

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

ARNOLD DAY,)	
)	
Plaintiff,)	Case No. 19-cv-7286
)	
v.)	Hon. Sara L. Ellis
)	District Judge
KENNETH BOUDREAU, <i>et al.</i> ,)	
)	
Defendants.)	

**THE OFFICER DEFENDANTS' REPLY IN SUPPORT OF
THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT**

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ARGUMENT

I. The Court Should Reject and Strike Plaintiff's Statement of Additional Facts.

The Court should strike and disregard Plaintiff's Statement of Additional Material Facts ("SOAF") because it not only violates the Court's Standing Order on Summary Judgment Practice (the "Standing Order") but it also ignores the repeated warnings directed at the law firm representing Plaintiff – Loevy & Loevy. *See Johnson v. Guevara*, No. 20 C 4156, 2025 WL 903818 (N.D. Ill. March 24, 2025). (J. Ellis) ("[T]his Court sternly admonishes Johnson for filing his voluminous statement of disputed facts...without due regard to the Court's summary judgment procedures...[t]he Court warns Johnson that future instances of noncompliance with the Court's procedures will result in sanctions, up to and including, dismissal of this case"); *see also* Minute Order, *Day v. Boudreau, et al.*, No. 19 cv 7286, Dkt. 276 (Jun. 10, 2025) ("The Court reminds Plaintiff that the statement of additional facts should be facts that the parties agree are in dispute; nonetheless, Plaintiff finds these facts necessary to demonstrate that summary judgment is not warranted because of these material factual disputes. In giving these proposed facts a cursory review, the Court has concerns that some of these facts are not disputed and should have been included in the parties' joint statement of material facts.") (J. Ellis).

One stern warning should be more than enough. Two should altogether end the improper tactics. Three or more warnings suggest a conscious disregard of the rules and Court's direction. Plaintiff's SOAF falls into the third category. This Court's Standing Order states that:

Parties are required to file a **joint statement of undisputed material facts** that the parties agree are not in dispute. The joint statement of undisputed material facts shall be filed separately from the memoranda of law. It shall include citations to admissible evidence supporting each undisputed fact (i.e. the line, paragraph, or page number where the supporting material may be found in the record). The supporting material must be attached to the joint statement. **The parties may not file – and the Court will not consider – separate statements of undisputed facts.** However, the non-moving party may include facts in its response to the motion for summary judgment that it contends are disputed **in order to**

demonstrate that a genuine issue of material fact exists that warrants denying the motion for summary judgment. The non-moving party must include citations to supporting material supporting the dispute and attach the same. The moving party may respond to these facts in its reply.

(Emphasis original). The Court’s Standing Order further notes that “[t]he **Local Rules and the Court’s procedures are not mere technicalities. Failure to abide by any of them, especially in the joint statement requirement will result in the Court striking briefs, disregarding statements of fact, deeming statements of fact admitted, denying summary judgment, and/or imposing sanctions.**” (Emphasis original). *See also Buttron v. Sheehan*, No. 00 C 4451, 2003 WL 21801222 (N.D. Ill. Aug. 4, 2003).

Plaintiff’s SOAF disregards these directives. For instance, rather than include facts that Plaintiff contends are disputed, as required by this Court’s Standing Order, 45 paragraphs of Plaintiff’s 91-paragraph “Statement of Additional Material Facts,” restate or duplicate the same facts that Plaintiff already agreed are *undisputed* in the Parties’ Joint Statement of Undisputed Material Facts (“JSOF”). (See JSOF, Dkt. 263; *see also* Resp. to Pl’s SOAF, Dkt. 286, ¶¶ 1-19, 21, 23, 25, 26, 28-30, 38, 40-42, 46-51, 53, 55, 57, 58, 60, 62, 64, 72, 77, 81). (See Opinion and Order at 2-3, *Lashawn Ezell, et al., v. City of Chicago, et al.*, No. 18 cv 1049, Dkt. 524, (N.D. Ill., Jan. 24, 2024) (J. Ellis) (noting that the Court’s standing order allows Plaintiffs “to include facts *in [their] response*...that [they] contend [] are disputed in order to demonstrate that a genuine issue of material fact exists that warrants denying the motion for summary judgment.”) (emphasis added)). Plaintiff includes another 40 paragraphs of additional facts that are not disputed and therefore should have been included in the JSOF. (*Id.* at ¶¶ 20, 22-27, 32-38, 43-45, 54, 56, 59, 66-76, 78, 80, 82-85, 87-90). The Court flagged this issue in its June 10, 2025, Minute Order, in which it reminded Plaintiff that “the statement of additional facts should be facts that the parties agree are in dispute... the Court has concerns that some of these facts are not disputed and should

have been included in the parties' joint statement of material facts.” (See Dkt. 276). The Court’s concern is justified.

Plaintiff’s SOAF also violates Local Rule 56.1 (d)(2), which requires that “Each asserted fact must be supported by citation to the specific evidentiary material, including the specific page number, that supports it.” Here, 19 paragraphs of Plaintiff’s SOAF include factual assertions that are not supported by the record citations. (See Defs’ Resp. to Pl’s SOAF, Dkt. 286, ¶¶ 14, 20, 23, 27, 29, 31, 39, 43, 52, 61-64, 67, 78, 79, 85, 86, 91). Additionally, paragraphs 25, 29, 34, 39 of Plaintiff’s SOAF contain improper argument based on Plaintiff’s opinion and speculation about what the facts mean, in violation of Local Rule 56.1(b)(3)(C). See *Uncommon, LLC v. Spigen, Inc.*, 305 F. Supp. 3d 825, 838 (N.D. Ill. 2018) (statements of fact should not contain legal argument), *aff’d*, 926 F.3d 409 (7th Cir. 2019) (responses to the opposing party’s statement of facts are not the place for “purely argumentative details”). And the facts in 19 paragraphs of Plaintiff’s SOAF are unnecessary filler – they are not cited anywhere in Plaintiff’s response – and therefore are not material to Plaintiff’s Response. (See Defs’ Resp. to Pl’s SOAF, Dkt. 286, ¶¶ 3, 4, 18, 22, 24, 32, 48-52, 62, 63, 67, 69, 74, 77, 80, 83; see also Local Rule 56.1(b)(3) (the non-movant may file “a statement of additional **material** facts” “**not** set forth in the [joint statement of facts].”)) (Emphasis added).

