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

Mario Casciaro,	)	
	)	
Plaintiff,	)	
	)	Case No. 17 C 50094
v.	)	
	)	Judge Philip G. Reinhard
Keith Von Allmen *et al.*,	)	
	).	
Defendants.	)	

ORDER

For the reasons stated below, the motion for summary judgment [164], filed by defendants Keith Von Allmen, Kenneth Rydberg, and the Village of Johnsburg, is denied in all respects except that summary judgment is granted to defendant Von Allmen on the §1983 supervisory liability claim (Count V). The parties are directed to contact the court's courtroom deputy within 30 days to arrange a telephonic conference with this court to discuss settlement options.

STATEMENT-OPINION

The broad factual and legal framework of this case remains largely the same as it was in 2017 when this court denied the defendants' motion to dismiss [49], which raised a number of the same arguments raised here. Not surprisingly, however, the factual picture has deepened greatly after discovery, and the court is presented with a stack of exhibits covering events over a decade, with deposition testimony from many witnesses. The central question now is whether the case must be tried by a jury or whether it instead can be ended, entirely in defendants' favor, based on the paper record. The short answer is that too many factual disputes remain to allow for summary judgment on all the claims.

This case arises out of the presumed murder of 17-year-old Brian Carrick in Val's Finer Foods ("Val's") in Johnsburg, Illinois on Friday evening December 20, 2002. Carrick's body was never found but everyone agrees that he was killed in a fight in or around the produce cooler at around 6:45 to 7:05 p.m. and that his body was taken to a dumpster behind the store soon thereafter. There were no independent eyewitnesses to the altercation, but many people were in the store at the time, including plaintiff Mario Casciaro, Carrick's brother Eddie, Jacob Kepple, and a young man named Robert Render, Jr., who is the person plaintiff believes likely killed Carrick. Plaintiff states that he had an "airtight alibi" because six witnesses confirmed that he was in the breakroom at the other side of the store eating a pizza during the time the murder took place.

Although the case was investigated heavily in the days and weeks after the murder, and

more sporadically thereafter, no charges were brought against anyone for the murder until early 2010 when plaintiff was charged with murder. Defendant Keith Von Allmen was involved in the investigation throughout this time. Initially, William Gruenes was the lead investigator, but Von Allmen took over when Gruenes died in a car accident a month later. Rydberg was Chief of Police up until July 2010 when he retired, and Von Allmen then became the Chief. In general, Rydberg acted as a supervisor and was less active in the day-to-day investigation than Von Allmen. These two defendants are represented by the same counsel for this motion and make similar arguments, although in a few places they offer arguments more tailored to their individual roles.

Insofar as the court can tell, investigators did not view plaintiff as a suspect until many years into the investigation.[1] The case against him was jumpstarted in early 2010—over seven years after the murder—when Shane Lamb, who was then in prison, made a confession. Lamb stated that he accidentally killed Carrick while trying to collect a drug debt Carrick supposedly owed plaintiff. In short, he was plaintiff's enforcer. Lamb was given full immunity from the McHenry County State's Attorney's Office for his testimony. Although Lamb's story has changed over time, the gist of the story is something along the following lines. Plaintiff called Lamb to come to the store that evening to put pressure on Carrick to pay the debt. Although Carrick was not working, he had dropped by the store to pick up his paycheck. Lamb and Carrick got into an argument in or around the produce cooler. Plaintiff was standing nearby. The verbal argument escalated, and Lamb and Carrick began fighting. Lamb, who was much bigger, lost his temper and hit Carrick in the face and knocked him out. Lamb left the produce cooler with plaintiff still standing there and with Carrick unconscious on the floor. Lamb assumed that plaintiff then disposed of the body. Lamb never claimed that plaintiff joined in Lamb's verbal or physical exchanges with Carrick. This was Lamb's story.

Plaintiff was indicted by the grand jury in February 2010 for multiple counts of first-degree murder. He was detained at the McHenry County Jail from February 27, 2010 to April 18, 2011. The first trial took place in 2012 and ended in a hung jury. A second trial was held in 2013. Prosecutors dropped all counts except a single count for felony murder predicated on intimidation. On April 2, 2013, the jury found plaintiff guilty on that count. Plaintiff was detained at the McHenry County Jail from April 2, 2013 until December 10, 2013 when he was transferred to the Illinois Department of Corrections. On November 14, 2013, plaintiff was sentenced to 26 years in the Illinois Department of Corrections. The prosecutor for these trials was Michael Combs, and plaintiff was represented by attorney Brian Telander.

