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

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Valderrama
	)	Magistrate Judge Finnegan

PLAINTIFF HENRY THOMAS' RESPONSE TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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INTRODUCTION

Plaintiff Henry Thomas is one in a long line of victims who former Chicago police officer Ronald Watts and his crew framed for crimes they did not commit. In fact, the Defendants in this case framed Mr. Thomas twice, the first time when he was only 22 years old, and their efforts led to an eight-year prison sentence for crimes that Mr. Thomas did not commit.

Before the federal government finally put an end to their reign of terror in 2012, Watts led a team of tactical officers that terrorized the Ida B. Wells housing development for more than a decade, fabricating drug cases against scores of residents and visitors alike. The level of Defendants' misconduct is staggering. Illinois courts have vacated more than 100 wrongful convictions for 80 people who were collectively sentenced to 250 plus years in prison for crimes they did not commit, with more exonerations to come. The Illinois Court of Claims has aptly described Defendants' actions "as a criminal enterprise right out of the movie Training Day."

Many of Defendants' victims, including Mr. Thomas, pled guilty rather than risk a trial. They did so not because they were in fact guilty, but because they knew a jury or criminal court judge was unlikely to take their word over the word of police officers who falsely claimed to have witnessed them commit crimes. Pleading guilty was the only way to avoid an even more unjustified, lengthier prison sentence. Mr. Thomas was not unique in pleading guilty even though he was innocent. Indeed, the Illinois Supreme Court recently acknowledged that innocent people plead guilty given the high stakes of taking a case to trial. It is therefore not surprising that convictions based on guilty pleas are at times vacated, which is what happened with Mr. Thomas' two wrongful convictions that are at issue in this case.

After his wrongful convictions were vacated and he received certificates of innocence, Mr. Thomas filed this civil rights lawsuit against a group of Individual Defendants – current and former Chicago police officers Ronald Watts, Kallatt Mohammed, Alvin Jones, Kenneth Young, Jr., Calvin

Ridgell, Jr., Gerome Summers, Jr., and Elsworth J. Smith, Jr. – certain supervisors within the Chicago police department, and the City of Chicago itself to seek redress for the immense harm that Defendants' misconduct caused.[1]

Mr. Thomas' Amended Complaint ("Complaint") includes nine counts alleging violations of the United States Constitution (brought under 42 U.S.C. § 1983) and analogous state-law tort claims. Defendants seek to dismiss parts of two of those claims. Specifically, they seek to dismiss part of Count II, which alleges constitutional violations for wrongful seizure and pre-trial deprivation of liberty, because they contend that Mr. Thomas is seeking to pursue the claim on more legal theories than case law permits. They also seek to dismiss Count I, which alleges that Defendants violated Mr. Thomas' due process rights by fabricating evidence and withholding exculpatory evidence that led to his conviction. Defendants contend that Mr. Thomas' guilty plea precludes such a claim, and that the Defendants had no obligation to disclose their misconduct in any event. As described in more detail below, Defendants are wrong, and none of their arguments support even partially dismissing any of the claims in Mr. Thomas' Complaint.

In ruling on Defendants' request to dismiss part of Count II, the Court is asked to decide one central substantive issue: which legal theories a plaintiff in federal court may advance in support of a claim that government officials seized and instituted legal proceedings against a citizen without cause. On this point, the parties agree that the Fourth Amendment allows for such a claim, and Defendants do not seek to dismiss Count II to the extent it is based on alleged Fourth Amendment violations. The parties depart as to whether there are any additional bases for such a claim. Although the law in this area has been evolving over the past few years, case law now permits such claims under the Fourteenth Amendment and under a federal malicious prosecution theory. Plaintiffs have

[1] The parties stipulated to dismissal of former Defendants Daryl Akins and Ronald Heard. Dkt. 55 in Case No. 18-cv-5131.

adequately alleged both theories. In any event, the Court need not resolve that issue at this stage. Motions to dismiss test the viability of claims, not legal theories, and Defendants' request to dismiss a portion of Count II to prevent Mr. Thomas from advancing a particular legal theory at this stage lacks merit.

With respect to Count I, Defendants ask the Court to rule that Mr. Thomas' guilty plea and his purported knowledge of Defendants' wrongdoing precludes him from seeking redress under the Fourteenth Amendment for his wrongful conviction. Four separate judges in cases that are now part of the *Watts* Coordinated Proceedings have already correctly rejected these arguments, and this Court should do the same. When convictions based on guilty pleas are vacated, plaintiffs are permitted to bring civil rights cases seeking redress for the constitutional violations that led to the guilty pleas. Contrary to Defendants' position, guilty pleas in wrongful conviction cases do not magically wipe away Defendants' liability for egregiously violating the constitution. The Defendants also seek a blanket rule that allows them to evade responsibility for failing to disclose exculpatory material if they also allegedly fabricated evidence. Defendants, however, cannot escape liability by pointing out that they committed multiple types of misconduct.

The Court should deny Defendants' partial motion to dismiss.[2]

FACTUAL BACKGROUND

Henry Thomas is 40 years old and lives in Chicago. Dkt. 170-1 (First Amended Complaint) ¶ 21.[3] He was sentenced to prison for eight years after the Individual Defendants twice framed Mr.

[2] In addition to seeking the dismissal of part of Count II and of Count I, Defendants also seek the dismissal of parts of certain other claims that depend on an underlying constitutional violation to the extent those claims are based on legal theories the Court dismisses. Dkt. 170 at 27 (using ECF pagination). Because there is no basis to dismiss any of Plaintiff's substantive legal theories, Defendants' request for dismissal of derivative claims fails as well.

[3] Most of the facts are taken from Mr. Thomas' operative complaint, as demonstrated by citations to that complaint (and with respect to Mr. Thomas' age, the complaint was filed when he was 38). Certain other facts consistent with the complaint but not specifically referenced in the complaint are

Thomas for drug crimes he did not commit, first in 2003 and then again in 2006. *Id.* ¶¶1-2, 33-64.

The Defendants completely invented the crimes and then created false and fabricated police reports to support their efforts to frame Mr. Thomas. *Id.* Defendants were successful. Mr. Thomas was prosecuted and, recognizing that he stood no chance of convincing a judge or jury that police officers framed him out of whole cloth, Mr. Thomas pled guilty to avoid the inevitably longer prison sentence he would have received after a conviction at trial. *Id.* ¶ 7. As noted above, Mr. Thomas was eventually sentenced to eight years in prison for crimes he did not commit (and that did not even happen). *See*, *e.g.*, *id.* ¶¶ 1, 7.