The entire SOAF is so rife with violations of both Court’s Standing Order and Local Rule 56.1, it should be stricken and disregarded in its entirety. When a non-moving party submits purported “disputed facts” in its response to summary judgment that are not actually disputed, not supported by the record, directly contradict facts in the parties’ JSOF or are nothing more than argument or re-casted facts from the JSOF phrased to suggest inferences not supported by the record, as is the case here, they should be stricken. See *Chicago Studio Rental, Inc. v. Ill. Dpt. Of*

Com., 940 F.3d 971, 980-81 (7th Cir. 2019) (affirming this Court’s striking of non-moving party’s additional facts for noncompliance where the additional facts were undisputed and could have been included in the parties’ joint statement of undisputed facts); *Podlasek v. State’s Attorney of Cook County*, No. 20 cv 23572022, 2022 WL 17718412 at *1 (N.D. Ill., Dec. 14, 2022) (“additional facts must be genuinely disputed; the non-moving party may not use the response as an opportunity to sidestep the joint process”).

The tactic employed by Loevy & Loevy in this case – submitting an unnecessarily long, repetitive and improper statement of additional facts in violation of Local Rule 56.1 – is not new, unique to this case or a mistake. Indeed, the same violations have been identified in multiple other cases involving Loevy & Loevy. In *Palmer v. City of Decatur*, lawyers from Loevy & Loevy representing the plaintiff obtained leave to respond to summary judgment with “excess argument being 25 pages and 9,500 words.” No. 17-CV-3268, 2021 WL 7543705, at *1 (C.D. Ill. May 12, 2021). But the court found that “the actual content of the proposed Response...far exceeded the [additional] ten double-spaced pages that Defendants had agreed to” due to “multiple pages of single-spaced argument in smaller font,” with “multiple lengthy footnotes containing argument,” and a “Summary of the Facts” that had “an extra twenty pages of detailed substantive argument.” *Id.* In all, the response contained 11,085 words, or 1,585 words more than requested. *Id.* Although the court in *Palmer* did not strike the improper response, it admonished Plaintiff’s lawyers that their conduct was a “deceitful and borderline abusive litigation tactic, more reminiscent of childish gamesmanship than the practice of law in federal court.” *Id.* The court noted that, “Should this type of behavior continue, by either side, the court will consider appropriate remedial measures, which could include sanctions, or *if the court finds that Plaintiff in particular has abused the*

judicial process, dismissal of the case with prejudice.” *Id.* (Emphasis added). Unfortunately, that warning did not have the desired impact.

In *Iglesias v. City of Chicago*, attorneys from Loevy & Loevy representing the plaintiff submitted a summary judgment response and additional fact statement that “exceeded the number of pages and paragraphs” allowed by the court by 89 fact statements. (*See* Minute Order, *Iglesias v. City of Chi.*, 19-cv-6508, Dkt. 287 (N.D. Ill. April 3, 2024, attached as Exhibit A). The court found that the plaintiff “filed a noncompliant brief,” but instead of striking the responsive briefings, the *Iglesias* court issued (yet another) stern warning: “The Court will not tolerate such blatant disregard of a Court order in the future. All Parties are reminded that they are to comply with the Court’s orders and ***failure to do so may result in sanctions, including dismissal of the action.***” *Id.* (emphasis added).

In *Pursley v. City of Rockford*, the court expressed its increasing impatience by describing the summary judgment proceedings in another Loevy & Loevy case as “in short, a mess,” with “533 pages of Rule 56.1 statements, briefing, and ancillary briefing.” 18-cv-50040, 2024 WL 1050242, at *1 (N.D. Ill. Mar. 11, 2024). The court further noted that the “kitchen sink approach rarely leads to a just, speedy, and inexpensive resolution of actions.” *Id.* at *1 n.1.

Similarly, in *Jaimes v. Cook County*, the court warned attorneys from Loevy & Loevy that they “cannot create disputes of fact by relying upon legal arguments, conclusions, or suppositions because these are not facts.” No. 17 C 8291, 2021 WL 1738507, at *1 n.1 (N.D. Ill. May 3, 2021), *rev’d on other grounds* No. 21-1958, 2022 WL 2806462 (7th Cir. 2022). In *Harris v. United States*, the court noted that Loevy & Loevy’s responses “often provide extraneous or argumentative information.” No. 13-cv-8584, 2017 WL 770969, at *1 n.1 (N.D. Ill. Feb. 28, 2017). And another court found that Loevy & Loevy’s formulaic misdeeds are a strategy to make it “significantly more

onerous” for courts to “sift[] through the supposedly undisputed facts.” *Graham v. Vill. of Niles*, No. 02 C 4405, 2003 WL 2295159, at *1 (N.D. Ill. Dec. 16, 2003). The strategy has been employed here and should be foreclosed by this Court in striking Plaintiff’s SOAF and Plaintiff’s Response arguments.

This Court is also familiar with the improper summary judgment tactics employed by Loevy & Loevy. In *Demetrius Johnson v. Reynaldo Guevara, et al.*, the attorneys from Loevy & Loevy filed a separate Local Rule 56.1 statement on behalf of the plaintiff that was a direct violation of the Local Rules for the Northern District of Illinois and this Court’s Standing Order related to Local Rule 56.1 statements. As in this case, the plaintiff in *Johnson* filed a statement of additional facts that repeated facts from the parties’ JSOF, contradicted already admitted facts, and included legal arguments and conclusions, immaterial facts, and facts that were not supported by the record. This Court struck the improper pleading. “Due to [plaintiff Johnson’s] failure to comply with this Court’s case management procedures, the Court grants Defendants’ motion to strike...the Court’s procedures specifically caution parties that the Court’s procedures are not optional and that failure to abide by them can result in the Court striking briefs, disregarding statements of facts, and imposing sanctions...this Court sternly admonishes Johnson for filing his voluminous statement of disputed facts...without due regard to the Court’s summary judgment procedures.” *Johnson v. Guevara*, No. 20 C 4156, 2025 WL 903818 (N.D. Ill. March 24, 2025). (J. Ellis).

In another case before this Court, *Ezell, et al. v. City of Chicago, et al.*, attorneys from Loevy & Loevy filed separate statements of disputed material facts that contradicted the Joint Statement of Facts in that case or were unnecessarily argumentative. *See, e.g.*, Pl.’s Statement of Disputed Material Facts, *Ezell v. City of Chi.*, No. 18 cv 0149, Dkt. 477, at ¶ 35 (“The coercion

was amplified by the fact that McCoy was in a custodial setting and the power imbalance between a 17-year-old and a seasoned Chicago Police Detective”). This Court declined to accept such facts and instead focused “only on the substantive facts included in statements that the record properly supports.” *Ezell v. City of Chicago*, No. 18 C 1049, 2024 WL 278829, at *2 (N.D. Ill. Jan. 24, 2024) (citing *Outley v. City of Chicago*, 354 F. Supp. 3d 847, 856 (N.D. Ill. 2019) (“[T]he paragraphs in a statement of facts should be short and not argumentative or conclusory[.]”).

