

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

Derrell Fulton, AKA Darryl Fulton,	)	
	)	Case No. 17 CV 8696
Plaintiff,	)	
	)	Hon. Judge Pacold
v.	)	
	)	Magistrate Judge Harjani
City of Chicago, et al.,	)	
Defendants.	)	

Nevest Coleman,	)	
	)	Case No. 18 CV 998
Plaintiff,	)	
	)	Hon. Judge Pacold
v.	)	
	)	Magistrate Judge Harjani
City of Chicago, et al.	)	
	)	
Defendants.	)	

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

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INTRODUCTION¹

These lawsuits arise out of Plaintiffs' convictions for the horrific sexual assault and murder of Antwinica Bridgeman in 1996. Bridgeman's badly decomposed body was found in Plaintiff Coleman's basement on April 29, 1994. She had been impaled through her vagina with a steel pipe and a piece of concrete had been shoved deep into her mouth. She was last seen alive on April 11, 1994, leaving a party with Coleman. Coleman and Fulton each confessed to committing the crime, though in their confessions each tried to minimize his role. They were convicted after a simultaneous trial before separate juries and sentenced to life in prison.

In early 2017, DNA testing excluded Plaintiffs as the source of semen found in the victim's underwear and pointed to another person, Clarence Neal, who has a history of sexual assaults. After a thorough investigation by the Conviction Integrity Unit ("CIU") of the Cook County State's Attorney's Office ("CCSAO"), the CCSAO vacated the convictions on November 17, 2017, and then dismissed the charges against Plaintiffs on December 1, 2017. However, that decision was not based on Plaintiffs' innocence. In fact, through discovery in this case, the parties were able to explore the decision-making process that took place among the highest-ranking members of the CCSAO, including former First Assistant Eric Sussman. These individuals concluded that Plaintiffs are likely guilty, despite the DNA evidence, and that Plaintiffs' confessions were not coerced. The CCSAO also rejected the suggestion that the real killer is Neal, instead concluding Neal likely had a sexual encounter with the victim before the murder took place. Nonetheless, Sussman and his team concluded it would be impossible to overcome their burden of proof on a retrial "in this day and age" given the presence of Neal's DNA on the victim's

¹ For their Motion for Summary Judgment, Defendants do not dispute Plaintiffs' factual allegations. However, Defendants do dispute unsupported conclusions of fact and conclusions of law. Defendants reserve the right to contest each and every fact at trial.

underwear, combined with the confessions being contested. As a result, Sussman, with the State's Attorney's approval, made the decision to vacate the convictions and *nolle* the charges against two people they consider guilty. Plaintiffs then filed petitions for a Certificate of Innocence ("COI"), which the CCSAO did not oppose. On March 9, 2018, just over four months after the charges were dismissed, the CCSAO and Plaintiffs entered agreed orders granting their COIs. The CCSAO had not learned of any new evidence since December 1, 2017 but agreed to the orders anyway to avoid wasting scarce resources fighting the COIs. The decision not to oppose the COI petitions and enter those agreed orders, however, was not based on Plaintiffs' innocence. These lawsuits followed. Plaintiffs sued the two lead Chicago Police detectives, Michael Clancy and the Estate of William Foley,² as well as detectives who allegedly assisted with the investigation: John Halloran, Kenneth Boudreau, James O'Brien, Gerald Carroll, William Moser, Al Graf and Thomas Kelly and Thomas Benoit (collectively the "Officer Defendants").³

Defendants now move for partial summary judgment. All Officer Defendants move for summary judgment on Plaintiffs' malicious prosecution claims because Plaintiffs cannot establish that their criminal cases were terminated in a manner indicative of their innocence. Defendants Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit move for summary judgment on all claims against them because there is no evidence they participated in any constitutional deprivation.⁴ All Officer Defendants also move for summary judgment on the *Brady* claims because there is no evidence they withheld or suppressed exculpatory evidence. Finally, the state law claim for intentional infliction of emotional distress ("IIED") is time-barred

² The independent administrator for Foley's estate is Geri Yanow.

³ Plaintiffs also sued the City of Chicago, former Assistant State's Attorney Hal Garfinkle and Cook County. The City joins this motion as to the respondeat superior and indemnification claims based on claims dismissed against the Officer Defendants. ASA Garfinkle and the County are not part of this motion.

⁴ Kelly and Benoit were not sued by Fulton. They are only Defendants in Coleman's lawsuit.

as to all Officer Defendants, and in any event the IIED and conspiracy claims fail as to Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit.

In addition, Defendant Thomas Benoit, who is only a Defendant in Coleman's lawsuit, moves for summary judgment on the basis that Coleman sued the "wrong Benoit." Thomas Benoit was not involved in the events at issue and was mistakenly sued only because he has the same last name as a supervisor of the investigation Coleman intended to sue, Sergeant Daniel Benoit.

LEGAL STANDARD

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Summary judgment is warranted when the nonmoving party cannot establish an essential element of its case on which it will bear the burden of proof at trial. *Kidwell v. Eisenhower*, 679 F.3d 957, 964 (7th Cir. 2012). While the court must construe the facts in the light most favorable to the non-moving party and draw all reasonable inferences in his favor (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)) "that duty does not extend to drawing inferences that are supported only by speculation or conjecture." *Swetlik v. Crawford*, 738 F.3d 818, 829 (7th Cir. 2013); *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). In the end, summary judgment is the "put up or shut up moment in litigation, by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case." *Goodman v. Nat'l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010).

ARGUMENT

I. The Malicious Prosecution Claims Fail Because Plaintiffs Cannot Establish Their Criminal Proceedings Were Terminated in a Manner Indicative of Innocence.

In Count VIII of Coleman’s Second Amended Complaint (“Coleman’s Complaint”)⁵ (Dkt. 14) and in Count VI of Fulton’s Fourth Amended Complaint (“Fulton’s Complaint”) (Dkt. 230), they each bring claims for malicious prosecution. To prevail on a claim of malicious prosecution, a plaintiff must prove his conviction was terminated in a manner indicative of innocence. *See Woods v. Vill. of Bellwood*, 2020 WL 6894660, at *14 (N.D. Ill. Nov. 24, 2020) *citing* *Washington v. Summerville*, 127 F.3d 552, 557 (7th Cir. 1997) (“In order to fulfill the second element, a plaintiff cannot predicate his malicious prosecution action on underlying criminal proceedings which were terminated in a manner not indicative of the innocence of the accused.”); *Bridewell v. City of Chicago*, 2012 WL 2458548, at *4 (N.D. Ill. June 27, 2012) (finding that plaintiff had not carried her “burden of showing that the criminal prosecution concluded in a manner indicative of innocence”).