Though the allegations that a group of Chicago police officers framed someone from crimes that never even happened may be shocking, Mr. Thomas' case is hardly unique. *Id.* ¶ 6. After Mr. Thomas had completed his prison sentences, Watts and Mohammed were caught on tape engaging in the exact same type of misconduct that Mr. Thomas had alleged against them. *Id.* ¶ 8. Both of them were then federally charged and convicted of abusing their authority. *Id.* ¶ 9. Moreover, evidence has now come to light showing that Watts and his team members framed many residents and visitors in the Ida B. Wells public housing development over the course of many years. *Id.* ¶ 10. By now, the Defendants' misconduct is well-documented. The Chief Justice of Illinois' Court of Claims has written that "Watts and his team of police officers ran what can only be described as a criminal enterprise right out of the movie 'Training Day,'" ensuring that "many individuals were wrongfully convicted as a result of one of the most staggering cases of police corruption in the history of the City of Chicago." *Id.* ¶ 12.

The misconduct was not always so well-publicized. To the contrary, although the Individual Defendants racked up dozens of citizen complaints about their behavior, and although

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included as well, consistent with Seventh Circuit precedent. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012).

the City was even involved in a joint confidential investigation of Watts and Mohammed (at a minimum) with the FBI, neither the City nor the Individual Defendants disclosed the alleged misconduct or the existence of the investigation to Mr. Thomas or to others who faced criminal prosecution as a result of Defendants' misconduct. *See, e.g.*, *id.* ¶ 42-43, 45, 62-72, 84, 112, 115, 120-121. This failure to disclose misconduct, or to make any meaningful effort to prevent misconduct or to stop misconduct from continuing after it begins, is consistent with a long-standing code of silence that plagues the Chicago Police Department. *Id.* ¶¶ 81-85.

Fortunately, the above-described misconduct did eventually start coming to light. After it did, and after Mr. Thomas had already completed his prison sentences, his wrongful convictions were finally vacated, and he received certificates of innocence from Illinois courts. *See id.* ¶ 15. To date, Illinois courts have vacated more than 100 convictions of more than 80 individuals who the Defendants framed, and the Cook County State's Attorney's Office has indicated that more convictions will be vacated later.

LEGAL STANDARD

"The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). At this stage, the court must accept all well-pleaded facts as true and draw reasonable inferences in Plaintiff's favor. *Roberts v. City of Chicago*, 817 F.3d 561, 564-65 (7th Cir. 2016). To survive a motion to dismiss, the complaint must "state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Plausibility" does not mean the Court "should decide whose version to believe, or which version is more likely than not." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010). Rather, the complaint must merely "give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself could these things have happened, not did they happen." *Id.* (emphasis in original).

Mr. Thomas' Complaint readily meets these standards, and Defendants' partial motion to dismiss should be denied.

ARGUMENT

I. Plaintiff's claim for unconstitutional pre-trial seizure, detention, and deprivation of liberty is well-pled, and so the Court should deny Defendants' request to dismiss a portion of Count II.

In Count II, Mr. Thomas alleges that the Defendants illegally seized Mr. Thomas, deprived him of his liberty, and subjected him to criminal prosecution without cause. By stipulation, Count II is titled "Count II: 42 USC 1983 – Malicious Prosecution and Unlawful Pretrial Detention – Fourth and Fourteenth Amendments." Dkt. 155 ¶ 6.[4] Although it is not necessary to do so in the Seventh Circuit, Mr. Thomas' complaint specifies various constitutional amendments and legal theories supporting that claim, specifically alleging that Defendants violated the Fourth and Fourteenth Amendments and forms the basis for a federal malicious prosecution claim. *See* Dkt. 170-1 ¶¶ 156-165; *see also*, *e.g.*, *Avila v. CitiMortgage, Inc.*, 801 F.3d 777 (7th Cir. 2015) ("plaintiffs are not required to plead legal specific legal theories").

Defendants do not seek dismissal of Plaintiff's ability to pursue this claim under the Fourth Amendment, but they do seek dismissal of any effort to also pursue the claim under the Fourteenth Amendment or as a federal malicious prosecution claim. The Court should reject this request for two reasons. First, courts are not supposed to parse out claims by legal theory at the pleading stage, dismissing some theories and allowing others to proceed. Second, given evolving case law, there is a legally sound basis to permit the claim to proceed under the Fourteenth Amendment and as a federal malicious prosecution claim.

[4] As discussed in the stipulation set forth in Dkt. 155, this title is slightly different than the title in the Amended Complaint itself.

A. The parties agree that Count II adequately alleges a Fourth Amendment violation.

"The Fourth Amendment protects the right of the people to be secure in their persons ... against unreasonable ... seizures." *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 917 (2017) (internal quotation marks omitted). The Fourth Amendment's protections continue even after "the start of the legal process in a criminal case" if the seizure is unreasonable because, "for example, a judge's probable-cause determination is predicated solely on a police officer's false statement." *Id.* at 918.

The parties agree that Mr. Thomas has alleged a plausible Fourth Amendment claim for unlawful pretrial seizure, detention, and deprivation of liberty. Mr. Thomas' alleges that he was seized and detained based solely on false and fabricated evidence. Indeed, as Mr. Thomas alleges, "the crimes never even happened; they were completely fabricated by Chicago police officers." Dkt. 170-1 ¶ 1.

The allegation that Mr. Thomas was seized and detained based entirely on false and fabricated evidence "fits the Fourth Amendment, and the Fourth Amendment fits [Thomas'] claim, as hand in glove." *Manuel*, 137 S. Ct. at 917. Defendants do not contend otherwise, and they do not seek dismissal of Count II to the extent it is based on the Fourth Amendment. But Defendants do contend that *Manuel* itself and certain Seventh Circuit cases hold that unlawful pre-trial seizure and detention claims must be based on the Fourth Amendment alone, to the exclusion of other constitutional amendments and other legal theories. As described below, these arguments do not provide a basis for dismissal.

B. There is no issue for the Court to decide with respect to Count II because Courts do not dismiss legal theories or splice claims by theory at the pleadings stage.

"A motion to dismiss under Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims; the question at this stage is simply whether the complaint includes factual allegations that state a plausible claim for relief." *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015); *see also*

KFC Corp. v. Iron Horse of Metairie Rd., LLC, 18 C 5294, 2020 WL 3892989, at *3 (N.D. Ill. July 10, 2020) ("As long as the plaintiff can, in response to a motion to dismiss, identify some plausible theory that would entitle it to relief on its claim, that claim may move forward and a motion to dismiss other legal theories must be denied.").