Plaintiff’s SOAF in this case only confirms that admonishments and stern warnings have not had the desired impact and are not enough. The Court should strike Plaintiff’s SOAF and disregard it.

II. All Defendants Are Entitled To Summary Judgment On The Claims Plaintiff Now Concedes Are Not Part Of His Lawsuit.

In Sections I.A., I.B. and III.A. of their motion, Defendants established they are entitled to summary judgment on the claims based on any misconduct related to the Garcia homicide and all due process fabrication claims alleging witness coercion. (Dkt. 267 at 21-22). In addition, in Sections III.B. of the motion, Defendants Evans and McWeeny established they are entitled to summary judgment on Day’s due process fabrication claim because they were not personally involved in interviewing Day and could not have known Day’s confession was false. (Dkt. 267 at 23).

Plaintiff does not offer any argument in opposition to summary judgment on these claims. But instead of just conceding these points, he unnecessarily accuses Defendants of making misleading “strawman” arguments regarding claims Plaintiff states he never made. (Dkt. 277 at 16-17). Plaintiff’s Complaint belies that position and demonstrates that those claims are part of his case – it refers to alleged misconduct that occurred during the Garcia homicide investigation and those allegations are incorporated into all of Plaintiff’s claims. (Dkt. 1, ¶¶ 24-29, 26-40, 56,

124, 140, 152, 169, 181, 193, 206, 215, 218, 223, 226). The Complaint also alleges that “Defendants” in general coerced witnesses and fabricated Day’s confession, without identifying who did what. (Dkt. 1, ¶¶ 24-35, 41-55). Given Plaintiff’s allegations, Defendants were justified in moving for judgment as a matter of law.

Instead of trying to cast Defendants in a negative light in his response brief, Plaintiff could have conceded the in the stipulation to dismiss that was filed alongside the motion for summary judgment, which both sides worked out between April 22-29, 2024. (*See* Emails between counsel for Plaintiff and counsel for the Officer Defendants, attached as Group Exhibit B). However, Plaintiff refused to do so, and as a result, Defendants were forced to address his claims based on the Garcia homicide, the coercion of witnesses in the fabrication context and McWeeny and Evans’ entitlement to summary judgment as to Day’s fabrication claim.¹ Having refused to take a position in the stipulation clarifying his position on these claims, Plaintiff cannot now complain that Defendants moved for summary judgment on the claims Plaintiff refused to concede. Regardless, as Plaintiff now concedes, the Court should grant summary judgment as follows: (1) for all Defendants on all claims based on the alleged misconduct related to the Garcia homicide; (2) for all Defendants on the due process fabrication claim in Count III based on coercion of witnesses; and (3) for Evans and McWeeny on Count III alleging a due process fabrication claim based on Day’s fabricated confession.

¹ Even assuming Plaintiff had concerns about waiving arguments regarding the admissibility of evidence from the Garcia homicide at trial in this case, he could have made that point when the parties were discussing the stipulation and built it into the stipulation instead of unnecessarily accusing Defendants of making misleading “strawman arguments.”

III. Evans Is Entitled To Summary Judgment On Plaintiff's Coerced Confession Claim Because He Was Not Personally Involved In Coercing Plaintiff's Confession.

In their memorandum of law, Defendants established that Evans was not personally involved in coercing Day's confession. Day responds that Evans engaged in enough misconduct to make him responsible for the allegedly coerced confession by being present for Day's arrest at Kwame Tate's home, striking Day during the arrest and then periodically going into the interrogation room where Day was located to either threaten him or accuse him of the Erving homicide. Day does not dispute, however, that Evans was not present for any of the interrogations or when Day gave his handwritten statement. Citing *Whitlock v. Brueggemann*, 682 F.3d 567, 583 (7th Cir. 2012) and *Gibson v. City of Chicago*, No. 19 C 4152, 2020 U.S. Dist. LEXIS 134213 (N.D. Ill. July 29, 2020), Day argues Evans' conduct is a contributing cause of his confession. The problem with this argument is that it ignores Day's own deposition testimony, in which he identified the reason he confessed. He blamed his false confession on Foley and Boudreau, **not** Evans. (See Dkt. 264-10, Exhibit 10, Day Dep., 369:16-373:19). If Day himself could not identify Evans as one of the reasons he confessed, then Evans could not have contributed to causing the confession. And though he believes *Gibson* supports his argument, the opposite is true. *Gibson* illustrates why Evans cannot be liable for coercing Day's confession. In *Gibson*, which was decided on a motion to dismiss, this Court found that detectives who participated in the interrogation and prosecution of the plaintiff were personally involved in eliciting a coerced confession, whereas the one who did not question the plaintiff was not involved. 2020 U.S. Dist. LEXIS 134213, 20. The same is true here. There is no evidence that Evans participated in questioning or coercing Day.

IV. Plaintiff Is Wrong That Section 1983 Allegations Are To Be Viewed In The Aggregate In Deciding Summary Judgment.

Citing *Goudy v. Cummings*, 922 F.3d 834, 838 (7th Cir. 2019), Plaintiff urges this Court to consider all the allegations in the aggregate against each Defendant, regardless of whether that Defendant was involved in the misconduct. (Dkt. 277 at 15-16). This view incorrectly assumes that the sum of Plaintiffs’ allegations is sufficient to defeat summary judgment. But *Goudy* is not that expansive, nor does it stand for the proposition that the aggregation of allegations is sufficient to defeat summary judgment or that a court cannot evaluate each specific *Brady* or fabrication claim. Rather, *Goudy* held that, where there is evidence that more than one officer is responsible for the suppression of evidence, those officers are subject to joint and several liability as opposed to apportioning liability based on percentage of fault. 922 F.3d at 843 citing *Whitlock v. Brueggemann*, 682 F.3d 567, 582 (7th Cir. 2012) and *Watts v. Laurent*, 774 F.2d 168, 179 (7th Cir. 1985). As the *Goudy* court explained, “[f]or this reason, we consider it appropriate that all defendants who can be shown to have ‘suppressed’ evidence in violation of *Brady*—that is, ‘all of the defendants [who] have committed the ... illegal act,’ should be liable for the aggregate impact on the outcome of the trial Goudy ultimately received.” *Id.* (emphasis added). The *Goudy* court’s use of the phrase “who can be shown” is consistent with well-settled Seventh Circuit precedent that the non-moving party bears the burden of producing admissible evidence on each essential element of his claims to survive summary judgment. *Moran v. Calumet City*, 54 F.4th 483, at *11 (7th Cir. 2022) (upholding summary judgment for defendants on the plaintiff’s Section