It is not enough to show that the prosecution dismissed the charges. *Woods*, 2020 WL 6894660, at *14. “Only when a plaintiff establishes that the *nolle prosequi* was entered for reasons consistent with his innocence does the plaintiff meet his burden of proof.” *Swick v. Liautaud*, 662 N.E.2d 1238, 1243 (Ill. 1996). The circumstances surrounding the cessation of the criminal proceedings must compel an inference that reasonable grounds to pursue the criminal prosecution were lacking. *Id.* (emphasis added). The Illinois Supreme Court has warned that “[o]therwise, every time criminal charges are *nol-prossed*, a civil malicious prosecution action could result.” *Id.* at 1243.

⁵ There are two Count VIII’s in Coleman’s Complaint. The second Count VIII, which appears to be the actual ninth count, is for malicious prosecution.

Here, the undisputed record proves that Plaintiffs' criminal charges were not terminated in a manner indicative of innocence. In fact, the CCSAO has made it abundantly clear it did not conclude Plaintiffs were innocent. During discovery, the parties were given access to the decision-making process that occurred among the highest-ranking members of the CCSAO. The decision to terminate the criminal proceedings was made by First Assistant Eric Sussman with input from the Director of the CIU, Mark Rotert, and Chief Deputy of the Special Prosecutions Unit, Stephen Block, among others, with the approval of the State's Attorney herself. (DSOF, ¶¶132-37, 139-40). The consensus among them was that Plaintiffs are in fact guilty of the crime. (DSOF, ¶¶124, 126, 134-35, 140-41, 143-47). In fact, just days before Sussman appeared in Court to formally dismiss the charges, Rotert sent Sussman and the same group an email stressing the importance of making it clear to the public that they "have NOT concluded that either defendant is innocent." (DSOF, ¶144) (emphasis in original). Sussman agreed and went out of his way to make sure the public was informed that the CCSAO had not concluded that Plaintiffs were innocent of the crime and that the decision was not based on a finding of innocence. (DSOF, ¶¶144-46). This communication was so important that Sussman personally oversaw the editing of a press release explaining the reasons for the decision to terminate the criminal proceedings, which explicitly points out that the CCSAO did not conclude Plaintiffs are innocent of the crime. (DSOF, ¶146) (emphasis added). That press release is the "official" position of the CCSAO with respect to Plaintiffs. (DSOF, ¶160).

The reasons provided by Sussman and Rotert for the decision likewise make it impossible for Plaintiffs to establish their criminal cases were terminated in a manner indicative of innocence. Not only did Sussman and Rotert conclude that Plaintiffs are likely guilty, but they and the same group with whom they discussed the case also concluded the confessions were not the result of

coercion or misconduct. (DSOF, ¶¶140-41). They also rejected the suggestion that Clarence Neal is the real killer. (See DSOF, ¶¶122-130). In his 23-page, single-spaced memo explaining the CIU’s findings and conclusion that Plaintiffs should be allowed a new trial, Rotert provided a detailed and thoughtful analysis of the evidence, explaining why the CIU did not believe Neal killed Bridgeman and why Plaintiffs are likely guilty. (DSOF, ¶¶124-30). Those reasons include: (1) Neal’s membership in a rival street gang that would have made it dangerous for him to be anywhere near Coleman’s home; (2) the implausibility of Neal randomly crossing the border into rival gang territory and choosing a house he was unfamiliar with to commit the crime; (3) the manner in which the body was found, with the victim’s underwear and pants around one ankle; (4) the implausibility of the victim being sexually assaulted and then pulling her pants up for the semen to be deposited in her underwear, but then being assaulted again by the same single person who forcibly pulled her pants and underwear off and down to one ankle; and (5) the brutality of the crime scene, which did not come close to matching any of the subsequent accusations of sexual assault against Neal. (DSOF, ¶¶124-30). With respect to point four, Rotert’s memo asserts, “
[REDACTED]
[REDACTED].” (DSOF, ¶126). The “[REDACTED]” that “[REDACTED]
[REDACTED]
[REDACTED]” (DSOF, ¶128). Sussman also noted that Coleman was the last person seen with the victim, that she was found in Coleman’s basement and that the basement door was blocked from the inside which made it less likely that the crime was committed by a random person unfamiliar with the home. (DSOF, ¶¶137).

Nonetheless, Sussman and his team decided not to re-prosecute because it would be impossible to overcome the burden of proof on a retrial “in this day and age” given the presence

of Clarence Neal's DNA on the victim's underwear, combined with the confessions being contested. (DSOF, ¶¶135-36). Sussman clarified that this "day and age" means he expected a jury to consider allegations of past misconduct against the Chicago Police Department, regardless of whether that consideration was appropriate. (DSOF, ¶136). Put another way, Sussman did not believe jurors would be able to set aside their negative impressions of the Chicago Police Department and focus on the facts, even though Sussman and his team, including Rotert, had concluded the confessions were not coerced and that Neal likely was not involved the violent crime. They also discussed whether Fulton and Coleman would still be a danger to society after 26 years in prison and whether Fulton and Coleman had statistically aged out of being dangerous. (DSOF, ¶138). That discussion would have been unnecessary had Sussman and his team concluded Plaintiffs are innocent. As a result, Sussman and his team made the decision to *nolle* the charges against two people they considered guilty. (DSOF, ¶139-40). "The abandonment of the proceedings does not indicate the innocence of the accused when the *nolle prosequi* results from . . . the impossibility or impracticability of having the accused tried." *Washington*, 127 F.3d at 557 *citing Swick*, 662 N.E.2d at 1243, Restatement (Second) of Torts §§ 660-61 (1970). Taken together, the undisputed facts compel only one conclusion: Plaintiffs' criminal cases were not terminated in a manner indicative of innocence. And because the undisputed evidence shows that the State chose to terminate the proceedings, not because of Plaintiffs' innocence, but because of what they perceived as the impossibility of a retrial despite Plaintiffs' guilt, Plaintiffs cannot establish this element of his malicious prosecution claim. (DSOF, ¶¶134-40).

Plaintiffs' COIs do not change the outcome. Although the Seventh Circuit recently held in *Patrick v. City of Chicago*, 974 F.3d 824 (7th Cir. 2020) that a COI may be relevant to the malicious prosecution inquiry, it also cautioned there are important limitations to that probative value and

that “the admissibility calculus should be weighed with care.”⁶ *Id.* at 833. In other words, COIs are not always relevant or admissible to a malicious prosecution claim, and the facts in *Patrick* illustrate why the COIs in this case cannot create an issue of fact. In *Patrick*, the court found there were “important limits to the probative value” of the plaintiff’s COI, in part because of how the petition was presented to the circuit court (it summarized the evidence of innocence) and in part because of how it was adjudicated (no hearing was held and the CCSAO took no position on the petition). *Id.* at 833. Under the circumstances, the court found the COI “does not really reflect a factual finding arising from the crucible of the adversarial process, which our legal system regards as the best means of discovering the truth.” *Id.* Nonetheless, the court also found that because the COI had some limited probative value, a well-crafted and specific cautionary jury instruction regarding the limits of the COI would be sufficient to guard against unfair prejudice. That limited probative value stemmed from what was notably missing in *Patrick*: evidence from the CCSAO explaining why it agreed to vacate the convictions, drop the charges and not oppose the COIs, leaving the answers to these questions open and disputed.

