevant time periods (the underlying criminal proceedings) the Permanent Retention File was not missing and had been produced by CPD.

The Investigative File was likewise produced to the CCSAO during the criminal proceedings, satisfying defendants' *Brady* obligations. *Carvajal v. Dominguez*, 542 F.3d 561, 566 (7th Cir. 2008). As with the Permanent Retention File, it is irrelevant that the original Investigative File cannot now be located 25 years after the investigation; what matters is it had been produced to the CCSAO during the underlying criminal proceedings. Because speculation cannot support a *Brady* claim, any argument that some unknown piece of paper written by an unknown detective may have contained exculpatory or

impeaching information on an unknown topic cannot create a genuine issue of fact. *Hill v. City of Chicago*, 2009 WL 174994, at *4-5 (N.D. Ill. 2009) (St. Eve, J.) (granting summary judgment where plaintiff speculated that non-existent reports may have existed in a "street file). In sum, plaintiff's "missing files" argument fails to create a genuine issue of material fact on plaintiff's *Brady* claim.

As for the allegedly withheld documents described by Plaintiff in category two, Plaintiff claims without any supporting evidence that the Defendant Officers obtained the Lock-up Roster, the Visual Check Logbook and the CPD Personnel List and then proceeded to place these documents in a Street File that was never produced in the criminal proceedings or in this action. Resp. at 3, 14-15. This begs the question - how does Plaintiff know what documents were placed in a file that he has never seen or reviewed? Once again demonstrating a gross misrepresentation of the record, Plaintiff contends that a that Visual Check Logbook was created on November 16, 1992 for the time period when Plaintiff was in custody and assumes without any factual support that the Defendant Officers obtained this record and put it a "Street File." See DRPSOF ¶ 75. Even assuming Plaintiff's baseless theory is true, it does not provide a basis for a viable *Brady* claim the undisputed evidence shows that Plaintiff was in possession of the bond slip and arrest report.

To get around the fact that these documents add nothing new to Plaintiff's alibi defense, Plaintiff contends that the withheld documents are "different in kind" from the bond slip and arrest report because they "illustrate that Plaintiff was absolutely in custody when the crimes occurred." Resp. at 14-15. These records do nothing of the sort. Contrary to Plaintiff's assertion, these documents do not independently verify the accuracy of the time in custody recorded on the bond slip and arrest report. The very same argument about these records was made by the plaintiffs in the *Phillips* case and was soundly rejected by the court (the court is "not persuaded by plaintiffs' argument" that the withheld

evidence was "critical" and would have provided independent verification of what otherwise "might be written off as clerical error" when the undisputed evidence shows that both Plaintiffs were provided with Taylor's arrest report and bond slip). *Phillips*, 2018 WL 1309881, * 22. Likewise, here, Plaintiff "was already aware" of the issue to which the withheld evidence related and had a full opportunity to raise that issue at trial, and in fact, he did so. *Pruitt v McAdory*, 337 F.3d 921, 927-27 (7th Cir. 2003).

Like the Plaintiffs in *Phillips*, Plaintiff also contends that the arrest reports and bond slips for James Anderson and Eugene Fisher, the Defendant Officers' handwritten notes of the Detectives' interview of Anderson was withheld by the Defendant Officers. Resp. at 11. Plaintiff further contends that three GPRs concerning Anderson and a December 30, 1992 GPR were never produced to his defense counsel. *Id.* Plaintiff once again ignores the information he had about his own alibi or that he "could have become aware of it from the evidence" he had, *Phillips*, 2018 WL 1309881, * 22, and goes so far as to say "[t]he 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." Resp. at 29. Not only does Plaintiff fail to offer any support for this proposition, but it is directly contradicts the very definition of suppression, which is that evidence is not suppressed if the defendant knew of the evidence and could have obtained it through the exercise of reasonable diligence. *U.S. v. Walker,* 746 F.3d 300, 306 (7th Cir. 2014). Plaintiff knew who was in the lock up with him. DSOF at ¶ 34. Given Plaintiff's knowledge about his cellmates any documents relating to Anderson (or Fisher) were not suppressed under *Brady*. Furthermore, there is no dispute that the prosecution was in possession of three GPRs related to the attempts made by the police to locate Anderson and so were the criminal defense attorneys of Plaintiff's co-defendants; as such, there is no question that the Defendant Officers discharged their obligation under *Brady*. See DRSOF at ¶ 79. See *Cairel v. Alderden*, 821 F.3d 823, 832 (7th Cir. 2016) (If evidence is turned over to the prosecutors, it has not been concealed by the officer).