1983 due process claim) *citing Stockton v. Milwaukee County*, 44 F.4th 605, 614 (7th Cir. 2022); *Khungar v. Access Cmty. Health Network*, 985 F.3d 565, 573 (7th Cir. 2021).²

Consistent with this precedent, the *Goudy* court evaluated each *Brady* violation separately to determine whether the plaintiff had produced admissible evidence to establish a genuine issue for trial. 922 F.3d at 838-843. The same is true in more recent cases too. For example, in *Moran* the court evaluated each alleged *Brady* violation separately to determine whether the plaintiff had produced sufficient evidence to survive summary judgment. *Moran*, 54 F.4th 483. Similarly, in *Brown v. City of Chicago*, No. 18 C 7064, 2022 WL 4602714 (N.D. Ill. Sept. 30, 2022), the district court evaluated whether the plaintiff had produced sufficient facts in support of each of his fabrication and *Brady* claims. In both cases, after individual analysis of each alleged due process violation, the courts granted summary judgment to some claims and denied summary judgment as to others. This is consistent Federal Rule of Civil Procedure 56, which provides that a party may move for summary judgment on “part of” any claim. Fed. R. Civ. P. 56(a). Accordingly, summary judgment can be granted on a part of any constitutional claim.

V. Defendants Are Entitled To Summary Judgment On Plaintiff’s Due Process Fabrication Claim.

A. Defendants cannot be liable for allegedly fabricated evidence that was not used at Day’s trial.

In their memorandum of law, the Officer Defendants showed that a plaintiff has no due process fabrication claim if the fabricated evidence was not used at trial. (*See* Dkt. 267 at 24-27; *Moran v. Calumet City*, 54 F.4th at 499 (court holding that the allegedly fabricated evidence —

² “[T]he only burden of production recognized in Rule 56 falls upon the nonmoving party once a basis for summary judgment has been established[.]” *Spierer v. Rossmann*, 798 F.3d 502, 508 (7th Cir. 2015); *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); *see also Ricci v. DeStefano*, 557 U.S. 557, 586, 129 S.Ct. 2658 (2009) (“[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, the nonmoving party bears the burden of production under Rule 56 to designate specific facts showing that there is a genuine issue for trial”).

the police report and the detectives' pretrial testimony — could not have influenced the jury's verdict if it was not used at trial); *Patrick v. City of Chicago*, 974 F.3d 824, 834-35 (7th Cir. 2020); *see also Brown*, 2022 WL 4602714, at *24 (court noting that in *Patrick*, the Seventh Circuit clarified that in a fabricated evidence theory of liability, the fabricated evidence must be used against the plaintiff in his criminal trial). As a result, Day has no due process fabrication claim based on the allegedly fabricated statements of Ralph Watson and Anthony Jakes or the allegedly fabricated police reports referring to the statements of Watson and Day.

In response, Day urges this Court to disregard *Moran* and *Patrick* as anomaly decisions that attempt to overrule prior Seventh Circuit decisions. (Dkt. 277 at 18-21). Day argues that he should be allowed to pursue a free-standing due process fabrication claim based on allegedly fabricated evidence – Ralph Watson's statement and various police reports documenting Day's confession and Watson's statements – even though that evidence was not used at Day's criminal trial.³ The argument must be rejected as it is contrary to well-established Seventh Circuit precedent.

First, Day is not free to disregard Seventh Circuit precedent that is squarely on point. *See Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004) (“a lower court cannot overrule the decision of a higher one”). Second, Plaintiffs' contention that *Moran* and *Patrick* are somehow at odds with prior Seventh Circuit precedent is demonstrably false. According to Day, the use of the phrase “in some way” by the Seventh Circuit in *Whitlock v. Brueggeman*, 682 F.3d 567, 582 (7th Cir. 2012) – issued before *Patrick* – means that a plaintiff has an actionable due process fabrication claim, even if the fabricated evidence is not used at trial, as long as the evidence

³ The Officer Defendants moved for summary judgment on the alleged claim as it relates to Jakes' statement. However, Day admits he is not pursuing a due process fabrication claim based on Jakes' allegedly fabricated statement, so there is no need to discuss whether Jakes' statement is actionable as a due process fabrication claim. (Dkt. 277 at 16).

is used “in some way” before trial. Not true. That interpretation ignores the pivotal holding in *Whitlock* that “the plaintiffs properly alleged that the act of fabrication caused a harm to them: the fabricated evidence, because it was introduced against them at trial, was instrumental in their convictions.” 682 F.3d at 582 (emphasis added). In other words, the *Whitlock* court recognized that the phrase “in some way” is about how the evidence was used and/or introduced at trial.

In *Avery v. City of Milwaukee*, 847 F.3d 433, 442 (7th Cir. 2017), the Seventh Circuit again held that “the due-process violation wasn't complete until the false confession was introduced at Avery's trial, resulting in his conviction and imprisonment for a murder he did not commit.” (Emphasis added). And though the Court in *Anderson v. City of Rockford*, 932 F.3d 494, 510 (7th Cir. 2019) cited the “in some way” language from *Whitlock*, the issue in that case was the use of fabricated evidence at trial to secure a conviction. *Id.* (“The plaintiffs’ primary contention is that the defendant officers coerced the prosecution’s two key witnesses, Dowthard and Brown, to give statements implicating the plaintiffs that the defendants knew were false, with the statements then being used to convict the plaintiffs of the Hanson murder”) (emphasis added). The only take-away from this line of cases is that the phrase “in some way” means “used in some way at trial,” which is exactly how the Seventh Circuit definitively ruled in *Patrick* and *Moran*.

Any lingering doubt was erased by the Seventh Circuit’s recent decision on June 23, 2025, in *Zambrano v. City of Joliet*, 2025 U.S. App. LEXIS 15409, where the Court once again re-confirmed that a plaintiff has no due process fabrication claim unless the alleged fabricated evidence was used at the criminal trial. *Id.*, *5 (holding that “to succeed” on a due process fabrication claim the plaintiff had to show “the evidence was used at Zambrano’s trial”). Citing *Patrick*, the *Zambrano* court repeated the now well-settled rule of law: that “[e]vidence is material if there is any ‘reasonable likelihood the evidence affected the judgment of the jury’” and “[i]f the

fabricated evidence was immaterial, it cannot be said to have caused an unconstitutional conviction and deprivation of liberty." *Id.*, *10 citing *Patrick*, 974 F.3d at 835 (other citations omitted).