Here, the COIs have zero probative value because the same questions have been answered. What separates this case from the COI in *Patrick* is former First Assistant Sussman’s undisputed testimony that decisions on COIs were made for reasons other than innocence, and that the

⁶ The COI itself is considered hearsay as “civil judgments are said not to be usable in subsequent proceedings as evidence of the facts underlying the judgment; for as to those facts, the judgment is hearsay.” *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1567 (7th Cir. 1987). Moreover, the findings of fact cannot be judicially noticed because innocence is subject to reasonable dispute. See Fed. R. Evi. 201(b)(2); *U.S. v. Jones*, 29 F.3d 1549, n. 2 (11th Cir. 1994).

decision to vacate Plaintiffs' convictions and not retry them was not based on their innocence. (DSOF, ¶¶143-47). That information was not discussed or even available in *Patrick* because the CCSAO had asserted a deliberative process privilege, precluding any discovery into the decision-making process and reasons to drop the charges against the plaintiff and not to oppose the COI. *See Patrick v. City of Chicago*, 111 F. Supp. 3d 909, 914 (N.D. Ill. 2015) (granting a motion to compel and ordering the CCSAO to produce non-privileged factual materials, but not documents that would reveal its theories, impressions, recommendations, and assessments).

According to Sussman, at the time the COIs were granted in this case the CCSAO was facing what amounts to a budget crisis and had no resources to litigate COIs. (DSOF, ¶¶149-51). Sussman testified that the overriding concern for the CCSAO in deciding whether to oppose petitions for COIs was a lack of resources. (DSOF, ¶151). As a result, it did not oppose COIs in order to preserve resources. (*See* DSOF, ¶¶149-151). Another concern, according to Sussman, was protecting the CCSAO from civil liability exposure. (DSOF, ¶152). And although Sussman acknowledged that in some cases the CCSAO might have also considered the petitioner's innocence in deciding not to oppose a COI, that was clearly not a factor in this case. (*See* DSOF, ¶¶134-47, 153). As of December 1, 2017, the decision-makers in the CCSAO, including Sussman and State's Attorney Foxx, believed Plaintiffs were guilty and the official position to the public was that the CCSAO did not conclude Plaintiffs are innocent. (DSOF, ¶¶ 146-48, 160). There is no evidence these conclusions had changed between December 1, 2017 and March 9, 2018, the date the COIs were granted. (DSOF, ¶¶159-60). That means the decision not to oppose the COI petitions was based on a budget crisis, not a belief in Plaintiffs' innocence, which is why the agreed orders granting Plaintiffs' COIs in this case, as proposed by the CCSAO and accepted by Plaintiffs, include language absolving the CCSAO of misconduct. Thus, while the same concerns the

Seventh Circuit cautioned against in *Patrick* are present here – there was no opposition to the COIs and no adversarial proceeding to test the truthfulness of the allegations – the same limited probative value of the COIs does not exist here. *Patrick*, 974 F. 3d at 833. It is undisputed the CCSAO concluded that Plaintiffs are not innocent and there is no evidence that conclusion has ever changed. As a result, the COIs in this case have no probative value and do not raise a disputed question of fact as to whether the criminal proceedings were terminated in a manner indicative of innocence.

II. There Is No Evidence Halloran, Boudreau, O’Brien, Carroll, Moser, Graf, Kelly or Benoit Were Personally Involved in the Alleged Coercion or Fabrication of Plaintiffs’ Confessions.

In Count I of Coleman’s Complaint (Dkt. 144), and in Count II of Fulton’s Complaint (Dkt. 230), they each bring claims alleging violations of their right to due process under the Fifth and Fourteenth Amendments based on the coercion or fabrication of their confessions.⁷ Coleman also brings a claim in Count III for deprivation of liberty without probable cause under the Fourth and Fourteenth Amendments and a due process claim under the Fourth Amendment, both based in part on the coercion and/or fabrication of his confession. (Dkt. 144). However, the undisputed facts demonstrate that Halloran, Boudreau, O’Brien, Carroll, Moser, Graf, Kelly and Benoit had no involvement whatsoever in any alleged coercion of Plaintiffs or in any other constitutional deprivation in connection with the confessions.

Personal involvement in an alleged constitutional deprivation is a predicate requirement for §1983 liability. *Pepper v. Vill. of Oak Park*, 430 F.3d 805, 810 (7th Cir. 2005) (the individual defendant must have caused or participated in a constitutional deprivation); *Vinning-El v. Evans*,

⁷ Plaintiffs each also allege the other’s confession was “fabrication” evidence, but the confessions are not material to the other’s trials, because they could not be and were not used against each other pursuant to *Bruton v. United States*, 391 U.S. 123 (1968).

657 F.3d 591, 592 (7th Cir. 2011); *Doyle v. Camelot Care Ctrs., Inc.*, 305 F.3d 603, 614 (7th Cir. 2002)). In other words, to be held liable under §1983 the individual defendant must have caused or participated – i.e., have direct personal involvement – in the alleged constitutional deprivation. *Pepper*, 430 F.3d at 810. As such, Plaintiffs “must demonstrate a causal connection between (1) the sued officials and (2) the alleged misconduct.” *Carmody v. Bd. Of Trs. of Univ. of Ill.*, 893 F.3d 397, 401-02 (7th Cir. 2018). It follows, therefore, that to survive summary judgment a plaintiff must offer some evidence that identifies and attributes the claimed misconduct to each particular defendant in order to meet the burden of establishing that defendant’s personal involvement. *See Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017) (finding plaintiff had not met his burden to establish personal involvement of the named defendants where he was unable to identify four named defendants out of ten potential officers who participated in a search that caused the alleged misconduct).

Moreover, participation in an investigation alone is not enough to establish personal involvement in a constitutional deprivation. *See e.g. de Lima Silva v. Wisconsin Department of Corrections*, 917 F.3d 546, 564 (7th Cir. 2019) (finding no personal involvement of two named Defendants in employment discrimination suit where there was no evidence that they were involved in the decision to discharge plaintiff despite their participation in the personnel investigation); *Harold Hill v. City of Chicago*, 2009 WL 174994, *5 (N.D. Ill. Jan. 26, 2009) (finding particular defendants had no involvement in Fifth Amendment deprivation where undisputed evidence establishes they had no interaction or contact with plaintiff during his arrest and interrogation); *Colbert*, 851 F.3d at 657 (finding plaintiff had not met his burden to establish personal involvement of four named defendants where he was unable to identify which of the ten potential officers caused the alleged misconduct). Similarly, the mere fact that some may have

known plaintiffs were being questioned is insufficient, without more, to create a genuine issue of material fact on these claims. *See Burks v. Raemisch*, 555 F.3d 592, 595 (7th Cir. 2009); *Accord Odogba v. Wisconsin Dept. of Justice*, 22 F. Supp. 3d 895, 911 (E.D. Wis. 2014).

A. Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit were not involved in eliciting Coleman's confession.

Coleman was at the police department's Area 1 headquarters ("Area 1") on two separate occasions, once during the evening of April 28, 1994, and again, just after midnight on April 29, 1994. (DSOF, ¶¶14, 25-31, 52-71). By Coleman's own admission, he was not subjected to any coercive or otherwise unconstitutional tactics during his first visit to Area 1 the night of April 28, 1994. (DSOF, ¶31). Coleman testified that he went to Area 1 the first time voluntarily, was not handcuffed or mistreated during the first visit and, after he was interviewed, was returned home. (DSOF, ¶¶25, 30-31). As such, Coleman cannot even establish a constitutional violation during the first visit, let alone a causal connection to any Defendant. *See Carmody*, 893 F.3d at 401-02 (Plaintiff must demonstrate a causal connection between the officials sued and alleged misconduct).

Although Coleman alleges that he was mistreated and coerced into confessing during his second visit to Area 1 between midnight and the start of his court-reported confession at 9:57 a.m. on April 29, 1994, he cannot establish that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit were involved in those events. According to Coleman, Foley and Clancy engaged in most of the allegedly coercive conduct while they were alone in an interview room with him, outside the presence of other officers. (DSOF, ¶¶31, 53-54, 66-67). There are only two instances in which Coleman alleges he was with detectives other than, or in addition to, Foley and Clancy before he gave a court reported statement to ASA Garfinkle. (*See* DSOF, ¶¶54-61). But he cannot

establish that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Benoit or Kelly were involved in either instance.

The first instance occurred shortly after midnight on April 29, 1994, when six unknown detectives allegedly crowded into an interview room with Foley, Clancy and Coleman. (DSOF, ¶54). Coleman has never been able to identify or even describe those other six detectives, other than to say they were white. (DSOF, ¶54). Moreover, the record establishes that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit were not at Area 1 when Coleman was being interviewed by Clancy and Foley on April 29, 1994. (DSOF, ¶¶7, 26, 39-40, 69-70). Boudreau, Halloran, O'Brien, Carroll, Moser and Graf were away that entire time, canvassing the area around Coleman's home for witnesses, trying to locate a suspect (Eddie Taylor) on the west side of Chicago or conducting surveillance of Fulton's home. (DSOF, ¶¶39-40, 69-70). Kelly had gone home after his shift ended at 1:00 a.m. and Benoit was not involved at all in the investigation. (DSOF, ¶¶7, 26).⁸ Without an ability to identify or describe any of these six officers in the room with Foley and Clancy, Coleman cannot establish a genuine issue of material fact that Boudreau, Halloran, O'Brien, Carroll, Kelly, Graf, Moser, Kelly or Benoit were part of the group. *See Colbert*, 851 F.3d at 657 (finding plaintiff had not met his burden of proof on summary judgment to establish personal involvement of four named defendants where he could not identify which of the ten officers present during an allegedly improper search caused the alleged misconduct). In addition, Coleman's description of the event confirms no constitutional deprivation even occurred while he was in the interview room with Foley, Clancy and the six unknown detectives. (DSOF, ¶¶54-58). Although there was some yelling and screaming, there was no physical abuse and no one made any promises or fed him any details about the crime. (*See* DSOF, ¶¶54-58).

⁸ As set forth more fully in Section VI below, Thomas Benoit was mistakenly sued because he has the same last name as a supervisor Coleman apparently intended to sue. (DSOF, ¶7).

The second instance that Coleman was with someone other than Foley and Clancy on April 29, 1994 before he confessed was, according to Coleman, a short time after the six officers and Foley and Clancy left the interview room. A single detective entered the room, alone, and struck Coleman twice in the face. (DSOF, ¶¶59-61). As set forth above, however, it could not have been Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit, because they were not at Area 1 when it allegedly occurred. (DSOF, ¶¶7, 26, 39-40, 69-70). Moreover, Coleman's description of the person who struck him does not match any of them. According to Coleman, the person was a white male, 6'5" to 6'6" tall with a slim to medium build who wore glasses and had black hair slicked to the side. (DSOF, ¶59). Boudreau, Halloran, Carroll, Graf, Moser, Kelly and Benoit do not match any part of Coleman's description. (See DSOF, ¶¶63-64). None of them were 6'5" or 6'6" tall in 1994; none had black, slicked back hair and none wore glasses. (See DSOF, ¶¶63-64). The only detective with a similar physical detail is O'Brien – he was 6'6" tall in 1994 – but nothing else except skin color matches. (See DSOF, ¶63). At 240 lbs., he had a bigger build in 1994 than the person who allegedly struck Coleman and his hair was not slicked back and black. (See DSOF, ¶63). It was reddish brown and greying. (DSOF, ¶63). He was also not the only detective at Area 1 who was 6'6" at the time. (DSOF, ¶63). Although reasonable inferences can be drawn in Plaintiffs' favor at the summary judgment stage, the Court is not required to draw every speculative inference in his favor. See *McCoy v. Harrison*, 341 F.3d 600, 604 (7th Cir. 2003) (the court is not required to draw every conceivable inference from the record and "mere speculation or conjecture will not defeat a summary judgment motion"). Here, there is simply no evidentiary basis for Coleman to suggest, or for the Court to infer, that the person who allegedly struck Coleman is O'Brien simply because O'Brien happened to be the same approximate height as that person, especially where the other descriptive details Coleman provided do not match O'Brien.

More importantly, at the time Coleman claims to have been struck, it is undisputed that Boudreau, Halloran, Carroll, O'Brien Graf, Moser, Kelly and Benoit were not at Area 1 headquarters. (DSOF, ¶¶7, 26, 39-40, 69-70). As set forth above, Kelly had gone home for the night and the rest were away from Area 1. (DSOF, ¶26). And Benoit was mistakenly sued in this matter because of his last name. (DSOF, ¶7). As such, there is no evidence to suggest Boudreau, Halloran, Carroll, O'Brien Graf, Moser, Kelly or Benoit participated in an interrogation of Coleman in which Coleman testified that the misconduct occurred. *See Colbert*, 851 F.3d at 657.

B. Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit were not involved in eliciting Fulton's confession.