Plaintiff filed an appeal. On September 17, 2015, the Illinois appellate court reversed the conviction without remand in a long and thorough 36-page decision, finding that no rationale trier of fact could have found that the essential elements of the crime had been proven beyond a reasonable doubt. *See People v. Casciaro*, 49 N.E.3d 39, 53 (Ill. App. Ct 2015). It is fair to say that the appellate court was extremely critical of the state's case, finding both the legal theory and factual support for the charge were lacking in multiple respects. This court will not summarize all of the many criticisms set forth in that decision, which can be read by anyone seeking further

[1] In his deposition, Von Allmen stated that he has never believed that plaintiff killed Carrick. Def. Ex. 2 at 187.

background about this case.[2] But the court will list the key findings. First, the appellate court rejected the state's legal theory, stating first that it "found no case in which intimidation has been used as the predicate forcible felony to prove felony murder." *Id.* at 54. Second, the state's theory at trial was that plaintiff used Lamb's mere presence as an "instrument of intimidation" to threaten Carrick, but Lamb testified to the "exact opposite," stating affirmatively that plaintiff "did *not* ask him to threaten Carrick or to harm Carrick." *Id.* at 56 (emphasis in original). In other words, even if a jury could find that Lamb was fully credible, his testimony still did not prove the legal elements. Third, contrary to the state's theory that plaintiff called Lamb to come to the store that night, plaintiff's phone records "conclusively demonstrated that he did not call or chirp Lamb." *Id.* at 57. Fourth, although the state presented a few other witnesses at trial, their testimony was "so impeached as to be valueless." *Id.* The appellate court noted that the state "invested everything in Lamb by granting him complete immunity, but Lamb failed to supply *any* evidence that [plaintiff] used him to threaten Carrick." *Id.* (emphasis in original). Fifth, the "physical evidence and the testimony of disinterested witnesses show[ed] that whatever happened to Carrick could not have been what Lamb portrayed." *Id.* at 59. In particular, Lamb claimed that nothing happened in the hallway outside the produce cooler, but the blood evidence showed otherwise. *Id.* Sixth, the forensic evidence rebutted Lamb's claim about who was present during the altercation. Most relevant to the present case, the appellate court summarized the evidence showing that Render was there and likely involved in the killing:

> The blood at the scene is also irreconcilable with Lamb's testimony that only he, [plaintiff], and Carrick were involved. Two persons' blood was found at the scene: Render's and Carrick's. Render's blood was also found on one of his own shoes. In closing argument, the State accounted for Render's blood with the outlandish theory that he bit his fingernails. Render cannot so easily be dismissed. Kepple testified that Render was missing between 5 p.m. and 7 p.m., and when Kepple next saw him he was by the mop room. Smith testified that Carrick entered the break room at 6:45 p.m. and asked where Render was. Two days after Carrick's disappearance, Render quit his job at Val's Foods. Six days later his father reported that he ran away from home.

Id. Seventh, numerous witnesses, including the victim's brother, confirmed that plaintiff was in the breakroom on the opposite side of the store at the likely time of the murder. The appellate court noted that the victim's brother was unlikely to "provide [the] accused killer with a false alibi." *Id.* at 60. Eighth, the appellate court listed many additional reasons why Lamb was completely lacking in credibility, including his agreement with prosecutors giving him full immunity for his alleged killing of Carrick and reducing the time he would have to serve on pending cocaine charges; his expectation that the prosecutor would provide other additional favors; his statement that he "lied whenever it suited him"; and the fact that he "changed and embellished" his story each time he told it. *Id.* In conclusion, the appellate court stated that the entire case was based on Lamb's testimony and that testimony was "so fraught with inconsistencies and contradictions" that no rationale trier of fact could believe it. *Id.* at 61.

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[2] Even though the decision was lengthy, the appellate court recognized that it still was not able to provide a "point-by-point discussion" of all the evidence because to do so would "amount to a retrial on appeal." 49 N.E.3d at 54.