B. Watson's statement was not used a Day's trial.

Despite the foregoing well-settled precedent, Day insists he can still pursue a due process fabricating claim based on Watson's statement. Citing *Hurt v. Wise*, 880 F.3d 831, 844 (7th Cir. 2018), Day argues that his due process fabrication claim based on Watson's statement survives because it was used in some way to affect the outcome of the criminal case. Not only does this theory fail as set forth above, but *Hurt* was also overruled on this point by *Lewis v. City of Chicago*, 914 F.3d 472, 479 (2019).

Day then argues that he should be allowed to pursue a due process fabrication claim based on Watson's statement even though "no one read the statement to the jury," because the fact that Watson gave statement was discussed as the reason Boudreau was looking for Day, implying Day's guilt. As Defendants established in their motion, however, this argument fails because police officers have absolute immunity from suit under §1983 for giving allegedly false testimony at trial proceedings, even if the testimony is false or implies something false. *See Briscoe v. LaHue*, 460 U.S. 325 (1983) and *Jones v. York*, 34 F.4th 550, 553 (7th Cir. 2022). Recognizing he cannot prevail based on Boudreau's trial testimony, Day pivots to his own testimony instead as a basis for his fabrication claim and tries to analogize it to the allegedly fabricated lineup report that was used in *Johnson v. Guevara*, No. 20 C 4156, 2025 WL 903818 (N.D. Ill. March 24, 2025). But the lineup report in *Johnson* was far different than what is at issue here and, in any event, its application to suggest that the report need not be introduced is inconsistent with the most recent Seventh Circuit decision on the same subject matter. To the extent there is any ambiguity, the Seventh Circuit clarified what is required to support a due process fabrication claim. As set forth

above, *Zambrano*, which post-dates *Johnson*, *Patrick* and *Moran*, clarified that the fabricated evidence must have been used at trial to be actionable. 2025 U.S. App. LEXIS 15409, *5. *Johnson* therefore does not salvage Day's claim here.

Day then goes back to Boudreau's testimony, arguing that Boudreau is not entitled to immunity under *Avery* because "police officers who fabricate evidence cannot immunize themselves by authenticating it at trial." (Dkt. 277 at 25). But Day ignores a crucial difference between *Avery* and this case. In *Avery*, the allegedly fabricated reports were admitted into evidence and the officer had authenticated them before the jury, which the Court then determined could not immunize the fabricated evidence. Here, by contrast, it is undisputed that Boudreau never attempted to authenticate Watson's statement or the police report containing Watson's statement at trial. *See Jones*, 34 F.4th at 553 (court holding that plaintiff could not circumvent *Briscoe* by citing *Avery*, because the defendant officer did not attempt to authenticate fabricated evidence at trial). Moreover, Watson's statement was not admitted into evidence at trial. The prosecution elicited the questions from Boudreau merely to indicate the course of the investigation and not any substance of what Watson said, which is precisely the context in which *Briscoe* immunity applies. The Seventh Circuit's decision in *Jones* forecloses Plaintiff's theory of liability.

C. The police reports were not used at Day's trial.

Day does not dispute that the police reports regarding his confession and Watson's statement were not used at trial. (Dkt. 277 at 25-26). He nonetheless argues that these reports somehow implicitly impacted the trial because (a) ASA Daniellien testified that he read them before he took Day's statement and (b) the reports contained allegedly fabricated information that was repeated at trial. Day relies on three district court cases to argue that this is enough to meet the "used at trial" standard. (Dkt. 277 at 26 citing *Johnson*, 2025 WL 903818, at *18; *Velez v. City*

of *Chicago*, No. 1:18-CV-08144, 2023 WL 6388231, at *12 (N.D. Ill. Sept. 30, 2023) and *Taylor v. City of Chicago*, No. 14 C 737, 2021 WL 4401528, at *7 (N.D. Ill. Sept. 27, 2021). This argument is meritless. But once again, as set forth above, *Zambrano*, clarified that the fabricated evidence must have been used at trial to be actionable. Plaintiff admits the reports were not used at trial. (Dkt. 277 at 25-26). That ends the analysis, and Defendants are entitled to summary judgment on this claim.

VI. Defendants Are Entitled To Summary Judgment On Day's *Brady* Claims.

In their motion, the Officer Defendants established that Day has no *Brady* claim based on: (1) the failure to disclose notes from Krona's interview, which Day thinks "would have demonstrated that [she]...did not identify Plaintiff as being a participant in Erving's murder" (Dkt. 264-50, Exhibit 50, p. 3); (2) the suppression of information Day thinks would have identified the witnesses who had knowledge of two alternative suspects, Spook and Mark, and documents showing steps to investigate this lead (Dkt. 264-50, Exhibit 50, p. 3); (3) Defendants' failure to disclose the unlawful manner used to obtain Watson's statement or that the statement was untrue; (4) Defendants failure to disclose the unlawful manner Boudreau used in his attempt to obtain a statement from Ed Robinson, (Dkt. 264-50, Exhibit 50, p. 5); (5) Defendants' failure to disclose the unlawful methods used to obtain Day's own confession (Dkt. 264-50, Exhibit 50, p. 6); and (6) the suppression of non-specific "street files." (*See JSOF*, ¶¶ 24, 39, 85, 111, 165).

In his response, Day does not offer any arguments in opposition to Defendants' entitlement to judgment as a matter of law as to the *Brady* theories centered on: Krona's interview, Watson's statement; Ed Robinson's interview; and Day's confession. (*See Defs' Mtn.* at 27-36, Dkt. 267; *see also generally* Pl's Resp., Dkt. 277). Instead, Day argues against summary judgment on only two categories of alleged *Brady* violations: (A) that McWeeny withheld evidence relating to

alternative suspects “Mark” and “Spook” and (2) that “street files” were withheld, which Day speculates would have contained *Brady* material. (Dkt. 277 at 27-36). Day’s failure to address the above arguments in his response constitutes a waiver. *Nichols*, 755 F.3d at 600 (“The non-moving party waives any arguments that were not raised in its response to the moving party’s motion for summary judgment.”); *Keck*, 517 F.3d at 487 (“non-moving party is deemed to have abandoned claim it failed to defend in response to a motion for summary judgment”). As set forth in Defendants’ motion and herein, the remaining *Brady* claims likewise.