Fulton likewise cannot show that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit were personally involved in any aspect of his confession. To begin with, Fulton accuses only Foley, Clancy, O'Brien, Carroll and an unknown African American detective of engaging in any kind of mentally or physically coercive conduct. (See DSOF, ¶¶82-103). Thus, the Court can reasonably conclude that Halloran, Boudreau, Moser, Graf, Kelly and Benoit had no involvement in the alleged coercion of Fulton's confession. *See Hill*, 2009 WL 174994, at * 5 (finding particular defendants had no involvement in constitutional deprivation where undisputed evidence establishes that they had no interaction or contact with plaintiff during his interrogation).

Fulton's deposition testimony likewise confirms that Carroll and O'Brien were not involved in his interviews. (See DSOF, ¶¶82-103). Fulton alleges that he was interviewed a total of four times for approximately 15-20 minutes each time between 7:00 a.m. on April 29, 1994 and midnight on May 1, 1994. (See DSOF, ¶¶82-103). According to Fulton, he interacted with only three detectives during this entire time, and though he identifies them by skin color – two white and one African American – he ultimately concluded at his deposition that the two white detectives were most likely Foley and Clancy. (See DSOF, ¶¶82-103). This means it is undisputed that apart

from the one instance in which an unknown and unidentified African American detective allegedly punched Fulton and threatened to shoot him, no Officer Defendant touched Fulton or threatened him, made any promises to him or fed him any details of the crime. Fulton was able to sleep and use the restroom and even allowed to call his mother, who told him not to sign anything. (DSOF, ¶¶91, 93-94). Setting aside the incident with the African American detective, Fulton's deposition testimony establishes that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit had no involvement with him at Area 1 headquarters. *See Carmody*, 893 F. 3d at 401-02 (Plaintiff must demonstrate a causal connection between the officials sued and alleged misconduct).

There is also no evidence to suggest Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit were aware of, let alone involved with, the incident involving the African American detective striking Fulton, nor does Fulton try to make the connection. He believes Foley and Clancy were the ones who witnessed it, and it allegedly occurred in a closed interview room with only Foley, Clancy, Fulton, and the African American detective present. (DSOF, ¶89). Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit are all white, and all deny interviewing Fulton or having had any involvement in any of his interviews. (*See* DSOF, ¶¶7, 95-97). Halloran and Boudreau were not involved with the case or with Fulton after they brought him to Area 1 at 7:00 a.m. on April 29, 1994 and spoke to him briefly to get his biographical data and his alibi, and Fulton does not allege that Halloran or Boudreau engaged in any misconduct towards him during their brief interview with him, or at any other point for that matter. (*See* DSOF, ¶¶83-84). Carroll and O'Brien were away from Area 1 for most of the day on April 29, and when they returned, they were tasked with finding and interviewing Fulton's alibi witness. (DSOF, ¶97). They did not have any conversations with Fulton. (DSOF, ¶¶96-97). Moser, Graf, Kelly, and Benoit all deny having had any involvement with Fulton, and Fulton himself has no way of

rebutting these denials, nor does he even try. (DSOF, ¶¶7, 95). At his deposition, Fulton did not try to make a case that anyone but Garfinkle, Clancy, Foley and the unknown African American detective are to blame for his confession. (See DSOF, ¶¶82-103). Accordingly, there is no triable issue of fact to suggest Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit were personally involved in allegedly coercing Fulton's confession.

III. There Is No Evidence That Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit Fabricated Evidence Used to Deny Plaintiffs Their Liberty.

In Count II of Coleman's Complaint (Dkt. 144) and in Count I of Fulton's Complaint (Dkt. 230), they each claim their right to due process under the Fourteenth Amendment were violated based on the coercion or fabrication of other evidence and witness statements. Coleman also brings a claim in Count III for deprivation of liberty without probable cause under the Fourth and Fourteenth Amendments and a due process claim under the Fourth Amendment, both based in part on the coercion or fabrication of other evidence and witness statements. (Dkt. 144).

A police officer who manufactures false evidence against a criminal defendant violates due process "if that evidence is later used to deprive the defendant of [his] liberty in some way." *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012). "On the other hand, a claim that an officer coerced a witness to give incriminating evidence does not, at least standing alone, violate the wrongly convicted person's due process rights." *Avery v. City of Milwaukee*, 847 F.3d 433, 439 (7th Cir. 2017). To violate due process, the fabricated evidence must have "involved not merely the fabrication, but the introduction of the fabricated evidence at the criminal defendant's trial" because "if the evidence hadn't been used against the defendant, he would not have been harmed by it, and without a harm there is ... no tort." *Fields v. Wharrie* ("*Fields II*"), 740 F.3d 1107, 1114 (7th Cir. 2014). More fundamentally, the factual allegations must set forth a *bona fide* due process violation, not a malicious prosecution claim. *McCann v. Mangialardi*, 337 F.3d 782,

786 (7th Cir. 2003) (“[T]o the extent [plaintiff] maintains that [defendant] denied him due process by causing him to suffer ‘[a] deprivation of liberty from a prosecution and a contrived conviction . . . deliberately obtained from the use of false evidence,’ his claim is, in essence, one for malicious prosecution, rather than a due process violation.”) (citation omitted).

As with their alleged coerced confessions, Plaintiffs put most of the blame on Foley and Clancy for having fabricated the police reports and their own statements. (See DSOF, ¶¶67, 92-93). And although Plaintiffs initially alleged in their Complaints that the statements of Michael Barber, Francine Calimee and Shaunice Williams were entirely coerced and/or fabricated, in their written discovery responses Plaintiffs have since backed off that broad claim in light of the depositions of all three witnesses, each of whom confirmed under oath there was no coercion and that their statements were accurate, with a few exceptions. (DSOF, ¶¶18-21, 47, 49, 51). Plaintiffs supplemented their discovery responses to account for those exceptions. They now allege that the following evidence was fabricated: (1) the entire initial Cleared Open Supplemental Report submitted June 9, 1994 (“First Supp Report”); (2) a single line from Barber’s handwritten statement; (3) the claim in the First Supp Report that Francine Calimee and Shaunice Williams feared Coleman; (4) the inculpatory descriptions in the general progress report (“GPR”) by Clancy regarding the timeline (bates labeled City 1948);⁹ (5) the June 6, 1994 GPR regarding Eddie Taylor (bates labeled City 1952) and the Cleared Closed Supplemental Report (“Second Supp Report”) (bates labeled City 1816-20) submitted June 10, 1994; and (6) Halloran’s trial testimony that Fulton may have been trying to evade police when they found him. (DSOF, ¶¶15, 72, 77, 104-05).

⁹ The complete version of this GPR is labeled CCSAO 1022-1023.

A. There is no evidence that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit fabricated the First Supp Report, the GPR by Clancy regarding the timeline, or the GPR and Second Supp Report regarding Eddie Taylor.

