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

	)	
	)	Master Docket Case No. 19-cv-1717
	)	
In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Judge Franklin U. Valderrama
	)	
	)	Magistrate Judge Sheila M. Finnegan
	)	
	)	

DEFENDANTS' JOINT MOTION TO DISMISS CERTAIN CLAIMS IN LOEVY & LOEVY PLAINTIFFS' COMPLAINTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Supreme Court

Appellate Court

Statutes

Rules

Defendant, City of Chicago (the "City"), Philip Cline, Terry Hillard, Dana Starks, Debra Kirby, and Karen Rowan ("Supervisory Officials"), Edward Griffin, John Griffin, and Jerrold Bosak, and Brian Bolton, Miguel Cabrales, Darryl Edwards, Robert Gonzalez, Alvin Jones, Manuel Leano, Douglas Nichols, Jr., Calvin Ridgell Jr., Elsworth J. Smith, Jr., Kenneth Young, David Soltis, John Rodriguez, Lamonica Lewis, Rebecca Bogard, Frankie Lane, Katherine Moses-Hughes, Nobel Williams, C. Ivy, Michael Spaargaren, Gerome Summers, Jr., Matthew Cadman, Kallatt Mohammed, and Ronald Watts ("Defendant Officers") (collectively "defendants"), through their respective undersigned counsel, jointly move to dismiss certain Fourteenth Amendment claims in Count I and the Fourteenth Amendment and federal malicious prosecution claims in Count II, as well as any derivative claims based on those deficient claims, in the complaints of plaintiffs represented by Loevy & Loevy. In support of this motion, defendants state:

INTRODUCTION

On December 1, 2020, this Court approved a procedure by which defendants in the Coordinated Pretrial Proceedings would file two representative motions to dismiss, one pertaining to the version of the complaints filed by plaintiffs represented by Loevy & Loevy, and a second pertaining to the version of the complaints filed by plaintiffs represented by Flaxman and Flaxman. (Dkt. #163). This motion addresses the Loevy plaintiffs' version of the complaint. For ease of reference, defendants will refer to allegations from the first amended complaint filed in *Thomas v. City of Chicago*, Case No. 18 C 5131 (attached as Exhibit A). As contemplated by the parties' proposed procedure as adopted by the Court, with the goal of avoiding successive, duplicative pleading, this representative motion is intended to apply to all of the complaints filed by the Loevy plaintiffs, where applicable, in lieu of filing and preparing individual motions in each of those cases.

COMMON FACTUAL ALLEGATIONS[1]

Plaintiff claims that, over many years, defendants Watts, Mohammed, and other members of Watts's tactical team had accumulated dozens of citizen complaints alleging violations of their civil rights at the Ida B. Wells housing complex. (First Amended Complaint ("FAC"), Exhibit A, ¶96.) Plaintiff acknowledges, however, that during this same time frame, a lengthy confidential federal investigation was conducted into the very type of activity alleged here and that the Chicago Police Department ("CPD") *assisted* in that federally-led investigation. (*Id*., ¶¶ 67-68.) Moreover, plaintiff does not claim that had the CPD taken disciplinary action against these officers in the midst of that confidential investigation, such actions would **not** have obstructed or exposed that investigation before its completion. Nevertheless, he has sued the City and certain Supervisory Officials, largely for not acting earlier, in addition to several police officers in this case.

Plaintiff claims he was a victim of "a tainted crew of officers, who ruled virtually unchecked" at this housing complex. (*Id*., ¶¶1-4). The complex was actively patrolled by a tactical team of CPD officers led by defendant Watts, and which included defendant Mohammed. (*Id.*, ¶¶ 23, 28.) Per the complaint, "Watts and his tactical team members were well known to plaintiff and the residents of Ida B. Wells" and "had a reputation in the community for harassing, intimidating, and fabricating criminal charges against the area's residents and visitors," including plaintiff. (*Id.*, ¶¶ 29, 31, 32.) These officers allegedly "sought bribes, planted drugs, and accused residents like plaintiff of possessing drugs they did not possess" at the Ida B. Wells complex. (*Id.*, ¶4.)

Plaintiff Thomas alleges he was arrested on February 5, 2003 and December 4, 2006 at the housing complex by Watts and several officers working for Watts. (*Id*., ¶¶ 2, 34, 37-38, 52-53.)

[1] For purposes of this motion to dismiss only, defendants accept as true the allegations of plaintiff's Complaint. While some of the specific details vary, the allegations common to the Loevy plaintiffs essentially are the same as they pertain to the claims addressed in the representative motion.

Plaintiff claims he was not committing any drug crimes on those days. (*Id*., ¶¶36, 51.) At both arrests, other residents/individuals were present, and some of them were also arrested even though the arresting officers found no drugs on any of them. (*Id*., ¶¶38, 50-52.) In connection with each arrest, plaintiff says defendant Watts planted drugs on him and that Defendant Officers fabricated police reports. (*Id*., ¶¶38-39, 54-55, 58.) Although he says he was innocent, plaintiff pled guilty[2] to both crimes because he thought he could lose at trial and be exposed to even greater sentences. (*Id*., ¶¶7, 40, 60.) Defendant Officers never disclosed to the prosecutors that they had fabricated the evidence and falsified the police reports related to plaintiff's arrests. (*Id*., ¶¶42, 62.)

As noted above, plaintiff admits that during this same time frame, CPD assisted a federally-led investigation into the policing at Ida B. Wells (*id.*, ¶¶67-68), after which defendants Watts and Mohammed each pled guilty to federal criminal charges arising out of a "sting" operation in which they accepted alleged drug proceeds from a confidential informant (*id.*, ¶75 (citing *United States v. Watts*, 12 CR 87-1 (N.D. Ill.) and *United States v. Mohammed*, 12 CR 87-2 (N.D. Ill.))). Both were sentenced to terms of imprisonment. (*Id.*) Years later, plaintiff's criminal convictions related to the 2003 and 2006 arrests at issue here were vacated. (*Id.*, ¶15.)