A. Defendants are entitled to summary judgment on Plaintiff’s *Brady* claim that information about alternative suspects “Spook” and Mark was withheld.

Plaintiffs did not argue that anyone other than McWeeny participated in concealing evidence about Mark and Spook as alternative suspects. Therefore, the Court should grant summary judgment for Evans and Boudreau on this *Brady* claim. (Dkt. 267, 277). *See Nichols v. Mich. City Plant Planning Dep’t*, 755 F.3d 594 at 600 (7th Cir. 2014); *Keck v. Nextel*, 517 F.3d 476 at 487 (7th Cir. 2008); *Pepper v. Village of Oak Park*, 430 F.3d 805, 810 (7th Cir. 2005) (the individual defendant must have caused or participated in a constitutional deprivation).

McWeeny is also entitled to summary judgment on this claim. Day has not identified any information McWeeny knew of and concealed about Spook and Mark, or any document McWeeny allegedly created about those suspicions, or any such document withheld from prosecutors or defense attorneys, or the specific information contained any such document. Speculation like this cannot support a *Brady* claim. *See United States v. Warren*, 454 F.3d 752, 759 (7th Cir. 2006) (no *Brady* violation because defendant was “unable to point to any specific evidence, exculpatory or otherwise, withheld by the government”); *United States v. Price*, 418 F.3d 771, 785 (7th Cir. 2005) (*Brady* violation did not occur where no document existed corroborating defendant’s claim). “[I]f there is no proof of a document’s existence, government officials cannot be held liable under

Brady.” *Hill v. City of Chicago*, No. 06 C 6772, 2009 WL 174994, at *4 (N.D. Ill. Jan. 26, 2009) (citing *United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001)).

Though Day argues that McWeeny suppressed the identities of Mark and Spook, he fails to cite any facts to show that McWeeny knew their identities, or that he created and then suppressed any specific document or file that was withheld. Day’s argument is premised on his speculative belief that because McWeeny was required to document steps in his investigation, he must have made more than one report regarding Spook and Mark, and because no such report exists, he must have also concealed those documents (even after he was no longer investigating the Irving homicide). Even Day’s expert, Richard Clark, admitted that this theory is speculation. (Dkt. 264-72, Exhibit 72, Clark Dep., 284:11-293:10). In fact, Day’s argument is nothing more than one layer of inadmissible speculation on top of another. (Dkt. 558, ¶219). And it too fails. *See Hill*, 2009 WL 174994, at *3-5; *see also United States v. Roberts*, 534 F.3d 560, 572 (7th Cir. 2008) (“defendant must provide some evidence other than mere speculation or conjecture that evidence was exculpatory and suppressed by the Government”) (citation omitted); *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996) (“speculation is not enough to establish that the Government has hidden evidence”); *United States v. Guzman*, 571 F. App’x 356, 364-65 (6th Cir. 2014) (plaintiff’s argument that she “[had] reason to believe that the government failed to disclose documents” because it was “likely that [the investigator] maintained documents and notes” that had information that “would most likely negate her culpability” was “mere speculation and conjecture – simply not enough to demonstrate a *Brady* violation.”) (citing *United States v. Ashley*, 274 F. App’x 693, 696-97 (6th Cir. 2008) (citing *United States v. Williams-Davis*, 90 F.3d 490, 514, 319 U.S. App. D.C. 267 (D.C. Cir. 1996), and *United States v. Santiago*, 993 F.2d 504, 506 (5th Cir. 1993) (internal quotation marks omitted)).

Notwithstanding Plaintiff's failure to demonstrate McWeeny had information and then concealed it, Mark and Spook's connection as possible alternative suspects were already known to both prosecutors and defense attorneys long before Day's trial began. Indeed, Day does not dispute that information regarding alternative suspects, Spook and Mark, was contained in McWeeny's GPR and that the GPR was disclosed to his criminal defense attorney before the start of the criminal trial. *See* JSOF ¶ 47 ("Plaintiff does not allege that [McWeeny's GPR about Spook and Mark] was not disclosed to his criminal defense attorney before his criminal trial began.") Instead, Day's responses to Defendant Radtke's interrogatories make clear that his only complaint is that Defendants allegedly suppressed the source of the information relating to Spook and Mark. *See* JSOF ¶ 39, 40. Day likewise ignores that McWeeny's GPR provided his counsel with physical descriptions of Spook and Mark and the street corners where they could be found, should his attorney wish to conduct any follow up investigation on these alternative suspects. (*See* Dkt. 264-30, Exhibit 30, May 18, 1991 GPR (McWeeny)). Day now argues that he was unable to present an alternative suspect theory at trial but fails to explain what prevented him from doing so. Given that Day has not identified any specific evidence known to McWeeny that was also not known to prosecutors and defense attorneys, his theory that something more about Spook and Mark was documented and then not disclosed cannot, as a matter of law, survive summary judgment for the reasons set forth above. (*See also* Dkt. 267 at 33-35).

B. Defendants are entitled to summary judgment on Day's street files Brady claim.

The street files theory likewise cannot survive summary judgment. Day never identified an actual street file or any document that existed or was not disclosed to prosecutors, or any information that exists within a street file that was not disclosed. As a result, summary judgment should be granted. *See Taylor v. City of Chi.*, No. 14 C 737, 2019 WL 4597383, at *9-10 (N.D.

Ill. Sep. 23, 2019) (court granting summary judgment for officers on the plaintiff's "clandestine street file" theory where the plaintiff did not identify any files that had not been turned over to prosecutors). *Taylor* is instructive. In that case, like this one, there was evidence that officers used the same monikers "street file" or "working files." *Id.* However, that alone was not enough to carry the day for the plaintiff. The court explained that,

because no such file has been produced in this case, Taylor's position that the file would contain *Brady* material is purely speculative. And mere speculation that exculpatory evidence may have existed cannot support a *Brady* claim. *See United States v. Roberts*, 534 F.3d 560, 572 (7th Cir. 2008); *United States v. Parks*, 100 F.3d 1300, 1307 (7th Cir. 1996); *United States v. Morris*, 957 F.2d 1391, 1402-03 (7th Cir. 1992); *Hill v. City of Chi.*, No. 06 C 6772, 2009 U.S. Dist. LEXIS 5951, 2009 WL 174994, at *4 (N.D. Ill. Jan. 26, 2009) (finding that the plaintiff's "mere speculation that [certain reports] may have existed" in a street file "cannot be the basis for his *Brady* claim"); *cf. Fields v. City of Chi.*, No. 10 C 1168, 2014 U.S. Dist. LEXIS 14621, 2014 WL 477394, at *6-7 (N.D. Ill. Feb. 6, 2014) (denying summary judgment where the "street file" at issue was located during discovery). Accordingly, Taylor cannot proceed on a *Brady* claim based on the mere existence of a "street file."