With respect to Count II, the question that *City of Angola* directs courts to ask – "whether the complaint includes factual allegations that state a plausible claim for relief" –is not a close call. As discussed above, the parties *agree* that Plaintiff pled a plausible claim for illegal pretrial seizure and detention under the Fourth Amendment. They merely disagree as to which additional legal theories, if any, can support such a claim. Given the parties' agreement that Mr. Thomas' claim for unlawful pretrial seizure and detention is viable under at least one legal theory, there is no basis to dismiss any part of Count II under applicable Seventh Circuit law. *E.g.*, *City of Angola*, 809 F.3d at 325. In line with that precedent, two judges have recently, and correctly, refused to dismiss portions of wrongful pretrial seizure/detention claims for this very reason. *Mack v. City of Chicago*, 19 C 4001, 2020 WL 7027649, at *3 (N.D. Ill. Nov. 30, 2020) (at pleadings stage, declining to dismiss Fourteenth Amendment claim that shared same factual underpinning as Fourth Amendment claim); *Culp v. Flores*, No. 17 C 252, 2020 WL 1874075, at *3 (N.D. Ill. Apr. 15, 2020) (same).

C. Count II adequately alleges a Fourteenth Amendment violation and a constitutional malicious prosecution claim.

As discussed above, in 2017, the Supreme Court in *Manuel* firmly established that plaintiffs in civil rights cases may pursue claims for unlawful arrest, seizure, and other pretrial deprivations of liberty under the Fourth Amendment. The law governing these claims has continued to evolve since then.

In particular, two years after deciding *Manuel*, the Supreme Court had another opportunity to consider the contours of a pretrial deprivation of liberty claim in *McDonough v. Smith*, 139 S. Ct. 2149 (2019). The plaintiff in *McDonough* alleged that he was arrested, deprived of his liberty, and

prosecuted based on fabricated evidence in violation of the Fourteenth Amendment. *Id.* at 2155.

The primary question for the Supreme Court in *McDonough* was when the claim accrued, and thus when the statute of limitations ran, rather than what legal theories might support the claim. *See generally id.* In considering the statute of limitations issue, however, the Supreme Court did address the legal basis for the pretrial claim. Namely, the Supreme Court accepted the Second Circuit's assumption that the plaintiff's pretrial deprivation of liberty was governed by the Fourteenth Amendment's due process clause while leaving open the possibility that other constitutional amendments—such as the Fourth Amendment—might provide additional safeguards against fabricated evidence. *McDonough*, 139 S. Ct. at 2155 n. 2 ("In accepting the Court of Appeals' treatment of McDonough's claim as one sounding in denial of due process, we express no view as to what *other* constitutional provisions (if any) might provide safeguards against the creation or use of fabricated evidence enforceable through a 42 U.S.C. §1983 action.") (emphasis added). Since then, as noted in the previous section, two separate judges in this district have recognized that the law on this issue remains fluid and refused to dismiss a Fourteenth Amendment theory at the pleadings stage where that theory shared the same factual predicate as a Fourth Amendment pretrial detention claim. *See Mack*, 2020 WL 7027649, at *3; *see also Culp*, 2020 WL 1874075, at *3.

In *McDonough*, the Supreme Court also accepted that, in addition to a fabricated evidence claim under the Fourteenth Amendment, the Second Circuit had recognized a distinct "constitutional malicious prosecution claim." *Id.* at 2156 n.3. As with the Fourteenth Amendment claim, the Supreme Court did not question the existence of a constitutional malicious prosecution claim. To the contrary, the Supreme Court merely stated that it "has not defined the elements of such a § 1983 claim," and that the *McDonough* case did not provide an "occasion to opine on what the elements of a constitutional malicious prosecution action under § 1983 are or how they may or may not differ from those of a fabricated-evidence claim." *Id.* At a minimum, *McDonough* should be read as recognizing

that a constitutional claim for malicious prosecution exists, even if the exact contours of that claim have not yet definitively been decided.

As Defendants point out, the Seventh Circuit has not adopted the view that the Supreme Court expressed in *McDonough* with respect to a 14th Amendment pretrial deprivation of liberty claim or a constitutional claim for malicious prosecution. Dkt. 170 at 9-13. But none of the case law that Defendants cite requires dismissal. Although Defendants are correct that the Seventh Circuit in *Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019) held that a 14th Amendment claim for pretrial deprivation of liberty was not viable, there are two reasons that *Lewis* does not mandate dismissal here. First, *Lewis* addressed a case where the plaintiff had been acquitted at trial, and the *Lewis* court made clear that it was dealing "only with a claim of wrongful *pretrial detention*, not a claim of wrongful *conviction*." *Id.* at 480. Here, Mr. Thomas was convicted, unlike the plaintiff in *Lewis*. Second, the Seventh Circuit decided *Lewis* before the Supreme Court decided *McDonough*. *Id.* at 478 n. 2 (noting that Supreme Court had granted certiorari in *McDonough*). By accepting a 14th Amendment pretrial deprivation of liberty claim in *McDonough*, the Supreme Court has called the Seventh Circuit's *Lewis* decision into question. This Court should therefore follow the same course that Judge Feinerman and Judge Pallmeyer recently took in *Culp* and *Mack* when they declined to dismiss such claims at the pleadings stage.[5]

Similarly, Defendants also correctly point out that the Seventh Circuit has long rejected a free-standing constitutional malicious prosecution claim. Dkt. 170 at 12-13. Again, however, the Seventh Circuit's pronouncements on the availability of a constitutional claim for malicious

[5] As Defendants also note, other more recent cases in the Seventh Circuit have continued to refer to pretrial deprivation of liberty claims as arising under the Fourth Amendment. *See*, *e.g.*, *Patrick v. City of Chicago*, 974 F.3d 824, 834 (7th Cir. 2020), which also noted that it the Seventh Circuit "recently clarified the contours of constitutional claims based on allegations of evidence fabrication." It does not appear that any of those cases have grappled with *McDonough* or have conclusively ruled on a plaintiff's ability to pursue such a claim under the Fourteenth Amendment.

prosecution claim came before *McDonough*. *See*, *e.g.*, *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018) (*Manuel II*) (holding that although a "federal malicious prosecution claim" is the wrong characterization for a claim of unlawful pretrial detention); *see also Lewis*, 914 F.3d at 479 (same). It does not appear that the Seventh Circuit has addressed the issue of whether a federal constitutional claim for malicious prosecution exists since *McDonough* was decided. Given *McDonough's* apparent approval of such a claim, this Court should decline to dismiss Mr. Thomas' constitutional malicious prosecution claim at the pleadings stage.[6]

In prosecuting Count II, Mr. Thomas should be permitted to proceed on a Fourteenth Amendment unlawful seizure and pretrial detention theory, as well as a constitutional claim for malicious prosecution, in addition to his Fourth Amendment theory.