Before turning to the specific fact disputes that take up the bulk of the briefs, the court will first sketch out each side's main arguments. Plaintiff's theory is that, from the very beginning, the evidence pointed strongly to Render as the killer. This argument rests on the evidence summarized above and on additional evidence presented in this case. Plaintiff asserts that Von Allmen and Rydberg steered the investigation away from Render because Von Allmen was friends with Render's father (Robert Render, Sr.). Plaintiff's case is circumstantial but is built on numerous suspicious incidents during the multi-year investigation. According to plaintiff, defendants repeatedly and inexplicably mishandled the investigation in a way that often led to the suppression of evidence inculpating Render. In short, there were simply too many anomalies for them all to be accidental. As a result, plaintiff was wrongfully charged with murder and needlessly incarcerated, both before and after trial.

Defendants do not set forth one simple overarching theory. Instead, they take a more piecemeal approach by choosing to keep the analysis confined to one piece of evidence at a time. Still, at various points, they seem to concede that the overall investigation might have been "incomplete" or "ineffective" and that perhaps some mistakes were made in handling the evidence and in documenting steps in the investigation. But they strenuously deny the allegation that these mistakes were purposeful or designed to protect Render or anyone else. They note that they were only a small part of a larger, multi-agency investigation with hundreds of interviews conducted by numerous people. None of these investigators, nor the prosecutor, have stated that they suspected that defendants were manipulating the evidence. In addition, defendants argue that, even if a jury could find that they intentionally suppressed evidence, their wrongdoing was not the proximate cause of plaintiff's harm. The prosecutor (Combs) made an independent decision to charge plaintiff based entirely on Lamb's 2010 confession and not based on any of their earlier investigation. They also state that they expressed concern to Combs about the weakness of his case against plaintiff, but Combs forged ahead without listening to them. They also argue that plaintiff's trial counsel (Telander) was either aware of the allegedly suppressed evidence or could have discovered it. They say that the facts inculpating Render were investigated and known to everyone, and they always treated him as a suspect.[3]

FACT DISPUTES

Set forth below is a discussion of the key fact disputes raised in the briefs. Because the court is considering a motion for summary judgment brought by defendants, the court is required to "view the facts in the light most favorable to the nonmoving party [*i.e.* plaintiff], and [to] draw all reasonable inferences in his favor." *Pack v. Middlebury Community Schools*, __ F.3d __, 2021 WL 915911, *2 (7th Cir. Mar. 10, 2021). The court may not grant summary judgment if there are genuine disputes about material facts. Fed. R. Civ. P. 56(a).

Gebauer Interviews in 2002. Anthony Gebauer was 15 years old and an employee of Val's in late 2002, but he was not at the store on the night of the murder. Two days later, on

[3] According to Telander, Render died sometime between the time of plaintiff's first and second trials. Def. Ex. 13 at 37.

December 22, 2002, he was interviewed at the store by Von Allmen and Gruenes. Def. Ex. 15.[4] According to an affidavit later signed by Gebauer and also as confirmed in his deposition testimony, he told the two detectives information that plaintiff contends was extremely important bearing on Render's motive to kill Carrick. Specifically, Gebauer testified that he told the detectives that Render had told him a week before the murder that Render "was pissed off" at Carrick about owing him money, that he was "going to jump" Carrick, and that he had a weapon and would hurt Carrick "more than just [a] normal fistfight." Def. Ex. 14 at 39, 41, 54, 56. However, this information was not included in the police report summarizing this interview. But as defendants are quick to point out, the report was prepared by Gruenes, not Von Allmen, and was later approved by Brogan.

Gebauer was interviewed again a week later, on December 29th, but neither defendant was present. This interview was conducted by James Andriakos, an investigator for the Illinois State Police, and Sean Grosvenor. Gebauer testified in his deposition that he believes that he also conveyed in this interview the same facts recounted above. Defendants dispute this claim, citing to an affidavit submitted by Andriakos in 2019 in which he denied that Gebauer made any such statements. Def. Ex. 16. Further, Andriakos stated in the affidavit and in the police report at the time that Gebauer was asked during the December 29th interview whether he knew of anyone who might want to harm Carrick, and Gebauer stated that he did not. *Id.* This suggests that Gebauer did not even think there was a low-level, lingering feud at the time between Render and Carrick.