Turning to category four - "evidence related to the fabrication of reports and testimony of Grimes," it is undisputed Grimes' identity and his role was well known to Plaintiff and his attorney. DSOF at ¶¶ 69, 79-81. Further, Plaintiff concedes that his attorney made no attempts whatsoever to interview Grimes prior to trial even though he was aware that Grimes was disclosed as a witness by the prosecution. *Id.* Thus, Plaintiff fails to satisfy the elements of his *Brady* claim.

With respect to category five - plaintiff's claim that the Defendant Officers withheld the Renard Foote Information Report - this allegation alone serves to highlight the egregiousness of Plaintiff's factual misrepresentations in his response brief. First, there is absolute no dispute that ASA Needham was in possession of this document prior to Plaintiff's 1995 criminal trial as demonstrated by his in court acknowledgment of receipt of the report. See DRPSOF at ¶¶ 93-94.ASA Needham testified that he if he had such a document, he would have turned it over to the defense. *Id.* As such, there is no question that the prosecution was in possession of Renard Foote's Information Report thereby discharging the Defendant Officers of their duty under *Brady*. Second, contrary to Plaintiff's assertion that Renard Foote's Information Report is exculpatory insofar as it is "evidence of alternative suspects," the report does not identify by name any of Goldie's associates. Resp. at 21. Rather, the report refers to "Goldie and his posse of vicelords" which is actually inculpatory of Plaintiff as it is undisputed that he and his co-defendants were a vice lords in the area of Hazel and Agatite. DRPSOF at ¶ 3. Plaintiff also incorrectly states that Renard Foote's Information Report is exculpatory of Plaintiff because it "would have allowed the defense to argue that there was a different motive for the crime-taking over Lassiter's house, rather than some sort of debt to the gang." Resp. at 22. To suggest that the report offers a motive unrelated to a gang activity is ludicrous because the report is replete with facts that Goldie and his fellow gang members were involved in a physical altercation with Lassiter, that Goldie and his gang had pressured Lassiter to sell drugs out his apartment, that Goldie and his vicelord gang members stood

guard in the hallway of Lassiter's apartment building watching out for the police and customers and that Goldie and his "posse of vicelords" were in the area of Agatite and Hazel. See DRPSOF at ¶ 4. Nonetheless, given the undisputed fact that the prosecution was in possession of Renard Foote's Information Report prior to Plaintiff's criminal trial this completely undermines Plaintiff's argument that the Defendant Officers' withheld this document, and in fact, demonstrates Plaintiff's desperate attempt to create a question of fact where none exists.

In section I.B.6 at page 11 and 22-23, plaintiff asserts that the following evidence was withheld in the street file:

> 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.

As set forth below, none of the items plaintiff references in section I.B.6 were withheld or contain exculpatory information unknown to plaintiff's criminal defendant attorney. Part (1), "the items listed above," is addressed in corresponding sections above. As for Parts (2) and (3), "the Elmore GPR regarding narcotics transactions" and "arrest reports regarding narcotics transactions," appear to be referencing plaintiff's exhibit 12. (Dkt. 496-12 at 4-5). However, plaintiff does not contend in his PSOF or elsewhere that the Elmore GPR regarding narcotics transactions (Pl. Ex. 12, Dkt. 496-12 at 5) was withheld. (Defendants' exhibit 39, plaintiff's answers to interrogatories ¶17; PSOF ¶110). Nor could plaintiff make any such contention as Elmore's GPR was in the CCSAO file and plaintiff's criminal defense attorney file. (*Id.*; see also defendants' exhibit 80). Likewise, the "arrest reports regarding narcotics transactions" appear to be "RD#'s T-708621, T-726567, T-732303, and T-736614," which are identified in the Webb/Akin November 18, 1992 GPR (Pl. Ex. 12, Dkt. 496-12 at 4). The