[6] Plaintiff also acknowledges that Judge Wood recently dismissed a federal malicious prosecution claim in another case that is part of the *Watts* Coordinated Proceedings. *See Baker v. City of Chicago*, 16-CV-08940, 2020 WL 5110377, at *6 (N.D. Ill. Aug. 31, 2020). There are two reasons why this Court should not reach the same result. First, although that decision was issued in August 2020, briefing had been completed long before then, and so Judge Wood did not have the benefit of briefing on the effect of *McDonough*. Nor did Judge Wood's decision address the *McDonough* opinion. Second, to the extent that Judge Wood's ruling was based on the theory that a under *Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001) a federal claim for malicious prosecution does not exist if there is also an adequate state-law remedy, that reasoning is incorrect because *Manuel I* abrogated *Newsome's* conclusion that the existence of an adequate state-law remedy can preclude a federal remedy for the same illegal acts. *See Manuel I*, 137 S. Ct. at 916-917; *see also Carter v. City of Chicago*, 17 C 7241, 2018 WL 1726421, at *4 (N.D. Ill. Apr. 10, 2018) (*Newsome's* continued vitality is questionable in light of *Manuel*") (emphasis in original); *White v. City of Chicago*, 17-CV-02877, 2018 WL 1702950, at *3 (N.D. Ill. Mar. 31, 2018) (recent case law shows that "the availability of the malicious prosecution state tort does not preclude a federal constitutional claim based on fabricated evidence"). It is true that the Seventh Circuit has not since recognized a federal constitutional claim for malicious prosecution, but it also has not rejected such a claim after *McDonough*. To the contrary, the Seventh Circuit sitting *en banc* expressly declined to rule on this issue when it was raised in *Savory v. Cannon*, 947 F.3d 409, 417 (7th Cir. 2020) and instead left it for the district court to consider on remand. Thus, *Savory* allows this Court to permit Mr. Thomas' claim without running afoul of Seventh Circuit precedent.

II. Plaintiff's claim for illegal post-conviction deprivation of liberty is well-pled, and the Court should not dismiss Count I.

Count I seeks to hold Defendants liable under the Fourteenth Amendment for damages arising from various due process violations that Defendants committed by fabricating evidence and by failing to disclose exculpatory evidence. At the outset, Plaintiffs note that their Fourteenth Amendment claims in Count I are distinct from the Fourteenth Amendment pretrial detention theory in Count II. The claim in Count I stems from Plaintiff's wrongful *convictions*, not his wrongful *detentions*. *See Lewis*, 914 F.3d at 479-80 (quoting *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017) (highlighting this distinction and explaining that "'*convictions* premised on deliberatively fabricated evidence'" or on violations of *Brady* "'will always violate the defendant's right to due process'") (other citations excluded).

Defendants assert that as a matter of law Mr. Thomas has no Fourteenth Amendment claim because he pled guilty rather than being convicted at trial. They are wrong. Mr. Thomas has adequately alleged a Fourteenth Amendment claim based on the use of false and fabricated evidence to secure his conviction, as well as based on the failure to disclose favorable evidence under *Brady* and its progeny. In fact, four judges in cases that are now part of the Coordinated Proceedings have already rejected many of the exact same arguments that Defendants raise here, rulings that Defendants do not even acknowledge, let alone try to distinguish. Those courts reached the correct result, and this Court should deny Defendants' request to dismiss Count I as well.

A. Plaintiff's guilty plea does not foreclose a due process claim.

The foundation of a Fourteenth Amendment due process claim seeking redress after a wrongful conviction is that the alleged misconduct wrongfully deprived the plaintiff of his or her liberty in some form. *See Patrick*, 974 F.3d at 835; *see also Baker*, 2020 WL 5110377, at *3 (N.D. Ill. Aug. 31, 2020) ("Courts in this Circuit recognize a standalone federal due process claim for evidence fabrication—separate and apart from any malicious prosecution claim—when fabricated evidence is

used to obtain a wrongful conviction or deprive a person of his liberty.") (emphasis added). There is no requirement that the misconduct result in a conviction *at trial*, and defendants cannot evade civil liability by fabricating such a strong case that plaintiffs are pressured into pleading guilty to crimes they did not commit. Four judges presiding over cases that are now part of the *Watts* coordinated proceedings have already rejected this very argument. Nonetheless, without even a passing reference to those cases, the Defendants' dedicate approximately five pages of their motion to dismiss to their contention that Mr. Thomas' guilty pleas preclude a Fourteenth Amendment Due Process claim because: (1) such a claim arises only when fabricated evidence is introduced at trial and used to convict the plaintiff; and (2) a guilty plea breaks the chain of causation, releasing officers who fabricate evidence from civil liability. Dkt. 170 at 9-13. Defendants are wrong.

1. Plaintiff may bring 14th Amendment claims based on their wrongful convictions even though he was convicted after pleading guilty rather than at trial.

A government official violates the Fourteenth Amendment by fabricating evidence if the "evidence 'is later used to deprive the [civil plaintiff] of his liberty *in some way*.'" *White v. City of Chicago*, 17-CV-02877, 2018 WL 1702950, at *3 (N.D. Ill. Mar. 31, 2018) (emphasis in *White*) (quoting *Bianchi v. McQueen*, 818 F.3d 309, 319 (7th Cir. 2016). Defendants contend that a Fourteenth Amendment claim arises only if the evidence is used to convict someone at a criminal trial, but they are wrong. The relevant question is not whether the evidence was used at trial, but whether it was used to deprive a plaintiff of his liberty in some way. Put differently, "[h]ow the fabricated evidence came into play is not as critical to establish the constitutional violation as the fact that the fabricated evidence was a direct cause of a Defendants' conviction." *Id.* (citing *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012)).

That is why four separate judges presiding over cases that are now part of the *Watts* coordinated proceedings have already rejected Defendants' argument that guilty pleas preclude

Fourteenth Amendment due process claims in wrongful conviction cases. *See Baker*, 2020 WL 5110377, at *4 (denying motion to dismiss 14th Amendment claim against Watts and others because "fabricated evidence compelled [plaintiffs] Baker and Glenn to plead guilty to charges stemming from their December 2005 arrests") (Wood, J.); *Carter*, 2018 WL 1726421, at *4 (N.D. Ill. Apr. 10, 2018) (in case against Watts and others, holding that "it reasonably can be said that the fabricated evidence caused plaintiff to be deprived of his liberty" because plaintiff alleged that he would not have pled guilty absent the fabricated evidence) (Gettleman, J.); *White v. City of Chicago*, 17-CV-02877, 2018 WL 1702950, at *3 (N.D. Ill. Mar. 31, 2018) (Coleman, J.) (guilty plea based on evidence allegedly fabricated by Watts and others was not voluntary and did not invalidate a 14th Amendment claim); *Powell v. City of Chicago*, 17-CV-5156, 2018 WL 1211576, at *8 (N.D. Ill. Mar. 8, 2018) (refusing to dismiss 14th Amendment due process claim where plaintiff alleged that he pled guilty because Watts and others fabricated evidence against him) (Blakey, J.). In this case, Mr. Thomas alleges that the only evidence implicating him in the purported crimes for which he was convicted was fabricated: Defendants made up the entire crime, and Mr. Thomas pled guilty only because he knew that he had no hope of convincing a judge or jury that he was innocent. *See*, *e.g.*, Dkt. 170-1 ¶¶ 1-2, 7.