LEGAL STANDARD

To survive a motion to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6), a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true all well-pleaded material facts and must draw all reasonable inferences from those facts in the light most favorable to the pleader. *Perkins v. Silverstein*, 939 F.2d 463, 466 (7th Cir.

[2] A small number of the Loevy plaintiffs did not plead guilty and instead proceeded to a criminal trial. For those plaintiffs, the discussion in Sections II(A), II(B) and II(C)(1), *infra*, would not apply.

1991). However, a court is not required to accept as true a legal conclusion couched as a factual allegation or unsupported conclusions of fact. *Twombly*, 550 U.S. at 570. Further, a plaintiff may plead himself out of court by asserting facts that undermine the claims set forth in his complaint. *Holman v. State of Indiana*, 211 F.3d 399, 406 (7th Cir. 2000).

DISCUSSION

Plaintiff's Section 1983 claims are centered on allegations that unconstitutional misconduct by state actors resulted in his allegedly wrongful convictions and confinements. For the reasons set forth below, the Fourteenth Amendment claims in Count I and the Fourteenth Amendment and federal malicious prosecution claims in Count II, as well as any derivative claims based on those deficient claims, should be dismissed with prejudice because they fail to state claims upon which relief may be granted.

I. THERE IS NO SUCH THING AS A FOURTEENTH AMENDMENT CLAIM FOR "POST-LEGAL PROCESS, PRE-TRIAL DETENTION WITHOUT PROBABLE CAUSE," OR FOR "MALICIOUS PROSECUTTION".

Count II of plaintiff's FAC is labeled "Due Process-Malicious Prosecution and Unlawful Pre-Trial Detention." In that count, plaintiff claims he was subjected to criminal prosecutions for which there was no probable cause. (Dkt. #54, at ¶157.) He further claims that his prosecutions without probable cause were malicious and violated his rights under the Fourth and Fourteenth Amendments. (*Id*. at ¶¶ 158-159.)[3] Finally, he claims that defendants deprived him of fair criminal proceedings, resulting in deprivations of liberty. (*Id*. at ¶160.) To the extent Count II asserts Fourteenth Amendment due process claims based on any pre-trial deprivation of liberty, or federal malicious prosecution claims, controlling Supreme Court and Seventh Circuit precedent require their dismissal.

[3] Plaintiff's counsel has asked the Court to read Count II as also alleging Fourth Amendment claims for pre-trial detention without probable cause. (*In re: Watts Coordinated Pretrial Proceedings*, Dkt. #155, ¶6.)

A. Under Controlling Supreme Court and Seventh Circuit Precedent, Any Claim for Pre-Trial Detention Without Probable Cause Rests Exclusively in The Fourth Amendment.

The Supreme Court has dispositively held that, even after legal process, a pre-trial detention based on fabricated evidence may violate the Fourth Amendment, but it cannot violate the due process clause (Fourteenth Amendment). *Manuel v. City of Joliet*, 137 S. Ct. 911, 919 (2017), ("*Manuel I*") ("If the complaint is that a form of legal process resulted in pretrial detention unsupported by probable cause, then the right allegedly infringed lies in the Fourth Amendment."). In its analysis, the court drew a bright line between a pre-trial deprivation of liberty secured through the use of fabricated evidence and a post-trial deprivation of liberty secured through the use of fabricated evidence at trial, and explained that a pre-trial deprivation of liberty, even after legal process has commenced, could only be remedied through a Fourth Amendment claim. *Id.* at 918-19 ("[Legal process] cannot extinguish the detainee's Fourth Amendment claim [for pre-trial detention secured through fabricated probable cause]—**or somehow . . . convert that claim into one founded on the Due Process Clause**." (emphasis added)).

Since *Manuel I*, the Seventh Circuit has repeatedly held that a claim for post-legal process, pre-trial detention arises only under the Fourth amendment. For example, in *Lewis v. City of Chicago*, 914 F.3d 472, 476–78 (7th Cir. 2019), the court declared: "It's now clear that a §1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment." (Emphasis original.) *Accord Mitchell v. City of Elgin*, 912 F.3d 1012, 1015 (7th Cir. 2019) ("the Fourth Amendment governs a claim for unlawful pretrial detention even beyond the start of legal process" (internal quotation marks omitted)); *Anderson v. City of Rockford*, 932 F.3d 494, 512 (7th Cir. 2019) ("Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pre-trial detention"); *Regains v. City of Chicago*, 918 F.3d 529, 536 (7th Cir. 2019), *as amended on denial of reh'g* (Apr. 17, 2019) (Fourth Amendment, not Due Process Clause, is source of right in §1983

claim for unlawful pretrial detention, whether before or after initiation of formal legal process); *Levy v. Marion County Sheriff*, 940 F.3d 1002, 1008 (7th Cir. 2019) (affirming trial court's finding that "the Fourth Amendment, not the Due Process Clause, governs a claim for wrongful pretrial detention.").[4]

The Seventh Circuit reaffirmed that principle this very year:

> Wrongful pretrial custody is what plaintiffs complain of here. If plaintiffs' custody was wrongful, it was the Fourth Amendment that made it so, whether for want of probable cause, as in *Manuel*, or for want of a neutral decision-maker, as in *Gerstein*, where the Court "decided some four decades ago that a claim challenging pretrial detention fell within the scope of the Fourth Amendment." *Manuel*, 137 S. Ct. at 917; see also *Albright v. Oliver*, 510 U.S. 266, 274, 114 S. Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion) ("The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."); *id*. at 290, 114 S. Ct. 807 (Souter, J., concurring in the judgment) ("it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment").

Williams v. Dart, 967 F.3d 625, 632–33 (7th Cir. 2020), *reh'g denied* (Aug. 21, 2020).[5] Accordingly, plaintiff's attempt in Count II to bring claims for "post-legal process, pre-trial detention without probable cause" under the Fourteenth Amendment fails as a matter of controlling law, and any such claims embedded in his FAC must be dismissed with prejudice.