Id. The same is true here. Because no "street file" was produced in this case, Day's theory is premised on pure speculation that such a file (a) existed and (b) would have contained *Brady* material. That is not enough. Even Day's expert could offer his guesswork, which he called "one possible explanation," as to why certain filed materials may not have been included in the file. (*See JSOF*, Dkt. 263, at ¶ 111).

Plaintiff's reliance on *Fields v. City of Chicago* 981 F.3d 534 (7th Cir. 2020) is misplaced because it is undisputed that, unlike this case, missing documents were identified in *Fields*. *Id.* at 543 (*citing* the district court's corrected opinion) ("Murphy, too, had information placed in the street file (a request for photographs used to purportedly identify the perpetrators); and the street file, which was never turned over, contained information that a reasonably competent defense attorney could have used to show the existence of reasonable doubt").

VII. There is no due process violation for failing to investigate or follow up on other leads.

In their motion for summary judgment, the Officer Defendants established they are entitled to summary judgment on Count III to the extent it is based on a failure to conduct an adequate investigation, corroborate Watson's statement to police or investigate the murder weapon's use in another crime by different individuals. (*See* Dkt. 267 at 31-32, 37-38). Day does not respond to this argument and therefore has waived any argument in opposition to it. *See Nichols*, 755 F.3d at 600; *Keck*, 517 F.3d at 487. Summary judgment should be granted on Count III to the extent it is based on a failure to conduct an adequate investigation.

VIII. Evans Is Entitled To Summary Judgment On Plaintiff's State Law Malicious Prosecution Claim In Count VII.

In their memorandum of law, Defendants established that Evans cannot be liable for malicious prosecution because he was not personally involved in causing the commencement or continuance of Day's criminal proceedings. In his response, Day argues that Evans was "not a sideline character," that Evans "primed the pump" for Day's confession and contributed to Day's prosecution and eventual wrongful conviction. These catchy phrases fail to address the absence of evidence showing that Evans was personally involved in causing the commencement or continuation of the prosecution. The only wrongful conduct attributed to Evans is (a) Evans struck Day once when Day was apprehended while hiding at a friend's apartment and (b) before any questioning occurred, Evans had minimal interaction with Day in which he told Day they know he did it. It is undisputed, however, that Evans (who was not a detective), did not question Day about the murder, was not part of the interrogation, and was not present when Foley and/pr Boudreau allegedly coerced or fabricated the confession. Even if Plaintiff could point to a factual dispute regarding Evans' alleged interactions with Day, none of it falls within the scope of personal

involvement, i.e., causing or continuing Day's prosecution for the Erving homicide. Moreover, Day ignores his own deposition testimony wherein he testified that he confessed because of Foley and Boudreau, and that Boudreau alone fed him the details of his confession. (Dkt. 264-10, Exhibit 10, Day Dep., 310:1-311:13, 369:16-370:21).

IX. Defendants Are Entitled To Summary Judgment On Day's Fourth Amendment Pretrial Detention Claim.

Defendants established that Day has no standing to bring a Fourth Amendment pretrial detention claim because it is undisputed that while Day was in jail awaiting trial on the Erving homicide, he was also being lawfully detained on a felony drug charge, for which he was lawfully convicted. Day does not challenge these facts but instead argues that his Fourth Amendment claim should survive because he could still recover nominal or punitive damages even without compensatory damages. This argument misses the point and erroneously assumes some categories of relief may be available to Day other than compensatory damages. Day lacks standing because a section 1983 plaintiff cannot receive any damages for time spent in custody if that time was credited to a valid and lawful sentence, including nominal and punitive damages. *Patrick v. City of Chicago*, 81 F.4th 730, 737 (7th Cir. 2023) citing *Ewell v. Toney*, 853 F.3d 911, 917 (7th Cir. 2017) citing *Bridewell v. Eberle*, 730 F.3d 672, 677 (7th Cir. 2013); *Ramos v. City of Chicago, et al.*, 716 F.3d 1013 at 1020 (7th Cir. 2013). *Ramos* and its progeny (*Ewell*, *Bridewell*, *Patrick*) remain good law and none of these cases created a carveout for nominal or punitive damages. As set forth above, however, neither this Court nor Day is free to disregard Seventh Circuit precedent that is squarely on point. *Taco Bell Corp.*, 388 F.3d at 1077 (7th Cir. 2004) ("a lower court cannot overrule the decision of a higher one"). Thus, Day has no standing because he cannot recover any damages – compensatory, nominal, punitive or otherwise – for the time he spent in custody before his conviction. Other district court cases in the Seventh Circuit addressing this exact issue reached

the same outcome. *See Cummings v. Marion Co.*, No. 17-cv-103, 2020 U.S. Dist. Lexis 76083 (S.D. Ind. April 30, 2020) (court followed *Ramos* and found the plaintiff could not recover any damages, including nominal damages, and therefore had no standing to bring a Fourth Amendment pretrial detention claim); *Johnson v. Menke*, Case No. 21-cv-823, 2023 U.S. Dist. LEXIS 16154 (S.D. Ill. September 12, 2023).

X. Detectives Evans And Mcweeny Are Entitled To Summary Judgment On Day's Conspiracy And Failure To Intervene Claims.

In their memorandum of law, the Officer Defendants established that Day's conspiracy and failure to intervene claims fail as a matter of law as to Evans and McWeeny because there is no triable issue of fact that either were personally involved in or liable for any underlying constitutional tort. As an initial matter, Day does not address whether McWeeny is entitled to summary judgment on the conspiracy/failure to intervene claims. Day's failure to address these arguments as to McWeeny constitutes a waiver, and therefore the Court should grant summary judgment in favor of McWeeny on Day's conspiracy and failure to intervene claims. *See Nichols*, 755 F.3d at 600; *Keck*, 517 F.3d at 487.

As for Evans, Day does not deny that his conspiracy/failure to intervene claims are predicated entirely on his allegations of coercion and fabrication discussed above. Those allegations fail to support Day's conspiracy/failure to intervene claims for the same reasons discussed above. *See Smith v. Gomez*, 550 F. 3d 613, 617 (7th Cir. 2009) (a conspiracy is not an independent basis of liability under §1983 actions); *Harper v. Albert*, 400 F. 3d 1052, 1064 (7th Cir. 2005) ("in order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation"). Undeterred, Day attempts to salvage his conspiracy and failure to intervene claims against Evans by making unsupported and unfounded accusations.