There are, of course, many cases in which fabricated evidence was used to secure a wrongful conviction, and Defendants cite some of those cases in their motion to dismiss. Dkt. 170 at 14-16. In particular, Defendants cite *Avery v. City of Milwaukee*, 847 F.3d 433 (7th Cir. 2017) for the proposition "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." Dkt. 170 at 14. But *Avery* stands for no such proposition. Rather, *Avery* merely stands for the uncontroversial proposition that the use of fabricated evidence to secure a conviction at trial violates the Fourteenth Amendment. *Avery*, 847 F.3d at 442-43. The Seventh Circuit in *Avery* held that

defendants were liable for securing a false confession that was later introduced at trial to secure a guilty verdict. *Id.* Defendants' efforts to stretch *Avery* into a ruling that a fabrication claim is available *only* if a defendant is convicted at trial rests on a logical fallacy. Namely, the fact that the Seventh Circuit upheld a 14th Amendment claim in *Avery* based on the use of fabricated evidence to secure a conviction at trial does not mean that the claim *does not exist* in any other circumstance.

Nor does *Patrick*, the other case on which Defendants primarily rely, change this analysis merely because the fabricated evidence at issue in *Patrick* had also been used to convict the plaintiff at a criminal trial. *Patrick*, 974 F.3d at 835-36. Defendants rely on the same flawed logic in analyzing *Patrick* that they use in analyzing *Avery*, highlighting part a sentence from *Patrick* that states when "**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." Dkt. 170 at 15, quoting *Patrick*, 974 F.3d at 834 (emphasis added in Defendants' brief). But again, the fact that introducing fabricated evidence at trial violates the Fourteenth Amendment does not mean that using fabricated evidence to secure a conviction in another manner does not violate the Fourteenth Amendment.

Defendants attempt to make much of the fact that the Seventh Circuit in *Patrick* took issue with the trial court's failure to instruct the jury that the plaintiff "had to prove that the fabricated evidence was introduced at trial and was material" to succeed on his Fourteenth Amendment claim. *Id.*, citing *Patrick*, 974 F.3d at 835-36. This does not support Defendants' request for dismissal because the Seventh Circuit was addressing the facts before it: the plaintiff in *Patrick* was convicted at trial, and so the defendants deprived plaintiff of his liberty by using the fabricated evidence to secure his conviction at trial. *See Patrick*, 974 F.3d at 835-36. In ruling that the jury instruction in *Patrick* was incomplete, the Seventh Circuit relied on the pattern jury instructions that were introduced in 2017, and specifically pattern instruction 7.14. *Id.* at 835 (holding that district court erred by rejecting pattern instruction 7.14). Defendants ignore that pattern instruction 7.14 provides

two paths to showing that fabricated evidence was used to deprive a plaintiff of his or liberty: either by proving that the evidence was introduced at trial *or* by proving that the evidence was used in some manner during the plaintiff's criminal case. *See* 7th Circuit Civil Pattern Jury Instruction No. 7.14.[7] Specifically, the pattern instruction includes bracketed language showing that a plaintiff may prove either that fabricated evidence was used "[at his criminal trial"] or "[in his criminal case]." *Id.* If a plaintiff could prove a fabricated evidence claim only by showing that the relevant evidence was used to convict him at trial, there would be no need for the bracketed language. *See* Introduction to 7th Circuit Civil Pattern Jury Instructions at 1 ("Phrases and sentences that appear in brackets are alternatives or additions to instructions, to be used when relevant to the particular case on trial.").

The fact that all four courts to have ruled on this issue in the *Watts* cases have agreed that plaintiffs may pursue fabricated evidence claims based on guilty pleas have done so after the relevant pattern instructions were approved in 2017 provides further evidence that Plaintiff's interpretation of the law is correct, and Defendants' is wrong. The Court should adopt the well-reasoned decisions of the four judges who have already ruled on this exact issue, and it should decline Defendants' invitation to limit Fourteenth Amendment claims in wrongful conviction cases to instances where fabricated evidence was introduced at a criminal trial.

2. Plaintiff's guilty pleas do not break the chain of causation and let Defendants off the hook for their misconduct.

Defendants also seek to dismiss Count I on the ground that "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." Dkt. 170 at 17. This is not even close to an accurate statement of the law, and the only cases that Defendants cite for this proposition do not provide any such support. In fact, Defendants rely exclusively on two federal cases that address the

[7] Available at http://www.ca7.uscourts.gov/pattern-jury- instructions/7th_cir_civil_instructions.pdf

circumstances in which defendants in criminal cases may withdraw or challenge on appeal their criminal convictions in support of their argument, and they only stand for the proposition that individuals who plead guilty in criminal cases do not have the unfettered right to challenge their guilty pleas in post-conviction proceedings in federal court. *Id.* at 17-18, citing *Tollett v. Henderson*, 411 U.S. 258 (1973) and *Hurlow v. United States*, 726 F.3d 958 (7th Cir. 2013).

For a number of reasons, the cases do not support Defendants' contention that a guilty plea in a state court criminal case cuts of a 14th Amendment claim in subsequent civil rights case as a matter of law. First, neither *Tollett* nor *Hurlow* says anything about civil claims at all, let alone discusses the effect of vacated guilty pleas on potential civil claims alleging constitutional violations. Second, *Tollett*, *Hurlow*, and other cases that address the circumstances in which a defendant is able to vacate a criminal conviction based on a guilty plea are plainly irrelevant to this case, where Mr. Thomas' guilty pleas and convictions were already vacated in the Illinois court system.[8]

Moreover, the Illinois Supreme Court has made abundantly clear that guilty pleas do not "guarantee the factual validity of the conviction." *People v. Reed*, 2020 IL 124940, ¶ 33 (Ill. 2020). Rather, the guilty "plea system encourages defendants to engage in a cost-benefit assessment where, after evaluating the State's evidence of guilt compared to the evidence available for his defense, a defendant may choose to plead guilty in hopes of a more lenient punishment than that imposed upon a defendant who disputes the overwhelming evidence of guilt at trial." *Id.* That is exactly what Mr. Thomas alleges here. He pled guilty because of the overwhelming, but entirely fabricated, evidence of guilt, not because he was guilty. *See*, *e.g.*, Dkt. 171-1 ¶¶ 1, 7, 60. The Illinois court system has recognized his innocence not only when it vacated his convictions but more directly when it

[8] Had the convictions not been vacated, Mr. Thomas would have been barred from bringing many, if not all of his § 1983 claims, by *Heck v. Humphrey*, 512 U.S. 477 (1994), which bars civil rights plaintiffs from bringing claims that imply the invalidity of an intact criminal conviction.

awarded him a certificate of innocence. *See id.* ¶¶ 15.[9]

Judge Coleman addressed this issue directly in *White*, where she rejected this very argument from this same group of Defendants on the ground that Lionel White Sr.'s plea agreement was not voluntary when the charges were based entirely on evidence that the Watts crew allegedly fabricated. *White*, 2018 WL 1702950, at *3 (N.D. Ill. Mar. 31, 2018) (plaintiff's certificate of innocence "establishes his legal innocence, which underscores the involuntariness of his conviction," and that, among other facts, shows that his guilty plea does not "invalidate[] his Fourteenth Amendment Due Process claim"). The same is true here, and this Court should reach the same result that Judge Coleman reached in *White*.