Plaintiffs cannot establish that Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit had any role creating the First Supp Report, the GPR by Clancy regarding the timeline, or the GPR and Second Supp Report regarding Eddie Taylor. The evidence is undisputed that the First Supp Report and the GPR and the Second Supp Report were created by Foley and Clancy, not anyone else. (DSOF, ¶105). And Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit have each denied that they created or reviewed the documents. (DSOF, ¶¶7, 26, 72, 77, 105). As for Clancy's GPR regarding the timeline, Plaintiffs do not even contend anyone other than Clancy wrote it, nor could they as his is the only reporting officer's name that appears on the report. (See DSOF, ¶77). Accordingly, Plaintiffs cannot maintain a fabrication claim against Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit based on the First Supp Report, the GPR by Clancy regarding the timeline or the GPR and Second Supp Report regarding Eddie Taylor.

B. Barber's handwritten statement was not coerced or fabricated.

Plaintiffs allege that Defendants Graf and Garfinkle fabricated a single line from Barber's handwritten statement that Coleman told him the smell coming from the basement of his house was a dead body. (DSOF, ¶15). Given Plaintiffs' allegation that only Graf and Garfinkle were involved in eliciting this statement, summary judgment in favor of the other Defendants who are not alleged to be involved in obtaining this statement is appropriate.

There is also no evidence that Barber's statement was false or coerced, or that Graf knew it was false or coerced. In *Fields II*, the court explained there is a critical difference between coercing witnesses to testify and fabricating their testimony. 740 F.3d at 1110 (Coerced testimony

is testimony that a witness is forced by improper means to give; the testimony may be true or false. Fabricated testimony is testimony that is made up; it is invariably false. False testimony is the equivalent; it is testimony known to be untrue by the witness and by whoever cajoled or coerced the witness to give it.). In *Petty v. City of Chicago*, plaintiff alleged that Officer Defendants coerced a witness into giving false evidence by threatening him with jail time if he did not cooperate, holding him against his will for over 13 hours, badgering him, and pressuring him to identify plaintiff as an assailant. 754 F.3d 416, 423 (7th Cir. 2014). Yet there was no allegation that the officers knew the evidence they coerced was false. *Id.* As a result, the court concluded Petty's claim was "a 'coercion' case for which there is no cognizable due process claim, as opposed to an 'evidence fabrication' case where there is a cognizable claim." *Id.* at 422-23.

Here, Barber has confirmed on multiple occasions under oath that his entire handwritten statement is accurate. (DSOF, ¶¶18-21). And although he could not remember whether Coleman said the smell coming from the basement of his house was a dead body or whether he told police Coleman made the comment, he has never denied that Coleman made the comment or that he told police Coleman made the comment. (DSOF, ¶¶18-21). Moreover, Barber's inability to remember whether Coleman made the statement or whether Barber relayed it to police is not the same as a denial, nor is it sufficient to create a triable issue of fact. *See Chicago United Industries, Ltd. v. City of Chicago*, 669 F.3d 847, 853 (7th Cir. 2012) (holding that a witness's testimony that he does not recall ordering something was not enough to raise a triable issue of fact at the summary judgment stage); *See also Garcia v. City of Chicago*, 2012 WL 601844, *4 (N.D. Ill. Feb. 23, 2012) (citing *Chicago United Industries, supra*) (court held that a witness's testimony that he *did not remember* a conversation is evidence only of his failure to remember, not of a denial). Finally,

there is no evidence that Graf knew the statement was false or that he helped to coerce or fabricate it.

C. There is no evidence that the statements attributed to Francine Calimee and Shaunice Williams caused a constitutional deprivation.

Plaintiffs allege that Foley, Clancy and Boudreau included false information in “their reports” of the interviews of Calimee and Williams; namely that Calimee and Williams never told anyone that Bridgeman left the party with Coleman because they were afraid of the Gangster Disciples and afraid for their safety. (DSOF, ¶32). Given Plaintiffs’ allegation that only Foley, Clancy and Boudreau were involved in fabricating this statement, summary judgment in favor of the other Defendants who are not alleged to be involved is appropriate.

There is also no evidence to suggest Boudreau had any role in the alleged fabrication of the statement. The only report in which the line is documented is the First Supp Report, which Boudreau had no role in creating. (DSOF, ¶32). For that reason alone, the claim fails as to him.

The claim likewise fails because the alleged fabrication was not used at trial and therefore cannot be material. To violate due process, the allegedly fabricated evidence must have “involved not merely the fabrication, but the introduction of the fabricated evidence at the criminal defendant’s trial,” because “if the evidence hadn’t been used against the defendant, he would not have been harmed by it, and without a harm there is ... no tort.” *Fields II*, 740 F.3d at 1114; *See also Whitlock*, 682 F.3d at 582 (“[I]f an officer fabricates evidence and puts that fabricated evidence in a drawer, making no further use of it, then the officer has not violated due process”).

In this case, Calimee did not testify at trial that she was afraid of Coleman or the Gangster Disciples or that she withheld information from police because of those fears. (DSOF, ¶46). Similarly, Williams did not testify at the trial that she was afraid of Coleman or the Gangster Disciples or that she withheld information from the police because of those fears. (DSOF, ¶50).

Thus, there is no factual basis for the fabrication claim based on that specific subject matter from the First Supp Report.

Nor is there a basis to argue Williams' trial testimony regarding her fears is actionable. Williams testified at the criminal trial that she initially did not tell the police that Coleman left the party with her and the victim because she was "scared that that had happened to [Bridgeman] and she was my friend and it could have happened to me." (DSOF, ¶50). At her deposition, she confirmed her trial testimony was truthful and accurate. (DSOF, ¶51). Thus, not only is the alleged fabricated statement in the First Supp Report not actionable, but the actual testimony Williams gave at trial is likewise not actionable, because Williams confirmed it was the truth.

D. Plaintiffs cannot maintain a cognizable §1983 claim based on Halloran's trial testimony.

Plaintiffs contend that Defendant Halloran is liable for a due process violation under the Fourteenth Amendment based upon his allegedly false testimony at Plaintiffs' criminal trial that he observed Plaintiff Fulton exit the rear of the Coleman residence as other detectives entered the front of the house, implying that Fulton was trying to escape. (DSOF, ¶79). This observation was not documented in any report and there is no evidence it was otherwise communicated to anyone or used for any purpose prior to trial. (DSOF, ¶80). Assuming for purpose of this motion that Halloran's trial testimony was not true,¹⁰ Plaintiffs cannot state a cognizable due process claim based on it, because police officers have absolute immunity from suit under §1983 for giving allegedly false testimony at trial proceedings, even when that testimony deprives a party of his right to a fair trial. *Briscoe v. LaHue*, 460 U.S. 325 (1983).

¹⁰ Halloran denies that he gave any false testimony.

IV. There Is No Evidence to Support the Conspiracy and Failure to Intervene Claims as to Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit.