---

[4] *See also Knox v. Curtis*, 771 Fed. Appx. 656, 659 (7th Cir. 2019) (treating claim for pre-trial detention secured through false testimony as a "Fourth Amendment claim of wrongful pretrial detention"); *Wright v. Runyan*, 774 Fed. Appx. 311, 313 (7th Cir. 2019) (treating federal malicious prosecution claim as Fourth Amendment claim for pre-trial detention without probable cause).

[5] Also from the Seventh Circuit this year:

> We have recently clarified the contours of constitutional claims based on allegations of evidence fabrication. **A claim for** false arrest or **pretrial detention based on fabricated evidence sounds in the Fourth Amendment right to be free from seizure without probable cause**. If fabricated evidence is later used at trial to obtain a conviction, the accused may have suffered a violation of his due-process right to a fair trial.

Patrick v. City of Chicago, 974 F.3d 824, 834 (7th Cir. 2020) (emphasis added).

B. *Manuel II*, like *Newsome*, Precludes Federal Malicious Prosecution Claims.

To the extent plaintiff is attempting federal malicious prosecution claims in Count II under the Fourteenth Amendment, they too should be dismissed as a matter of law. The Seventh Circuit has long held the Constitution does not create a free-standing claim for malicious prosecution. *See, e.g.*, *Stone v. Wright*, 734 Fed. Appx. 989, 989-90 (7th Cir. 2018), *citing Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013) ("[T]here is no such thing as a constitutional right not to be prosecuted without probable cause"). Following the Supreme Court's decision in *Manuel I*, the Seventh Circuit, on remand in that case, again addressed and again rejected the viability of a constitutional "malicious prosecution" claim. *Manuel v. City of Joliet, Illinois*, 903 F.3d 667, 669-70 (7th Cir. 2018), *cert. denied sub nom. City of Joliet, Ill. v. Manuel*, 18-1093, 2019 WL 861187 (U.S. June 28, 2019) ("*Manuel II*"). Pointing not only to *Manuel I* but also to its own deep-rooted precedent, the Seventh Circuit explained:

> After *Manuel* [*I*], "Fourth Amendment malicious prosecution" is the wrong characterization. There is only a Fourth Amendment claim - the absence of probable cause that would justify the detention. 137 S. Ct. 917-20. The problem is wrongful custody. "[T]here is no such thing as a constitutional right not to be prosecuted without probable cause." *Serino v. Hensley*, 735 F.3d 588, 593 (7th Cir. 2013).

Manuel II, 903 F.3d at 670; *see also Anderson*, 932 F.3d at 512 (affirming summary judgment in favor of defendants on §1983 malicious prosecution claim: "[t]here is no such thing as a constitutional right not to be prosecuted without probable cause" (internal citations and quotation marks omitted)); *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) ("Claims of malicious prosecution should be analyzed not under the substantive due process approach . . . but under the language of the Constitution itself []. Relabeling a fourth amendment claim as 'malicious prosecution' would not extend the statute of limitations . . . and if a plaintiff can establish a violation

of the fourth (or any other) amendment there is nothing but confusion to be gained by calling the legal theory 'malicious prosecution.").[6]

In short, as *Manuel I* requires, and consistent with decades of its own precedent, the Seventh Circuit has dispositively held that the "wrong" in a claim for Fourth Amendment pre-trial detention without probable cause is not the prosecution; it is the detention and the detention alone. To the extent plaintiff is attempting to bring federal malicious prosecution claims, they fail as a matter of law and any such claims in his FAC must be dismissed with prejudice.

II. UNDER CONTROLLING LAW, PLAINTIFF'S DUE PROCESS CLAIMS IN COUNT I SHOULD BE DISMISSED.

Plaintiff clearly admits that he pled guilty (twice), which means there were no trials, and hence no evidence (fabricated or otherwise) was admitted against him. Plaintiff's due process claims based on fabricated evidence in Count I thus should be dismissed because no fabricated evidence was admitted at trial or caused his convictions.

Plaintiff's *Brady*-based due process claims in Count I should also be dismissed because (i) there is no duty to disclose impeachment evidence prior to a guilty plea; (ii) plaintiff knew about the allegedly fabricated evidence in his cases; (iii) he and the Ida B. Wells community had knowledge of the allegations that form the allegedly withheld "pattern" of misconduct before his arrests and, in any event, in the exercise of reasonable diligence, he and his attorneys had ready access to witnesses from his community as well as any and all civilian complaints; (iv) plaintiff's prosecutors had access to any and all civilian complaints and it was *their* duty to disclose the complaints to him; and (v) police officers have no duty to disclose their own supposed misconduct

[6] *See Albright*, 510 U.S. 266, 273 (rejecting an evidence fabrication due process claim after charges were dismissed: "Where a particular Amendment [the Fourth Amendment]'provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of substantive due process, 'must be the guide for analyzing these claims.'" (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

whether the misconduct occurred in plaintiff's or other unrelated cases.

A. Plaintiff Cannot Allege the Requisite Elements of a Due Process Fabrication Claim.

Plaintiff admits that he pleaded guilty in connection with both of his arrests. (FAC, ¶¶7, 41, 60-61.) Thus, he concedes there were no trials in either of his two cases, much less the introduction of any evidence (fabricated or otherwise) against him at any trial. For that reason, he cannot state viable due process claims based on allegedly fabricated evidence.

In *Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017), the Seventh Circuit held that a due process claim based on fabricated evidence is viable *only* when the allegedly fabricated evidence was admitted against a plaintiff at trial and caused the plaintiff's conviction:

> A §1983 claim requires a constitutional violation, and the due-process violation wasn't complete until the [fabricated evidence] **was introduced at Avery's trial**, resulting in his conviction and imprisonment for a murder he did not commit. **After all, it was the admission of the [fabricated evidence] that made Avery's trial unfair**.