Third, Defendants have a procedural problem. Their contention that Mr. Thomas' guilty plea breaks a causal chain directly contradicts the operative complaint, which alleges in relevant part that Defendants' caused Mr. Thomas' convictions and the resulting damage by fabricating all of the evidence against him. Dkt. 170-1 ¶¶ 1-2, 4, 7, 33-64. At this stage, the Court must accept Mr. Thomas' factual allegations as true, and it cannot credit Defendants' contrary version of events. *See Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015) (reversing dismissal of complaint when district court had not accepted well pleaded allegations as true at pleadings stage). Put differently, Mr. Thomas plausibly alleges that Defendants' fabrication caused his conviction, and the Court may not ignore those allegations and credit Defendants' contrary version of events at the pleadings stage. Causation is a classic jury question, and not one that the Court should decide at the pleadings stage. *See*, *e.g.*, *Letten v. Michigan Ladder Co.*, 13 C 7179, 2016 WL 193365, at *2 (N.D. Ill. Jan. 15, 2016) ("typically proximate cause is a question of fact" for a jury to decide).

[9] The operative complaint does not reference the fact that Mr. Thomas received certificates of innocence, but it is relevant to an argument that Defendants made in their motion to dismiss, and including this fact in the response brief is consistent with Seventh Circuit law. *See Geinosky*, 675 F.3d at 745 n.1.

B. Plaintiff states a viable claim for Defendants' failure to disclose *Brady* material.

Mr. Thomas' due process claims is based in part on allegations that the Defendants withheld exculpatory evidence that they were obligated to disclose pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Although Mr. Thomas addresses the merits of Defendants' arguments with respect to the *Brady* theory below, the Court need not parse out the various potential theories of liability with respect to Count I at the pleadings stage. *See*, *e.g.*, *Baker*, 2020 WL 5110377, at *4 (N.D. Ill. Aug. 31, 2020) ("In short, it does not matter whether Plaintiffs label their due process claims as 'evidence fabrication, claims, *Brady* violations, or something else. Defendant Officers allegedly created evidence they knew to be false and then used that evidence to secure Plaintiffs' convictions for crimes they did not commit.").

To the extent that the Court is inclined to address the merits of a *Brady* theory at this stage, Judge Wood's recent opinion in *Baker* both explains the contours of the theory and shows why it should not be dismissed at this stage. As Judge Wood explained:

> To establish a *Brady* claim against officers, a plaintiff must show (1) the evidence at issue was favorable to the plaintiff; (2) the officers concealed the evidence; and (3) the concealed evidence resulted in prejudice to the plaintiff. A *Brady* violation may provide the basis for a due process claim when officers fail to disclose exculpatory evidence that the plaintiff needs to impeach fabricated evidence at trial. This is so even if the plaintiff knew that the evidence was fabricated. That the plaintiff knew evidence was fabricated at the time does not preclude a *Brady*-based due process claim if the officers failed to disclose circumstances pertaining to the fabrication that would have enabled the plaintiff to challenge the validity of the evidence at trial.

Baker v. City of Chicago, 16-CV-08940, 2020 WL 5110377, at *4 (N.D. Ill. Aug. 31, 2020).

The plaintiffs in *Baker* alleged that Watts and the other "Defendants withheld evidence that Watts and his team planted drugs and falsified police reports, as well as information about those officers' 'pattern of misdeeds' in the form of citizen complaints of misconduct." *Id.* Judge Wood held that these allegations were sufficient to defeat a motion to dismiss, explaining:

> It is reasonable to infer that Plaintiffs could have used this information to impeach the state's evidence against them. Without it, Plaintiffs had to rely only on their own denials that they possessed drugs without support for any other explanation as to why drugs were found in their possession. Drawing all inferences in Plaintiffs' favor, it is reasonable to infer that knowledge of Watts's and the other officers' misdeeds would have cast sufficient doubt upon the evidence in Plaintiffs' cases that the outcomes would have been different. Baker's trial on charges stemming from his March 2005 arrest might have ended in an acquittal, and both Plaintiffs would have been on better footing to refuse a plea deal, go to trial, and obtain acquittals with respect to the charges stemming from the December 2005 arrests.

Id. So too here. Mr. Thomas makes the same allegations that the plaintiffs in *Baker* made against Watts and the other Defendants: they "planted drugs and falsified police reports, as well as information about those officers' 'pattern of misdeeds' in the form of citizen complaints of misconduct." *Id.*; *see also* Dkt. 170-1 ¶¶ 42, 43, 45, 62-72, 79-80, 84, 96-100, 106, 115, 120, 144. These allegations are sufficient at the pleadings stage. *See*, *e.g.*, *Baker*, 2020 WL 5110377, at *4 (declining to dismiss *Brady* theory in Watts case); *Powell*, 2018 WL 1211576, at *5-6 (same).

C. Defendants offer no basis to dismiss Plaintiff's *Brady* theory.

In the face of Mr. Thomas' well-pleaded *Brady* allegations, Defendants offer a number of arguments that they contend warrant dismissal of the *Brady* theory. As described below, none are persuasive.

1. Defendants may not evade liability by recasting the *Brady* allegations as alleging only the withholding of immaterial impeachment evidence that they were not required to produce before a guilty plea.

Relying on *United States v. Ruiz*, 536 U.S. 622 (2002), Defendants first argue that, as a matter of law, they had no obligation to disclose impeachment material before Mr. Thomas pled guilty. Dkt. 170 at 19-20. *Ruiz*, however, does not warrant dismissal of Mr. Thomas' *Brady* theory. For one, *Ruiz* at most stands for the proposition that government officials do not have an obligation to disclose *impeachment* material before trial, as opposed to *exculpatory* material. *See Powell*, 2018 WL 1211576 (*Ruiz* does not excuse government officials from disclosing exculpatory information

before a defendant pleads guilty). Indeed, the Supreme Court in *Ruiz* explained that regardless of its ruling with respect to impeachment evidence, before allowing a defendant in a criminal case to plead guilty, "the Government will provide 'any information establishing the factual innocence of the defendant,' which "diminishes the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." *Ruiz*, 536 U.S. at 631.