In Counts V and VI of Coleman's Complaint (Dkt. 144) and Counts III and IV of Fulton's Complaint (Dkt. 230), they bring §1983 claims that Defendants conspired to frame and compel them to provide involuntary inculpatory statements, and/or that they failed to intervene. As such, Plaintiffs' claims of conspiracy and failure to intervene rest on their alleged coerced confessions and the circumstances surrounding those confessions. As outlined above, there is no evidence to suggest that any other Officer Defendant besides Foley and Clancy were involved in securing their confessions and therefore, Plaintiffs' claims of conspiracy and failure to intervene against all other named Defendants fail.

Conspiracy is not an independent basis of liability in §1983 actions. *Smith v. Gomez*, 550 F.3d 613, 617 (7th Cir. 2009). As such, if a plaintiff fails to prove an underlying constitutional injury, any attendant conspiracy claim necessarily fails. *Hill*, 2009 WL 174994, at *9 (N.D. Ill. Jan. 26, 2009); *See also Celafu v. Village of Elk Grove*, 211 F.3d 416, 423 (7th Cir. 2000). In addition, while in some circumstances a state actor's failure to intervene in a violation of another's constitutional rights can serve as a basis for §1983 liability, "in order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation." *See Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005). A plaintiff may state a claim for failure to intervene by showing that "any constitutional violation has been committed by a law enforcement official; and the [defendant] had a realistic opportunity to intervene to prevent the harm from occurring." *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994) (emphasis omitted); *Hobbs v. Cappelluti*, 899 F. Supp. 2d 738, 754 (N.D. Ill. 2012).

Here, there is no evidence that any Officer Defendant other than Clancy and Foley were personally involved in securing Plaintiffs' allegedly fabricated and coerced confessions. (DSOF,

¶¶7, 26, 31, 38, 51-69, 78-100). In addition, the undisputed evidence in the record establishes that no other Officer Defendant other than Clancy and Foley were present at Area 1 in the same room as Plaintiffs when the events giving rise to their confessions allegedly occurred or when any other alleged misconduct occurred. (DSOF, ¶¶7, 26, 31, 38, 51-69, 78-100). As such, Plaintiffs cannot establish that any Officer Defendant had a realistic opportunity to intervene. *See Yang*, 37 F.3d at 285. Plaintiffs' claims against Defendants Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit for conspiracy and their alleged failure to intervene must therefore be dismissed. *See Celafu*, 211 F.3d at 423; *Harper*, 400 F.3d at 1064 (Plaintiff's failure to establish an underlying constitutional violation warrants dismissal of their dependent failure to intervene claim).

V. There Is No Evidence That Any Defendant Suppressed or Withheld Exculpatory Evidence.

In Count IV of his Complaint, Coleman makes the generic allegation that all Defendants withheld, suppressed or destroyed unknown evidence. (Dkt. 144, ¶129). In his written discovery responses, Fulton also claims certain aspects of the witness interviews were suppressed or withheld. Neither Plaintiff can demonstrate a triable issue of fact that a *Brady* violation occurred. To support their *Brady* claims, Plaintiffs must prove three elements: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or because it was impeaching; (2) the evidence must have been suppressed by the state, either willfully or inadvertently; and (3) the evidence must have been material, meaning that if it had been disclosed, there is a reasonable probability the proceeding would have resolved differently. *Carvajal v. Dominguez*, 542 F.3d 561, 566–67 (7th Cir. 2008). The materiality element is often referred to as “prejudice.” *Id.* at 566. Here, Plaintiffs cannot identify any specific existing evidence that was material to their criminal trials which was suppressed by Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or

Benoit. Lacking that evidence, Plaintiffs have attempted to recast their fabrication of evidence claims as violations of *Brady*, which is prohibited under well-established law.

A. Plaintiffs cannot recast their fabrication claims as *Brady* claims.

Plaintiffs allege that all Officer Defendants withheld, concealed, or intentionally omitted documentation of exculpatory evidence relating to the statements of Barber, Calimee, Williams, Coleman and Fulton. (See Dkt. 144, ¶¶129, 172; Dkt. 230, ¶¶89, 123-29; DSOF, ¶¶1 32, 72, 77, 79-80, 103-106). As an initial matter, and as set forth above, there is no evidence that the statements of Barber, Calimee or Williams were coerced or fabricated, and therefore Plaintiffs' *Brady* claims as to the manner in which those statements were obtained fails as a matter of law. (See DSOF, ¶¶15-21, 32-50). Setting that defect aside, Plaintiffs' allegations still cannot support viable *Brady* claims based on the alleged fabrication of those statements. Withholding the truth in the form of detectives' accounts of interviews is not suppression of evidence for purposes of *Brady* and the Seventh Circuit has refused to extend *Brady* to encompass the theory that a police officer suppresses evidence by giving the prosecution a false account of an interview. See *Carvajal*, 542 F.3d at 567; *Harris v. Kuba*, 486 F.3d 1010, 1016-17 (7th Cir. 2007). As the Seventh Circuit explained in *Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015), reh'g denied (Feb. 26, 2015):

In the end, [plaintiff] seeks to charge the officers with a *Brady* violation for keeping quiet about their wrongdoing [fabricating evidence], not for failing to disclose any existing piece of *evidence* to the prosecution. But our case law makes clear that *Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution.

The same is true for the allegation that Defendants failed to disclose the alleged “systemic torture” by the Chicago Police Department, because the alleged misconduct Plaintiffs believe should have been disclosed involved the same type of alleged mistreatment of witnesses and/or parties during interviews, for which there is no obligation to disclose. *Saunders-El*, *supra*.

In addition, Plaintiffs' *Brady* claims regarding their coerced confessions must fail because the alleged failure to disclose the coercive circumstances of one's own confession does not state a viable *Brady* claim. *Sornberger v. City of Knoxville, Ill.*, 434 F.3d 1006, 1028 (7th Cir. 2006); *Wallace v. City of Chicago*, 440 F. 3d 421, 429-30 (7th Cir. 2006) ("A section 1983 plaintiff cannot base his *Brady* claim on a defendant's failure to disclose plaintiff's own false confession."); *Walden v. City of Chicago*, 755 F. Supp. 2d 942, 965 (N.D. Ill. Dec. 21, 2010).

B. Plaintiff Coleman's generic allegation that Defendants suppressed, withheld or destroyed unknown documents fails as a matter of law.