Webb/Akin GPR was in the CCSAO file and plaintiff's criminal defense attorney file and these cases were therefore known to plaintiff's criminal defense attorney. *Id.* Plaintiff does not offer any evidence to the contrary.With respect to Part (4), "a trespassing report related to Lassiter just before he was murdered," plaintiff does not include any reference to such a report in his PSOF. As a result, it should be disregarded. The same analysis applies to Part (5), "the officer's handwritten notes," because plaintiff does not identify in his PSOF or elsewhere what handwritten notes he claims were suppressed. Plaintiff's failure to cite to this information or explain in any meaningful way how it is relevant to his claim operates as a waiver. See *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012), *citing United States v. Berkowitz*, 921 F.2d 1376, 1384 (7th Cir. 1991)("[P]erfunctory and undeveloped arguments … are waived."); *Bonte v. U.S. Bank*, 624 F.3d 461, 466 (7th Cir. 2010); *330 W. Hubbard Rest. Corp. v. U.S.*, 203 F.3d 990, 997 (7th Cir. 2000)(It is not the court's obligation "to research and construct the legal arguments open to the parties, especially when they are represented by counsel."). Plaintiff next suggests in Part (6) "criminal backgrounds of suspects and alternative perpetrators, etc." were withheld. Although unclear, it appears plaintiff is referring to Detective Elmore's November 23, 1992 Supplementary Report, which states that a copy of the case report from an arrest of Larry Mixon and others "was obtained and placed into the street file for future reference." (Pl. Ex. 12, Dkt. 496-12). Notably, plaintiff does not contend his attorney did not possess Det. Elmore's November 23, 1992 Supplementary Report. (PSOF ¶109; Defendants' exhibit 39, plaintiff's answers to interrogatories ¶17;). Even if plaintiff did not receive the Larry Mixon trespassing case report, he was on notice of it by virtue of the disclosed Elmore Supplementary Report, and would therefore have no basis for a *Brady* claim based on that specific report. *See Patrick v. City of Chicago*, 213 F. Supp. 3d 1033, 1051-53 (N.D. Ill. 2016). Moreover, Detective Elmore explained he put those documents in the "street file" after submitting them into the sergeant's in-basket for inclusion in the investigative file. (Ex. 26, Elmore Dep

at 108, 136). Also, the Investigative File Inventory in this case, which accompanied the CPD's investigative file, has an entry specifically listing the case report involving Larry Mixon (defendants' exhibit 81 ¶23 at Zellner 12), and the Larry Mixon case report was in the possession of Deon Patrick's criminal defense attorney John Theis (defendants' exhibit 78), all of which establishes the report was produced during the criminal discovery process. Moreover, the Investigative File Inventory specifically references the criminal backgrounds of the people mentioned in Elmore's November 23, 1992 GPR, corroborating his testimony that he submitted this material to the Sergeant for inclusion in the Investigative File which was produced to the CCSAO. (Defendants' exhibit 81 ¶24-27 at Zellner 12-11)

B. Plaintiff and his attorney were not reasonably diligent.

Plaintiff's claim that his criminal defense attorney, Diamond Falk, was "beyond diligent" because he filed a motion for discovery and issued a subpoena to CPD for "lock up records from the 23rd District from November 14, 1992 through November 17, 1992" is a nonstarter. Resp. at 33. Rather, Diamond-Falk's subpoena to CPD confirms that he was aware that CPD kept documentation of people in its custody. DRPSOF at ¶ 115. Indeed, Diamond-Falk was in possession of Plaintiff's bond slip and arrest report and likewise Rubin was aware that the Chicago Police Department kept documentation of the names of the arrestees in custody, the time the arrestees were release from its custody and the number of arrestees in a lockup. DSOF at ¶ ¶ 62, 86, 93. Issuing a subpoena for documents that he knew existed and then doing nothing more to follow up on the subpoena is far from being reasonably diligent. Plaintiff contends that Diamond Falk inquired in court about the subpoena on multiple occasions (Resp. at 27), but once again Plaintiff mischaraterizes the record as Diamond-Falk "believes" he may have asked the court about the subpoena, but he did not say that he actually did so. DRPSOF at ¶ 115. More importantly, Plaintiff completely overlooks Diamond Falk's access to Plaintiff and the ability to communicate with him about Plaintiff's time in custody and his cellmate. DSOF at ¶ 4. Thus,