Defendants do not argue that *Ruiz* excuses government officials from disclosing exculpatory information (as opposed to impeachment material), which should be the end of the inquiry. In this case, and contrary to Defendants' unsupported contention otherwise, Mr. Thomas alleges not that Defendants merely failed to disclose impeachment evidence, but that they failed to disclose exculpatory evidence that would help prove his innocence and make his conviction less likely. In fact, the Defendants failed to disclose that they framed Mr. Thomas, that they did not catch him possessing or selling drugs, and that they made up the crimes entirely. Dkt. 170-1 ¶¶ 42, 43, 45, 62-72, 79-80, 84, 96-100, 106, 115, 120, 144. There is no basis for the Court to make a factual determination at the pleadings stage as to whether the alleged *Brady* material would have been impeachment material, exculpatory material, or both. *See*, *e.g.*, *Fields v. City of Chicago*, 981 F.3d 534, 555 (7th Cir. 2020) (evidence that "rebuts the substantive evidence introduced into the record by the defendants, and exposes the misrepresentations" of witnesses is not merely impeachment, but is also substantive evidence); *see also Baker*, 2020 WL 5110377, at *4.[10]

[10] To the extent that Defendants are asking the Court to hold at this stage that evidence about the officers' pattern of similar misconduct could only have been impeachment material, that is simply not the case. The evidence may well have been admissible for exculpatory Rule 404(b) purposes and not simply for impeachment. *See People v. Cannon*, 293 Ill.App.3d 634, 640 (1st Dist. 1997) (noting that evidence of prior acts of officer misconduct may be admissible in a criminal case for 404(b) purposes not simply just used for impeachment, citing *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993)).

2. Mr. Thomas' general knowledge that Defendants engaged in misconduct does not warrant dismissing his *Brady* allegations.

Defendants argue that Mr. Thomas has pleaded himself out of court by alleging that: (1) he knew the evidence against him had been fabricated; (2) he and other community members knew that the Defendants engaged in a pattern of misconduct; and (3) Mr. Thomas could have requested citizen complaints that had been made against the Defendants. Dkt. 170 at 15-17. The Court should reject this argument as well.

Although it may be true that, as a general matter, a specific piece of evidence is not considered suppressed if it is known to defendant in a criminal proceeding, that does not mean a civil rights claim alleging *Brady* violations should be dismissed merely because the plaintiff may have been generally aware of some of the relevant information. Indeed, the Seventh Circuit has expressly rejected that interpretation of the law in *Avery*, 847 F.3d at 443-44. The district court in *Avery* dismissed the plaintiff's *Brady* claim at summary judgment, accepting an argument much like the one Defendants offer here. Reversing, the Seventh Circuit explained

> The [district court] judge thought the *Brady* obligation "dropped out" because Avery already 'knew what he said (or didn't say) to the jailhouse informants.' But that's beside the point; the material question is whether Avery was aware of the impeachment evidence. . . . Avery knew that the informants' statements were false, but he did not know about the pressure tactics and inducements the detectives used to obtain them. And he did not know that Kimbrough had in fact recanted his statement just before trial but was told that he "had to" testify. In other words, he did not have the evidence that could help him prove that the informants' statements were false. The *Gauger* rule does not apply. Summary judgment on the *Brady* claims was improper.

Id.; *see also Newsome v. McCabe*, 256 F.3d 747, 753 (7th Cir. 2001) (Brady theory viable where police officers withheld information about the manner in which they improperly influenced eyewitnesses).

The Seventh Circuit's decision in *Avery* shows exactly why Defendants' argument fails here (not to mention that *Avery* was ruling on summary judgment based on a factual record rather than at the pleadings stage). Namely, Mr. Thomas' operative complaint presents a lengthy

factual narrative concerning a rogue band of police officers who engaged in pattern of unconstitutional and unlawful conduct toward citizens for almost a decade and Chicago Police Department officials who enabled them. He further alleges that the officers concealed information that would have been exculpatory. And he alleges that Chicago Police Department officials were personally responsible for this conduct by failing to take any meaningful action to abate the known risk that these officers faced to the community and that they too concealed information that would have exculpated Plaintiffs in their criminal cases. *See* Dkt. 170-1 ¶¶ 42, 43, 45, 62-72, 79-80, 84, 96-100, 106, 115, 120, 144.

Mr. Thomas did not detail all of the evidence that was withheld from him, and he was not required to do so under Federal Rule of Civil Procedure 8. *See Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992) ("A complaint under Rule 8 limns the claim; details of both fact and law come later, in other documents."). At the pleading stage, all that is required is a plausible, non-conclusory short and plain statement of the claim showing that Plaintiff is entitled to relief. *Twombly*, 550 U.S. at 554-55. Instead of focusing on applicable pleading standards, Defendants are asking the Court to draw inferences in their favor. Such efforts are improper at the pleading stage of course, and they must fail. For one, Defendants read Mr. Thomas' suppression claims too narrowly.

As described above, Mr. Thomas alleges suppression that goes beyond the fact of the fabricated evidence. Even if the fabricated evidence of drugs was the sole basis for Mr. Thomas' due process claim for suppression, however, *Avery* shows that the mere fact that Mr. Thomas knew that he did not commit the crimes does not foreclose a *Brady* claim. Knowing that he was innocent does not mean he had the means to call witnesses and present evidence that the drugs were not his. For example, Mr. Thomas could not call witnesses who had knowledge of the narcotics' true origin if Defendants withheld the names of the witnesses who could exculpate Mr. Thomas. Likewise, documents, such as evidence reports and chain of custody paperwork regarding the true nature of

the drugs that were falsely attributed to Mr. Thomas, could have established how the police actually obtained the drugs, were similarly not disclosed. Withholding the names of exculpatory witnesses and documents is classic *Brady* material, and Defendants could not argue otherwise. For this reason alone, this Court should reject Defendants' attempt to dismiss the *Brady* theory.[11]