847 F.3d at 442 (internal citations omitted) (emphasis added). In so holding, the court emphasized that the allegedly fabricated evidence, defendants' police reports, *were admitted at trial* (*id.*) and caused Avery's conviction:

> [w]hen the detectives falsified their reports of a nonexistent confession, it was entirely foreseeable that this fabricated "evidence" would be used to convict Avery **at trial** for Griffin's murder. That was, of course, the whole point of concocting the confession.

Id. at 443 (emphasis added).

In short, a due process claim based on fabricated evidence can arise only if the fabricated evidence is admitted at trial and causes the plaintiff's conviction. The Seventh Circuit has restated and upheld this principle for nearly a decade: from *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) ("[Defendant] is correct that the alleged constitutional violation here was not complete until trial."), to *Fields v. Wharrie*, 740 F.3d 1107, 1114 (7th Cir. 2014) ("*Fields II*")

("[T]he cases we've just cited involved not merely the fabrication, but the introduction of the fabricated evidence at the criminal defendant's trial. For if the evidence hadn't been used against the defendant, he would not have been harmed by it, and without a harm there is, as we noted earlier, no tort."), to *Avery* (as discussed above), to its opinion this year in *Patrick*, 974 F.3d 824, 834-5 (a plaintiff must prove that the allegedly fabricated evidence was used at trial and was material to the plaintiff's conviction).[7]

In *Patrick*, the defendants argued the trial court erred by refusing to include in its instruction on the plaintiff's fabricated evidence-based due process claim the additional language that the plaintiff was required to prove the allegedly fabricated evidence was used at his criminal trial and material to his conviction. *Id.* In addressing that argument, the Seventh Circuit reiterated that to sustain a due process claim based on fabricated evidence, a plaintiff must indeed prove that the allegedly fabricated evidence was used at the plaintiff's criminal trial and was material to the plaintiff's conviction:

> We have recently clarified the contours of constitutional claims based on allegations of evidence fabrication. A claim for false arrest or pretrial detention based on fabricated evidence sounds in the Fourth Amendment right to be free from seizure without probable cause. **If fabricated evidence is later used at trial to obtain a conviction**, the accused may have suffered a violation of his due-process right to a fair trial.

Id. at 834 (internal citations omitted) (emphasis added)); *see also id.* at 835 ("The essence of a due-

[7] Trial courts in this district routinely follow this black-letter law. *See, e.g., Boyd v. City of Chicago*, 225 F. Supp. 3d 708, 725 (N.D. Ill. 2016) ("Here, nothing about the lineup procedure was introduced at plaintiff's criminal trial. Therefore, even assuming the defendant officers did fabricate their reports regarding the lineup, an evidence fabrication claim cannot be sustained because the allegedly fabricated evidence was not used at plaintiff's trial."); *Ulmer v. Avila*, 15 CV 3659, 2016 WL 3671449, at *8 (N.D. Ill. July 11, 2016) ("*Whitlock*, though, is distinguishable from the present case. The court in *Whitlock* found that the fabrication of evidence caused harm because it was introduced against the defendants at trial and 'was instrumental in their convictions.'" (quoting *Whitlock*, 682 F.3d at 582)); *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1048 (N.D. Ill. 2015) ("nowhere did *Fields* question the requirement that the fabricated evidence must be introduced at trial; to the contrary, it reaffirmed that requirement").

process evidence-fabrication claim is that the accused was convicted and imprisoned based on knowingly falsified evidence, *violating his right to a fair trial* and thus depriving him of liberty without due process. A conviction premised on fabricated evidence will be set aside if the evidence was material—that is, if there is a reasonable likelihood the evidence affected the judgment of *the jury*." (emphases added)).

Applying these principles of law, the Seventh Circuit in *Patrick* agreed with the defendants that the instruction submitted to the jury by the trial court was "incomplete in that it failed to explain that Patrick had the burden to prove that the fabricated evidence was used against him at his criminal trial and was material." *Id.* The court also pointed out that its pattern instruction on a fabricated evidence-based due process claim (which was approved after Patrick's civil trial) provides that a plaintiff *must* prove, as elements of the claim, that the fabricated evidence was introduced at trial and was material. *Id.*; *see also* Federal Civil Jury Instructions of The Seventh Circuit §7.14 (2017).[8]

This law makes crystal clear that, in the absence of a trial, the only constitutional remedy available to plaintiff based on Defendant Officers' alleged fabrication of evidence (if proven) would be claims for post-legal process, pre-trial detention without probable cause under the Fourth Amendment and the Fourth Amendment alone. Plaintiff, unlike the plaintiff in *Avery* (or those in *Patrick*, *Whitlock* and *Fields II*), did not go to trial. He therefore cannot (and never will be able to) allege that the purported fabricated evidence was *admitted against him at trial*, an allegation critical to stating a fabrication of evidence claim under the due process clause, dooming that claim.

Because the FAC expressly admits plaintiff never went to trial, he has pleaded himself out of court on his Fourteenth Amendment fabricated evidence-based due process claims in Count I and

[8] Although the court found that the trial erred in refusing the defendants' instruction, it found the error to be harmless because there was no dispute that the allegedly fabricated evidence was admitted at Patrick's trial and because the defendants did not argue that the evidence was immaterial. *Patrick*, 974 F.3d at 835-6.

the claims should be dismissed.

B. Plaintiff's Convictions Were Caused by His Guilty Pleas Per Supreme Court Law.

The Seventh Circuit's requirement that the allegedly fabricated evidence be introduced at trial is consistent with—indeed, mandated by—long-standing Supreme Court precedent holding that a guilty plea breaks the causal chain between any unconstitutional acts that precede the plea and the conviction and imprisonment subsequent to the plea. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process.") (referring to *Brady v. United States*, 397 U.S. 742, 750 (1970), *McMann v. Richardson*, 397 U.S. 759, 770 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970)); *see also*, *Hurlow v. United States*, 726 F.3d 958, 966 (7th Cir. 2013) ("[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process.") (quoting *Tollett*, 411 U.S. at 267).