A. Evans and McWeeny are entitled to summary judgment on Day's conspiracy claims.

Day's only argument that Evans knowingly participated in a conspiracy to violate his constitutional rights is that his actions ensured that Day was "available" and "primed" for Boudreau's interrogation. This speculation is unsupported by any evidence. The law requires that the undisputed facts show there was a single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences. *Richardson v. City of Indianapolis*, 658 F. 2d 494, 500 (7th Cir. 1981). The fact that Evans participated in the lawful arrest of Day pursuant to a facially valid warrant and accused Day of being involved in the Erving homicide a few times long before Day was interrogated is not enough, because there is no evidence that Evans was acting in furtherance of an agreement with Foley and Boudreau to frame Day. "A defendant who innocently performs an act which happens to fortuitously further the tortious purpose of another is not liable under the theory of civil conspiracy." *Turner v. Hirschbach Motor Lines*, 854 F. 3d 926, 930 (7th Cir. 2017); *see Market Force, Inc. v. Wauwatosa Realty Co.*, 706 F. Supp. 1387 (E.D. Wis. 1989) ("coincidence does not a conspiracy make.").

Day has not alleged any facts that Evans had or knew of a plan to frame Day, that they all agreed to such a plan or that Evans did anything in furtherance of this plan (as opposed to participating in a homicide investigation). Instead, Day relies on discrete instances of alleged misconduct (such as Day's arrest pursuant to a facially valid arrest warrant, during which he claims that Evans struck him once after he was discovered hiding under a bed, and the subsequent minimal interactions while at the Area). But he cannot connect these events to any agreement between Evans and any other Defendant Officer to violate Day's constitutional rights and instead tries to fill in this fatal evidentiary gap with unfounded speculation about what Evans' alleged conduct must show. This is insufficient to defeat Officer Defendants' summary judgment motion.

Recognizing he has no evidence of a conspiracy involving Evans, Day points to Boudreau's conduct, alleging that Evans should be liable for conspiracy because Boudreau fed Day facts for his confession even though Evans was not present at the time. Again, Day has not alleged any facts that Evans had or knew of a plan to frame Jakes, that they all agreed to such a plan or that Evans did anything in furtherance of this plan. Nor is there evidence to show that Evans knew anything about what transpired when Day was questioned by Boudreau. This means Evans had no basis to determine whether anything in Day's confession was false.

Even assuming Day was fed facts, he still has presented no evidence that Evans knew that the information Boudreau "fed" him was false, which is insufficient to support a conspiracy claim. *See Carmona v. City of Chicago*, No. 15 C 462, 2019 U.S. Dist. LEXIS 149318, *2 (N.D. Ill. Sep. 3, 2019) (to prove conspiracy, a plaintiff must show not merely that defendants were part of an investigation that resulted in the alleged constitutional and state law violations, but that they made an *agreement* to commit those violations). Day also has not provided any evidence to support an inference that Evans conspired with Foley and Boudreau to obtain a false confession, which is also fatal to his claim. *See e.g. Daugherty v. Page*, 906 F. 3d 606, 612 (7th Cir. 2018) ("Even if, as Daugherty contends, Harrington and Page knew that he never made the remarks alleged in the disciplinary report, these facts do not support the existence of an agreement between them to violate Daugherty's constitutional rights."). Without evidence of an agreement or plan Day's conspiracy claims cannot survive summary judgment. *Richardson*, 658 F. 2d at 500; *Carmona*, 2019 U.S. Dist. LEXIS 149318, at *2 (N.D. Ill. Sep. 3, 2019); *Daughtry*, 906 F. 3d at 612.

Finally, Evans is entitled to qualified immunity on the Section 1983 conspiracy claim. Though Day asserts that the conspiracy law was known in 1991, he fails to address the fact that as of 2017, there was a circuit split on whether the law was clearly established. *See Haliw v. City of*

South Elgin, 2020 WL 1304697, *4 (N.D. Ill. March 3, 2020) (finding liability is not clearly established for conspiracies amongst police officers of a single municipality because the law was unsettled on whether the intra-corporate conspiracy doctrine applies to § 1983 claims) (*comparing Jackson v. City of Cleveland*, 925 F.3d 793, 819-20 (6th Cir. 2019) (the intra-corporate conspiracy doctrine applies to § 1983 just as it does to § 1985 claims because both create “cause[s] of action against any ‘person’ who deprives a plaintiff of his rights[.]”), with *Drager v. Vill. of Bellwood*, 969 F. Supp. 2d 971, 985 (N.D. Ill. 2013) (“The Seventh Circuit has yet to decide whether the doctrine applies to § 1983 conspiracy claims, and district courts in this Circuit are split on whether it does.”). Day tries to downplay *Haliw* as an outlier decision but fails to address the most important take away: if the law was unsettled in 2017, it was certainly unsettled in 1991. Accordingly, the Officer Defendants are entitled to qualified immunity on the federal conspiracy claims.

B. Evans is entitled to summary judgment on Day’s failure to intervene claim.

As for his failure to intervene claims, Day summarily concludes that Evans could have prevented his constitutional rights from being violated by alerting others of the conspiracy or intervening when Day was fed facts by Boudreau, falsely arrested or abused by Foley. Day, however, fails to identify why Evans would have intervened to prevent Day from being arrested pursuant to a facially valid arrest warrant. Day also fails to identify when Evans would have had an opportunity to intervene during Day’s interrogation and confession because he cannot. Evans was not present for these events. (*See* Dkt. 263, JSOF ¶¶ 130-141). Nor does Day explain how Evans had reason to know that the claimed misconduct was occurring. (*See Id.*). “[I]f . . . all they did was stand by while Root made an arrest, then what [Day] seeks is vicarious liability,” forbidden

under § 1983. *Mwangangi v. Nielsen*, 48 F. 4th 816 at 833 (7th Cir. 2022) (Easterbrook, J., concurring).

XI. Day's IIED Claim Is Derivative And Therefore Fails.

Day does not dispute that his intentional infliction of emotional distress ("IIED") claim is based upon the same circumstances surrounding his allegedly fabricated and coerced confessions and fabricated evidence claims. As set forth above, however, Day has not demonstrated a triable issue of fact that Evans and McWeeny were personally involved in committing any constitutional tort. Because the IIED claim is completely derivative of his §1983 claims, it likewise fails as to Evans and McWeeny.

Date: July 24, 2025

Respectfully submitted,
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