Plaintiff's argument that his criminal defense attorney exercised reasonable diligence by issuing a supoena does not save his Brady claim. Plaintiff also relies on his expert's report wherein she opines that the motion for discovery filed by Diamond-Falk satisfy the reasonable standard of care with respect to discovery in a criminal case in 1992. Resp. at 26.

Assuming Plaintiff's expert's report is admissible, it does nothing to bolster Plaintiff's argument that his attorney was reasonably diligent because Plaintiff's expert equates "constitutional reasonable diligence with the general requirement of zealous representation under the Illinois Rules of Professional Conduct," but fails to recognize that "there is more to reasonable diligence than the criminal defense attorney's duties under state ethics rules." *Rivera v. Guevara*, 2018 WL 3093339, * 5 (N.D.Ill. 2018). Because this allegedly withheld evidence could have been obtained with reasonable diligence, Defendants are entitled to summary judgment on this claim.

C. Plaintiff's fabrication claim in Count II fails.

Despite being given every opportunity in an interrogatory to identify all reports and or other evidence which Plaintiff contends was fabricated, Plaintiff, for the first time in his response brief, claims that the Defendants fabricated "four fabricated police reports relating to Gillespie, Grimes, and Seymore." Resp. at 41. First, Plaintiff cannot amend his fabrication claim through arguments in his brief in opposition to a motion for summary judgment. *Whitaker v. T.J. Snow Co.*, 151 F.3d 661 (7th Cir. 1998); *Shanahan v. City of Chicago*, 82 F. 3d 776, 781 (7th Cir. 1996). Second, the evidence does not support that these reports are fabricated. See DRPSOF at ¶ ¶ 59-64. Third, even if these reports fall within the scope of Plaintiff's fabrication claim, the undisputed evidence remains that none of these reports were introduced at Plaintiff's criminal trial. *Id.* Seymour did not even testify at Plaintiff's criminal trial. Thus, for the reasons outlined in Defendants' opening brief, Plaintiff's are

entitled to summary judgment on Plaintiff's fabrication claim.

II. Plaintiff's Fourth Amendment Pretrial Deprivation Claim in Count III Fails.

Plaintiff's interpretation of *Manuel II* is clearly wrong and is not supported by the law. In no uncertain terms, *Manual II* held that a Fourth Amendment claim for unlawful *pretrial* detentions accrues when the detention ends, not when the *prosecution* ends. Rather than acknowledging the scope of a post-legal-process pretrial detention claim as outlined in *Manual II*, Plaintiff contends that he could not have sued on his Fourth Amendment pretrial detention claim "until he was able to show that he was no longer in his [sic] custody for the Lassiter-Haugabook murders" and that his "conviction would have prevented him from making that challenge." Resp. at 47. Plaintiff reliance on *Heck* and its progeny to save his Fourth Amendment claim that encompasses the entire duration of his incarceration is misplaced because the Seventh Circuit has limited a Fourth Amendment pretrial detention claim to exactly that - the time spent in pretrial detention. The parameters of a Fourth Amendment post-legal-process pretrial detention was recently discussed in *Lewis v. City of Chicago,* 914 F.3d 472 (7th Cir. 2019). In *Lewis*, the Seventh Circuit specifically noted that "a claim for wrongful pretrial detention based on fabricated evidence is distinct from a claim for wrongful conviction based on fabricated evidence." *Id.* at 480-481. *Lewis* unequivocally forecloses Plaintiff's Fourth Amendment claim based on a detention that Plaintiff contends began from the date of his arrest in 1992 until his exoneration and release in June 2013. As such, there is no support to extend Plaintiff's Fourth Amendment clam and therefore this Court should grant summary judgment on this claim.

Respectfully submitted,

BORKAN & SCAHILL, LTD.

By: /s/ Misha Itchhaporia
Misha Itchhaporia