It is also simply not correct that Mr. Thomas alleged that he knew all of the relevant facts relating to the Defendants' pattern of misconduct, as Defendants suggest. *See* Dkt. 170 at 21. Although he alleges that it was generally known in his community that Watts ran a corrupt group of police officers, he also alleges that the Defendants withheld evidence of their misconduct for years, and there is nothing in the complaint that suggests anything near a full accounting of Defendants' misconduct was available to Mr. Thomas during his criminal proceedings. Defendants' argument on this point thus does not support dismissal. Nor does Defendants' completely unsupported statement that "during his criminal proceedings, plaintiff could have requested any citizen complaints filed against his arresting officers from his prosecutors." *Id.* That statement is plainly contradicted by the complaint, which alleges that complaints of misconduct were suppressed, not that they were readily available. *See*, *e.g.*, Dkt. 170-1 ¶106.[12] So too for Defendants' unsupported contention that the Defendants had no obligation to reveal their misconduct because "prosecutors are aware of and have access to citizen complaints, which plaintiff claims were rife with allegations against these officers

[11] This case is therefore entirely different from the cases on which Defendants rely, *Gauger v. Hendle*, 349 F.3d 354, 360 (7th Cir. 2003), *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1029 (7th Cir. 2006), and *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007) , where the Seventh Circuit found that a plaintiff could not sustain a *Brady* claim over specific information already available to him. Defendants read these cases much too broadly, urging this Court to take the law in new directions and adopt a rule that there can be no *Brady* violation relating to fabricated evidence so long as a criminal defendant knows it is false. Such a position is not supported by existing law, and is directly contrary to *Avery*.

[12] The idea that complaints against the Defendant Officers was readily available to Mr. Thomas in his criminal proceedings is also contradicted by the fact that the City of Chicago has had issues with making complete productions even of complaint-related documents even when ordered by courts to do so. *See*, *e.g.*, *Turner v. City of Chicago*, 15 CV 06741, 2017 WL 552876, at *1 (N.D. Ill. Feb. 10, 2017) (discussing City's failure to make complete produce of such documents despite court order).

similar to his own." Dkt. 170 at 22. Again, Mr. Thomas does not allege that prosecutors had access to this type of evidence. To the contrary, the operative complaint alleges that Defendants' hid their misconduct from prosecutors.

The Court should decline Defendants' invitation to draw conclusions that directly contradict the operative complaint.

3. Defendants cannot evade liability for *Brady* violations merely because they also fabricated evidence.

Finally, Defendants attempt to evade liability by arguing that "binding circuit court precedent plainly holds that *Brady* does not require Defendant Officers to disclose their alleged fabrication of evidence, whether the fabrication occurred in plaintiff's case or in other unrelated cases." Dkt. 170 at 23. Defendants' position runs directly counter to a long line of Seventh Circuit cases holding that police officers who have failed to disclose and/or lied about their misdeeds can be held liable for *Brady* violations. *Avery*, 847 F.3d at 443-44 (*Brady* theory viable where police officers did not disclose the coercive circumstances surrounding the manner in which they obtained statements from witnesses); *Engel v. Buchan*, 710 F.3d 698, 710 (7th Cir. 2013) (allegations that defendants fabricated false police reports and concealed facts about their use of unduly suggestive identification procedures sufficient to support a *Brady* claim); *Manning v. Miller*, 355 F.3d 1028, 1032-33 (7th Cir. 2004) (holding that a *Brady* claim is viable where police concealed from prosecutors information about their misconduct of inducing a witness to identify Manning and inducing another witness to create a false story about Manning; rejecting defendants invitation to "create a rule that would eliminate the availability of *Brady* claims any time perjury is involved"); *see also Tillman v. Burge*, 813 F. Supp. 2d 946, 962 (N.D. Ill. 2011) (due process *Brady* claim properly pled where allegations related to suppression of a pattern of misconduct that extended beyond facts personally known to Plaintiff).

Defendants primarily rely on two Seventh Circuit decisions for their argument that a *Brady* claim cannot be based on the failure to disclose alleged fabrication of evidence, *Gauger v. Hendle*, 349

F.3d 354 (7th Cir. 2003) and *Saunders-El v. Rohde*, 778 F.3d 556 (7th Cir. 2015). Neither case warrants dismissal of Mr. Thomas' *Brady* theory of liability. In *Gauger*, the plaintiff complained that the defendants' failed to disclose that they had falsely summarized his interrogation when they created a summary suggesting that he had confessed to a murder when he had not in fact confessed. *Gauger*, 349 F.3d at 360. Although the Seventh Circuit did briefly opine on an investigator's obligation (or lack of obligation) under *Brady* to *create* exculpatory evidence, that discussion was unnecessary to resolve the plaintiff's *Brady* claim because the only alleged *Brady* violation was the failure to disclose events that the plaintiff had personally witnessed and in which the plaintiff personally participated. *Id.* Thus, the plaintiff's *Brady* claim in *Gauger* failed because he was already aware of the purported exculpatory information. As discussed above, Mr. Thomas plausibly alleges that he was not aware of the *Brady* material at issue in this case. Similarly, the plaintiff in *Saunders-El* complained that police officers fabricated evidence against him and then violated *Brady* by not disclosing that they had fabricated the evidence. *Saunders-El*, 778 F.3d at 562. That claim failed because the plaintiff was acquitted at his criminal case and thus did not suffer a deprivation of his liberty in the form a conviction, which Mr. Thomas unquestionably did. *See id.* Defendants seem to suggest that *Saunders-El* sets forth a rule that police officers who lie about their misconduct cannot be liable under a *Brady* theory. Dkt. 170 at 25-26. To the extent there is any language in *Saunders-El* that supports such a position, it is dicta; there is no indication in *Saunders-El* that it was overruling any of the cases Plaintiff cites above, which are not cited by Defendants either.[13]

[13] Nor could any of the district court decisions that Defendants cite in footnote 11 overrule the Seventh Circuit cases that Mr. Thomas cites above. That other district courts have dismissed *Brady* claims based on the specific allegations in those cases says nothing about whether Mr. Thomas has adequately alleged such a claim here. If this Court is inclined to look to other district court opinions to analyze Mr. Thomas' *Brady* claim, that analysis should begin and end with Judge Wood's recent decision in *Baker*, which addressed a *Brady* claim against this same group of Defendants. Judge Wood was aware of *Saunders-El*, and cited it twice in *Baker*, and she nonetheless appropriately refuse to dismiss the *Brady* theory at this stage.

Mr. Thomas has adequately alleged a plausible *Brady* claim, and this Court should deny Defendants' request to dismiss that claim.

III. There is no basis to dismiss any of Plaintiff's "derivative" claims.

Defendants' seek to dismiss portion of Plaintiff's remaining claims to the extent those claims depend on any of the above-described theories of liability. Dkt. 170 at 27. Because there is no basis to dismiss any portions of Count I or Count II, there is also no basis to dismiss any of the claims that may derive from those counts.

CONCLUSION

Defendants grossly abused their positions of authority and framed Mr. Thomas twice from crimes that he did not commit. He is entitled to his day in Court to seek redress for the immense damage that Defendants cause. For the foregoing reasons, Defendants' motions to dismiss should be denied.

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