In Count IV of his Complaint, Coleman also makes generic allegations that all the Officer Defendants withheld, suppressed or destroyed evidence of Coleman's innocence. (Dkt. 144, ¶131). But to present a viable *Brady* claim, a plaintiff must identify specific evidence that was suppressed and explain how it was material. Plaintiffs cannot support a *Brady* claim with mere speculation that Defendants destroyed or suppressed unknown documents or police reports. *See Hill*, 2009 WL 174994, *4 (finding plaintiff's speculation that a certain police report existed and was suppressed insufficient to establish a *Brady* claim); *U.S. v. Roberts*, 534 F.3d 560, 572 (7th Cir. 2008) (plaintiff must provide some evidence other than mere speculation or conjecture that evidence was exculpatory and suppressed by the Government). Coleman therefore cannot maintain a *Brady* claim based on his speculation that unknown documents or evidence favorable to him existed and were suppressed.

VI. Defendant Benoit Was Improperly Sued by Coleman and Should Be Dismissed.

Coleman sued the wrong person named Benoit under a direct participation theory and under a theory of supervisor liability in Count VII of his Complaint (Dkt. 144) for alleged misconduct in "[approving] the supplementary report that contained the false information" prepared by the other

named Officer Defendants.¹¹ (See Dkt. 144, DSOF, ¶¶7, 72, 104-06). It is undisputed, however, that Defendant Thomas Benoit was not a supervisor in 1994 and was not in any way involved in the Bridgeman murder investigation. (DSOF, ¶7). His name and star number, 7930, do not appear in any police report related to this investigation, nor did he perform any tasks related to the investigation. (DSOF, ¶7). It appears Coleman mistook Defendant Thomas Benoit for Sgt. Daniel Benoit, whose name and star number, 2249, does appear in several police reports in this case as the sergeant who approved the reports. (DSOF, ¶7). Coleman would have learned of this mistake when he took Defendant Benoit's deposition on November 19, 2019, but he did not amend his Complaint to name Daniel Benoit. See Dkt. 144. Thomas Benoit had no personal involvement and should be dismissed from the case. *Pepper*, 430 F.3d at 810 (personal involvement in an alleged constitutional deprivation is a predicate requirement for §1983 liability).

VII. The State Law Claims for IIED and Conspiracy Fail.

A. Plaintiffs' IIED claims are time-barred as to all Defendants.

In Count IX of Coleman's Complaint (Dkt. 144) and Count VII of Fulton's Complaint (Dkt. 230), Plaintiffs bring claims for IIED. The statute of limitations for a claim alleging IIED against a public official in Illinois is one year. See 735 ILCS 10/8-101(a). "The Seventh Circuit has broadly held 'that a claim of intentional infliction of emotional distress in the course of an arrest and prosecution accrues on the date of the arrest.'" *Friends-Smiley v. City of Chicago*, 2016 WL 6092637, at * 2 (quoting *Bridewell v. Eberle*, 730 F.3d 672, 678 (7th Cir. 2013)). This is true even where the distress alleged is intertwined with a claim for malicious prosecution. *Id.* "To the extent that Plaintiffs attempt to characterize Defendants' actions as a 'continuous tort' for limitations purposes, that route is similarly foreclosed for IIED claims." *Id. citing Bridewell*, 730

¹¹ As set forth above, Fulton did not sue Thomas Benoit or Daniel Benoit.

F.3d at 678. Here, it is undisputed that Plaintiff Coleman was arrested on April 29, 1994, and Plaintiff Fulton was arrested April 30, 1994, which means their IIED claims should have been filed no later than April 1995 to be timely. (DSOF, ¶¶70, 99). Plaintiffs' failure to raise these claims until 2018 when the instant lawsuit was filed means their IIED claims are time-barred and must be dismissed.

B. Plaintiffs' conspiracy and IIED claims are derivative and therefore fail as to Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit.

Civil conspiracy under Illinois law, much like a §1983 conspiracy claim, is not an independent tort. Therefore, if “a plaintiff fails to state an independent cause of action underlying [the] conspiracy allegations, the claim for conspiracy also fails.” *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶49 quoting *Indeck North American Power Fund, L.P. v. Norweb PLC*, 316 Ill.App.3d 416, 432 (2000). Similarly, a cause of action for IIED must be premised on conduct that is so extreme and outrageous that it goes beyond all possible bounds of decency. *Public Finance Corp v. Davis*, 66 Ill.2d 85, 90 (1976). As such, if a Plaintiff cannot establish that a Defendant engaged in the conduct that caused the underlying harm complained of, the claim for IIED must fail.

As with their §1983 conspiracy and failure to intervene claims, Plaintiffs base their claims under state law for conspiracy and IIED based on the same circumstances surrounding their allegedly fabricated and coerced confessions. There is no evidence in the record, however, that any Officer Defendant other than Clancy and Foley were personally involved in securing Plaintiffs' allegedly fabricated and coerced confessions. (DSOF, ¶¶7, 26, 31, 42, 52-103). Therefore, because Plaintiffs' IIED and Illinois conspiracy claims derive from their constitutional claims, these claims must be dismissed against all Officer Defendants except Clancy and Foley.

C. There is no evidence to support a state law conspiracy claim as to Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly or Benoit.

Under Illinois law, a civil conspiracy requires, “(1) an agreement between two or more persons for the purpose of accomplishing either an unlawful purpose or a lawful purpose by unlawful means; (2) at least one tortious act by one of the co-conspirators in furtherance of the agreement that caused the injury to the Plaintiff. *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 509 (7th Cir. 2007) *citing McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 133 (1999). An agreement is a “necessary and important” element of this cause of action, and “[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). Plaintiffs have alleged a conspiracy in only the most generic, boilerplate terms and discovery has produced no evidence of a conspiracy. (See Dkt. 144, ¶¶176-78; Dkt. 230, ¶¶179-83; DSOF, ¶¶7, 26, 31, 42, 52-103). They have not pointed to any specific tortious act by the alleged co-conspirators and instead, can only speculate that because Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit worked together and communicated with each other, they must have conspired with each other. (DSOF, ¶¶7, 26, 31, 42, 52-103). This kind of speculative hypothesizing without evidence is insufficient to create a triable question of fact. *United States v. Sullivan*, 903 F.2d 1093, 1099 (7th Cir. 1990) (hypothesizing that activities were part of a conspiracy based on “piling inference upon inference [is] a practice disapproved of by the Supreme Court”).

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant this motion and enter summary judgment in their favor and against Plaintiffs as follows: (1) for all Defendants on the malicious prosecution claims in Count VIII of Coleman's Complaint and Count VI of Fulton's Complaint; (2) for Defendants Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit on all federal and state law claims in both Complaints; (3) for all Defendants on the *Brady* claim in Count IV of Coleman's Complaint and any similar claim by Fulton; (4) for Defendant Benoit on all claims in Coleman's Complaint; and (5) for all Defendants on the IIED claims in Count IX of Coleman's Complaint and Count VII of Fulton's Complaint. Further, because the relief sought on behalf of Defendants Halloran, Boudreau, O'Brien, Carroll, Moser, Graf, Kelly and Benoit is complete, those Defendants should be dismissed from the lawsuits with prejudice.

Respectfully submitted,

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