Because a guilty plea breaks the chain of events that preceded the plea, any constitutional violations that occurred prior to the plea cannot form the basis of attacking the plea. *Tollett*, 411 U.S. at 267. Instead, the plea can be constitutionally attacked only by establishing that the plea was not voluntary or knowing, *id*., which plaintiff nowhere alleges here.

The reasoning in *Tollett*, *McMann*, *Brady*, and *Harlow* goes hand in hand with the requirement in *Patrick, Avery*, *Whitlock* and *Fields II* that the allegedly fabricated evidence must both be admitted at trial *and* material to a conviction in order for that tainted evidence to be deemed the cause of the injury, *i.e*., the conviction and subsequent incarceration.

McMann is particularly instructive on this point. There, three defendants seeking to vacate their guilty pleas claimed their pleas were induced by constitutionally tainted evidence (physically coerced confessions) and therefore their pleas were involuntary and should be vacated. *McMann*,

397 U.S. at 761-64. Specifically, the defendants claimed the tainted evidence was crucial to the State's cases and, but for the existence of that evidence, they would not have pleaded guilty. *Id*. at 768. The Supreme Court rejected any notion that the pleas were involuntary, remarking:

> [a] more credible explanation for a plea of guilty by a defendant who would go to trial except for his prior confession is his prediction that the law will permit his admissions to be used against him by the trier of fact. At least the probability of the State's being permitted to use the confession as evidence is sufficient to convince him that the State's case is too strong to contest and that a plea of guilty is the most advantageous course. **Nothing in this train of events suggests that the defendant's plea, as distinguished from his confession, is an involuntary act**.

Id. at 769 (emphasis added).

Similarly here, plaintiff chose to plead guilty to charges stemming from the arrests, rather than take his chances at a trial, thereby ensuring shorter sentences. In choosing to plead guilty, he also twice chose to waive the due process rights a trial would have afforded him. Having waived his right to a trial, the very purpose of which is to "effectuate due process,"[9] plaintiff cannot now "blame" his guilty pleas, which caused his convictions and subsequent incarcerations, on due process violations that simply did not occur: the allegedly fabricated evidence was never admitted against him at trial. *McMann*, 397 U.S. at 769 (defendant could have chosen to go to trial and contest the State's tainted evidence, including through appellate and collateral proceedings; "[i]f he nevertheless pleads guilty the plea can hardly be blamed on the [tainted evidence]").

Because the only injury plaintiff suffered as a result of the allegedly fabricated evidence was any pre-plea detention, the only §1983 claims he can try to allege based on the use of that evidence are Fourth Amendment (and not Fourteenth Amendment) claims for post-legal process, pre-trial detention without probable cause.

[9] *Saunders-El v. Rohde*, 778 F.3d 556, 561 (7th Cir. 2015).

C. Plaintiff Has Not Alleged Viable *Brady*-Based Due Process Claims in Count I.

The crux of plaintiff's attempted *Brady*-based due process claims is that defendants had a duty to disclose to prosecutors what he admits he already knew, namely, that Defendant Officers: (i) planted drugs on him at the time of his arrests; and (ii) falsified police reports in connection with the arrests. (FAC, ¶¶38-39, 54-55, 58-59.) Plaintiff also alleges defendants had a duty to disclose another fact he admits he already knew, namely, the officers' alleged pattern of misconduct, and, he claims, had that purported pattern been disclosed, "he could have used it to impeach the officers' accounts of his arrests, which would have changed the outcome of the criminal proceedings instituted against him." (*Id*. at ¶¶84.) None of plaintiff's allegations, however, establish that Defendant Officers suppressed any evidence at all much less evidence subject to disclosure under *Brady*.

Supreme Court precedent holds that there is no constitutional duty to disclose impeachment evidence prior to a guilty plea. *United States v. Ruiz*, 536 U.S. 622, 633 (2002). Furthermore, to sustain a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), a plaintiff must show: (1) evidence was suppressed by the government, either willfully or inadvertently; (2) the evidence at issue is favorable to the accused, either because it was exculpatory or impeaching; and (3) there is a reasonable probability that prejudice ensued. *Parish v. City of Chicago*, 594 F.3d 551, 554 (7th Cir. 2009). Because evidence is only "suppressed for *Brady* purposes if the plaintiff did not know of the evidence or, in the exercise of reasonable diligence, could not have discovered the evidence on his/her own," *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007), plaintiff's own allegations defeat his *Brady*-based due process claims.

1. Defendants Had No Duty to Disclose Impeachment Evidence Prior To Plaintiff's Guilty Pleas.

According to plaintiff, had the alleged fabrication of evidence and pattern of misconduct

been disclosed, he could have used that information in his defense. (FAC, ¶¶45, 64, 84.) Of course, the only possible use plaintiff could have made of the alleged pattern would have been to impeach any testifying Defendant Officer at his trials—*trials he chose to forgo*. Without any trials, there was no testimony to impeach. This is precisely the reason the Supreme Court has held that "the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant." *Ruiz*, 536 U.S. 622, 633. *Ruiz* is dispositive. For this reason, plaintiff's due process claims predicated on any failure to disclose the alleged fabrication of evidence or alleged pattern of misconduct prior to plaintiff's guilty pleas must be dismissed as a matter of law.

2. As an Independent, Second Basis for Dismissal, Defendants Had No *Brady* Duty to Disclose Defendant Officers' Alleged Misconduct in Plaintiff's Cases or Allegations of Misconduct in Other Criminal Cases Because Plaintiff Knew About the Alleged Misconduct in His Cases and Admits That He and Others at The Ida B. Wells Complex Knew About the Alleged Misconduct in Other Cases Before His Arrests.

That which is known, by definition, cannot be suppressed. *Gauger v. Hendle*, 349 F.3d 354, 360 (7th Cir. 2003), overruled in part on other grounds, *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006). Plaintiff alleges that he knew Defendant Officers planned to and did "falsely" claim they found drugs on him because, as he alleges, he was never in possession of any drugs at any time during the course of his arrests and, as he further alleges, Watts showed him the actual drugs Defendant Officers "falsely" reported were his. (*See* FAC, ¶¶36, 38, 51-56). Plaintiff's very allegations establish he knew that the evidence against him was fabricated; therefore, Defendant Officers could not have "suppressed" the alleged fabrication as a matter of law. *See e.g., Harris,* 486 F.3d at 1015) ("Harris' own alibi was not concealed from him and is therefore not properly a claim under *Brady*."); *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1029 (7th Cir. 2006) (there is no *Brady* obligation to inform accused that her own confession was coerced). This alone dooms

plaintiff's due process claims based on the failure to disclose the alleged misconduct in his cases.

Plaintiff also alleges not only that he *and* the community at Ida B. Wells (where he lived for years) knew about the alleged pattern of misconduct he claims was "withheld" from him, and that many other members of the community were similarly victimized over a period of years, he also alleges other residents/individuals were present at and witnessed his purportedly trumped-up arrests. Indeed, plaintiff claims he in turn witnessed some of those individuals also being falsely arrested and framed. (FAC, ¶¶4, 6, 29-32, 38-39, 50-52.) By his own admission, plaintiff knew what he needed to know and had an abundance of witnesses at his fingertips from his own community he could have called to present evidence of the purported pattern *if* he had chosen to go trial. The evidence of the "pattern" was therefore not suppressed under *Brady* as a matter of law. *Harris*, 486 F.3d at 1015 (evidence is only "suppressed for *Brady* purposes if the plaintiff did not know of the evidence or, in the exercise of reasonable diligence, could not have discovered the evidence on his/her own.")

Plaintiff further alleges that "dozens" of residents filed formal complaints against Watts and other members of his tactical team. (*Id.*, ¶96.) Assuming the truth of the allegations, these complaints were all available to plaintiff. At any time during his criminal proceedings, plaintiff could have requested any citizen complaints filed against his arresting officers from his prosecutors. Thus, not only was the purported pattern known to plaintiff, evidence of the "pattern" was easily discoverable in the exercise of even the most minimal diligence. *U.S. v. O'Hara,* 301 F.3d 563, 569 (7th Cir. 2002) (evidence is only suppressed if plaintiff could not have discovered the evidence through the exercise of reasonable diligence).

So once again, plaintiff has pleaded himself out of court. The FAC claims that long before his arrests, plaintiff and the Ida B. Wells community had knowledge of the allegations that form the

allegedly withheld "pattern" of misconduct. In the exercise of reasonable diligence, he and his attorneys would have had access to these other witnesses, as well as any and all civilian complaints they saw fit to request and investigate. Because plaintiff already knew about Defendant Officers' alleged pattern of misconduct, there was no duty to disclose it. For this additional reason, plaintiff's *Brady*-based due process claims in Count I must be dismissed.

3. As an Independent, Third Basis for Dismissal, Defendants Had No *Brady* Duty to Disclose Allegations in Other Criminal Cases Because Plaintiff's Prosecutors Were Aware of Or Had Access to Civilian Complaints.

While plaintiff claims that defendants should have revealed the scope of Defendant Officers' misconduct to the prosecutors, prosecutors are aware of and have access to citizen complaints, which plaintiff claims were rife with allegations against these officers similar to his own. (FAC, ¶96). *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (police officers discharge their *Brady* obligation by disclosing exculpatory information to prosecutors that is *not otherwise already known to them*). Assuming, for purposes of argument only, that the content of these citizen complaints constituted *Brady* material, there is not a single allegation indicating that plaintiff's prosecutors did not have ready access to these materials, much less any claim that they had no obligation to review them or disclose them.[10] *Beaman v. Freesmeyer*, 776 F.3d 500, 512 (7th Cir. 2015) (the duty to disclose *Brady* material to the defense in a criminal case belongs to the prosecutor). For this additional *third* reason, plaintiff's *Brady*-based due process claims in Count I must be dismissed.

[10] Moreover, as set forth in Section II (C)(1) and (2) above, plaintiff's admitted knowledge of these allegations and his guilty plea meant that the prosecutors' duty to disclose this impeachment evidence was never triggered in the first place.

4. As an Independent, Fourth Basis for Dismissal, Defendants Had No *Brady* Duty to Disclose Defendant Officers' Alleged Misconduct or Pattern of Misconduct.

Guilty pleas, plaintiff's admitted knowledge, and prosecutors' duties aside, plaintiff's *Brady*-based due process claims also fail because binding circuit precedent plainly holds that *Brady* does not require Defendant Officers to disclose their alleged fabrication of evidence, whether the fabrication occurred in plaintiff's cases or in other unrelated cases. Put simply, *Brady* does not impose a duty on police officers to tell the truth (or what is alleged to be the truth) about their investigations, including that they supposedly fabricated evidence. *Gauger v. Hendle*, 349 F.3d 354, 360 ("Gauger wants to make every false statement by a prosecution witness the basis for a civil rights suit, on the theory that by failing to correct the statement the prosecution deprived the defendant of *Brady* material, that is, the correction itself."); *see also Harris*, 486 F.3d at 1017 ("Harris essentially seeks an extension of *Brady* to provide relief if a police officer makes a false statement to a prosecutor by arguing that an officer is "suppressing" evidence of the truth by making the false statement. This court has already foreclosed this extension.").

The plaintiff in *Gauger* attempted to extend *Brady*'s disclosure obligations to apply to the defendant police officers' alleged failure to tell the truth about his interrogation. *Gauger*, 349 F.3d at 360. According to plaintiff, he only *hypothetically* discussed murdering his parents, but the officers did not describe his statements as "hypothetical." *Id.* at 356-7. Per the plaintiff, the officers should have given the truthful (*i.e.*, the plaintiff's) version of his interrogation to the prosecutors for disclosure to the plaintiff's counsel, all pursuant to *Brady*. (Put another way, the officers lied about his interrogation, and that should have been disclosed under *Brady*.) This is ultimately the precise claim plaintiff makes here: he wants to extend *Brady* to mean that the officers should have given the "truthful" (*i.e.*, plaintiff's own) version of the arrests to the prosecutors.

The Seventh Circuit flatly rejected such an extension of *Brady*, stating: "We find the

proposed extension of *Brady* difficult even to understand. It implies that the state has a duty not merely to disclose but also to create truthful exculpatory evidence." *Id*. The court also observed that adopting the proposed extension of *Brady* would not benefit Mr. Gauger in any event: "Indeed [even] the [extended] duty to disclose falls out, because Gauger knew what he had said at the interrogation." *Id*.

Thus, *Gauger* does not merely stand for the principle that there is no *Brady* duty to disclose that which is known to a criminal defendant—this principle is a fundamental to *all Brady* claims and is neither new nor groundbreaking nor even clarifying. Instead, *Gauger* sets forth a corollary to the long-standing principle of law that the state has no duty to conduct an investigation or assist in the preparation of a defendant's case. *See, e.g.*, *United States v. Tadros*, 310 F.3d 999, 1005 (7th Cir. 2002) ("*Brady* prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel."); *Harris*, 486 F.3d at 1015 (*Brady* "'does not place any burden upon the government to conduct a defendant's investigation or assist in the presentation of the defense's case'" (internal citations omitted)). The corollary is that police officers do not have a duty *under Brady* to tell the truth and the State does not have a duty *under Brady* to create truthful exculpatory evidence. In short, allegations of police dishonesty do not state a claim under *Brady*. *Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) (*Brady* does not require police officers to disclose their misconduct, whether that misconduct occurs in or out of the interrogation room).

The allegations of police misconduct in *Saunders-El* are virtually identical to the allegations here. Specifically, the plaintiff in *Saunders-El* attempted to base a *Brady* claim on allegations that the defendant police officers planted blood evidence at the crime scene in an attempt to frame plaintiff for a crime he did not commit and failed to disclose their misconduct to the prosecutor. *Id.* at 561. The plaintiff claimed "that the police officers' failure to admit their misdeeds to the prosecution amounts to a withholding of exculpatory evidence in violation of *Brady*." *Id.* The court rejected the claim explaining:

> We have dealt on several occasions with similar *Brady* claims concerning accusations of police dishonesty. In *Gauger v. Hendle*, for instance, we rejected the plaintiff's argument that *Brady* requires police to disclose truthful versions of statements made during interrogations, finding "the proposed extension of *Brady* ... difficult even to understand," since "[i]t implies that the state has a duty not merely to disclose but also to create truthful exculpatory evidence." 349 F.3d 354, 360 (7th Cir. 2003), *overruled in part on other grounds by Wallace v. City of Chicago*, 440 F.3d 421, 423 (7th Cir. 2006). Later, in *Sornberger v. City of Knoxville*, we determined that *Brady* cannot "serve as the basis of a cause of action against [police] officers for failing to disclose [the circumstances surrounding a coerced confession] to [a] prosecutor...." 434 F.3d 1006, 1029 (7th Cir. 2006) (citation and internal quotation marks omitted).

Id. at 562. The court continued:

> Consequently, in *Harris v. Kuba*, 486 F.3d 1010, 1017 (7th Cir. 2007), we upheld the dismissal of a *Brady* claim premised on an argument "that an officer is 'suppressing' evidence of the truth by making [a] false statement to a prosecutor," noting that "[t]his court has already foreclosed this extension" of *Brady*.
>
> In the end, Saunders– El seeks to charge the officers with a *Brady* violation for keeping quiet about their wrongdoing, not for failing to disclose any existing piece of *evidence* to the prosecution. But our case law makes clear that *Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution.

Id. (emphasis original). Thus, *Saunders-El* stands for the proposition that when a police officer fabricates evidence, remaining silent or lying about such misconduct is simply not a violation of

Brady.[11] *Brady* articulates a specific constitutional right that does not include this type of conduct.

Like the plaintiff in *Saunders-El*, plaintiff has alleged only that Defendant Officers were silent about their alleged fabrication of evidence in his two cases and about other alleged fabrications of evidence that had nothing to do with his cases. Again, under Seventh Circuit precedent, "keeping quiet about their own wrongdoing" is simply not a violation of *Brady*. *Saunders-El*, 778 F.3d at 562. Nor is lying about it—even under oath. *Sornberger*, 434 F.3d 1006, 1029 ("The Constitution does not require that police officers testify *truthfully*." (emphasis original)). In the end, plaintiff's *Brady* claims are nothing more than a doomed recast of his fabrication claims. Whether occurring in plaintiff's criminal cases or others, Defendant Officers had no constitutional duty under *Brady* to disclose their alleged fabrication of evidence. For this additional *fourth* reason, any due process claims in Count I premised on defendants' failure to disclose the alleged fabrications or some pattern

[11] Here too trial courts in this district routinely follow this black-letter law. *Serrano v. Guevara*, 315 F. Supp. 3d 1026, 1041 (N.D. Ill. 2018) (dismissing *Brady* claim: "plaintiffs' *Brady* violation claims are impermissible recasts of the evidence fabrication claims and do not allege the suppression of then-existing exculpatory evidence"); *Boyd*, 225 F. Supp. 3d 708, 720–21 ("[P]laintiff alleges that the defendant officers fabricated statements that they attributed to [witnesses] and then falsified their reports to conceal the fact that the statements were never made. There is no support for a *Brady* claim where, as here, the allegation is not that defendants suppressed evidence, but rather that they produced evidence that was fabricated."); *Patrick v. City of Chicago*, 103 F. Supp. 3d 907, 916 (N.D. Ill. 2015) (declining to reconsider dismissal of *Brady* claim based on police officers' failure to disclose misconduct: "Plaintiff's objection to Defendants' conduct appears to be not so much that they suppressed evidence as that the evidence they ultimately produced was fabricated or otherwise secured by misconduct."); *Andersen v. City of Chicago*, 16 C 1963, 2019 WL 6327226, at *9, n. 8 (N.D. Ill. Nov. 26, 2019) ("*Saunders-El* explains that suppression of the fact that police fabricated evidence is not a *Brady* violation, i.e., police do not violate *Brady* by 'keeping quiet about their wrongdoing.'" (internal citations omitted)); *Walker v. White*, 16 CV 7024, 2017 WL 2653078, at *4 (N.D. Ill. June 20, 2017) (dismissing *Brady* claim: "The Seventh Circuit [] does not permit recasting evidence-fabrication claims as *Brady*-based due process claims."); *Alvarado v. Hudak*, 14 CV 9641, 2015 WL 4978683, at *3 (N.D. Ill. Aug. 20, 2015) (dismissing *Brady* claim because "the Seventh Circuit [has] rejected the premise that the police officers' silence following their alleged fabrication of evidence results in a *Brady* violation."); *Myvett v. Chicago Police Detective Edward Heerdt*, 12 C 09464, 2015 WL 12745087, at *6 (N.D. Ill. May 28, 2015) ("[The premise of [plaintiff]'s argument here is that by failing to tell him that they fabricated witness statements — []—the defendants withheld evidence that would have strengthened [plaintiff]'s defense. The Seventh Circuit has repeatedly rejected such a theory."); *Harris v. City of Chicago*, 14-CV-4391, 2015 WL 1331101, at *4 (N.D. Ill. Mar. 19, 2015) (dismissing *Brady* claim based on allegations that "Defendants' fail[ed] to disclose the pattern and practice of coerced and fabricated confessions" because "*Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution." (internal citations and quotation marks omitted)).

of fabricating evidence must be dismissed.

III. PLAINTIFF'S DERIVATIVE FAILURE TO INTERVENE, CONSPIRACY, AND *MONELL* CLAIMS MUST ALSO BE DISMISSED TO THE EXTENT BASED ON PLAINTIFF'S FOURTEENTH AMENDMENT AND FEDERAL MALICIOUS PROSECUTION CLAIMS.

Failure to intervene is a derivative claim. Absent an underlying constitutional violation, there can be no independent claim for failure to intervene. *Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005). Because plaintiff's underlying Fourteenth Amendment and federal malicious prosecution claims are not actionable, his derivative failure to intervene claims must be dismissed. For the same reason, plaintiff's conspiracy claims based on these claims must also be dismissed. *See Reynolds v. Jamison,* 488 F.3d 756, 764 (7th Cir. 2007) (Section 1983 conspiracy claim depends upon the viability of the underlying constitutional claim). Likewise, plaintiff's *Monell* claims against the City should be dismissed to the extent based on Fourteenth Amendment and federal malicious prosecution claims that are not actionable. Section1983 liability cannot attach to a municipality in the absence of an actionable constitutional violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (If there is no violation of the plaintiff's constitutional rights by a police officer, "it is inconceivable" the municipality could be liable pursuant to a *Monell* claim). If plaintiff cannot establish a constitutional injury, he has no claim against the municipality. *Durkin v. City of Chicago,* 341 F.3d 606, 615 (7th Cir. 2003).

CONCLUSION

For the foregoing reasons, (i) Count I of the FAC; (ii) the Fourteenth Amendment and federal malicious prosecution claims in Count II; and (iii) any derivative claims based on those deficient claims, should be dismissed with prejudice because they fail to state a claim upon which relief may be granted.

Dated: December 17, 2020

Respectfully submitted,

By: /s/ *Paul A. Michalik*
Special Assistant Corporation Counsel
Attorneys for Defendants City of Chicago, Philip Cline, Terry Hillard, Dana Starks, Debra Kirby, Karen Rowan, Edward Griffin, John Griffin, and Jerrold Bosak

Terrence M. Burns
Paul A. Michalik
Daniel M. Noland
Reiter Burns, LLP
311 South Wacker, Suite 5200
Chicago, Illinois 60606
(312) 982-0090

By: /s/ *Amy A. Hijjawi*
Special Assistant Corporation Counsel
Attorneys for All Defendant Officers Other Than Watts, Mohammed, Spaargaren and Cadman

Andrew M. Hale
Amy A. Hijjawi
William E. Bazarek
Brian Stefanich
Hale Law LLC
53 W. Jackson Blvd., Suite 330
Chicago, IL 60604
(312) 341-9646

By: /s/ *Eric S. Palles*
Special Assistant Corporation Counsel
Attorneys for Kallatt Mohammed

Gary Ravitz
Eric S. Palles
Sean M. Sullivan
Kathryn M. Doi
Daley Mohan Groble P.C.
55 West Monroe, Suite 1600
Chicago, IL 60603
(312) 422-9999

By: /s/ *Brian P. Gainer*
Special Assistant Corporation Counsel
Attorney for Defendant Ronald Watts

Brian P. Gainer
Monica Gutowski
Ahmed A. Kosoko
Johnson & Bell
33 W. Monroe St., Suite 2700
Chicago, IL 60603
(312) 372-0770

By: /s/ *Megan McGrath*
Special Assistant Corporation Counsel
Attorneys for Defendants Michael Spaargaren and Matthew Cadman

Thomas M. Leinenweber
James V. Daffada
Michael J. Schalka
Megan McGrath
Leinenweber Baroni & Daffada LLC
120 North LaSalle Street, Suite 2000
Chicago, Illinois 60602
(312) 663-3003

CERTIFICATE OF SERVICE

I, Amy A. Hijjawi, an attorney, hereby certify that, on the date stamped on the margin above, I caused to be filed with the Clerk of the Court's CM/ECF system a copy of this motion, which simultaneously served copies on all counsel of record via electronic notification.

/s/ *Amy A. Hijjawi*