Defendants attempt to discredit Gebauer's testimony by suggesting he was not entirely certain whether he conveyed the information about Render's motive-related statements at both the December 22nd and December 29th interviews. Defendants rely on this testimony:

> Q. Okay. Did you convey that information about the weapon and the threat to beat up Brian Carrick by Rob Render to the police on December 29, 2002?
> A. Yes.
> Q. So you said those very statements on two separate occasions to the police?
> A. I don't recall which occasion I said it to the police exactly, but I know I told them, yes.
> Q. So it's very possible that on December 29th, 2002 may have been the occasion when you told the police Rob Render gave me the or told me about these threats that he was gonna hurt Brian Carrick and that he was gonna use a weapon?
> A. I'm pretty positive I said it both times, but I'm not 100 percent sure.

Def. Ex. 14 at 55-56. Defendants rely on the "not 100 percent sure" language to sow doubt about Gebauer's testimony. They also note that Gebauer never told anyone at Val's, including his supervisors or co-workers, that Render had made these threats a week before the murder. Perhaps a jury will find these arguments persuasive, but they are clearly not sufficient to disregard this evidence when considering a summary judgment motion.

Defendants also argue that officers likely were not intentionally trying to suppress

[4] The police report states that Rydberg "arrived [at the store] and was explained what was found." Def. Ex. 15.

Gebauer's statements (assuming he even made them) because investigators knew from other sources that Render and Carrick had been "feuding," a fact which was included in some other police reports around the time. Again, a jury might agree with defendants' interpretation, but it could also find that vague reports of a feud were not the same as a concrete, emotionally-charged threat to harm Carrick. But either way, it is not clear why the officers still would not have included Gebauer's statement in the police reports because it would show at a minimum that multiple witnesses confirmed this seemingly important point. Additionally, plaintiff argues that the December 29th police report did not simply omit the statements made by Gebauer but affirmatively misrepresented that Gebauer did not know anyone who wanted to harm Carrick. The omitted information could have been material at trial because, as plaintiff notes, the prosecutor made the following argument in closing: "There is no other person. Nobody. Rob Render didn't have any motive to kill Brian Carrick." PDF 44. Telander testified that this additional information allegedly provided by Gebauer, if disclosed, would have been "one of the most significant items in the case" and would have been "major" but that he was "totally unaware" of it. Def. Ex. 13 at 22, 27. In sum, given the importance of this evidence, a jury could find that its omission was not merely an accident, but was done intentionally.

Kepple Interview in 2002. Jacob Kepple, who was then 17 years old, was working at Val's on the night of the murder. On December 27, 2002, he was interviewed by Von Allmen and Michael Cooper. The police report documenting this interview, which was prepared by Cooper, states that Kepple told the detectives that he saw Render, along with others, "eating pizza in the break room at approximately 6:30 pm through 7:00 pm." Def. Ex. 25 (corrected). Plaintiff argues that this statement was false because Kepple has testified that he did not make this statement to police and because six witnesses have confirmed that Render was not in the breakroom as stated in the report. Def. Ex. 8 at 51 (Kepple: "There is an inaccuracy [in the police report] that it states I saw Mario, Rob, and Ed eating pizza in the breakroom, and that's not true. I did not see Rob Render in the break room from 6:30 to 7:00."). Plaintiff's theory is that detectives included this statement to give Render an alibi and thereby take away suspicion from him at this critical early stage of the investigation.

Although defendants deny they did anything intentionally, they do not otherwise deny the underlying factual allegations. Instead they respond more generally by declaring that "[n]o one ever dismissed Render as a culpable party in conjunction with Carrick's killing." [200 at p. 8.] They again emphasize that Von Allmen did not prepare or sign the police report at issue. This is true, but it does not rule out the possibility that defendants were still aware of the falsehood in the report and failed to correct it or failed to submit a separate report or otherwise reveal this alleged falsehood at any later point in the investigation. Defendants argue that this was merely one small inadvertent misstatement in a much larger investigation, but a jury must decide between these competing interpretations.

The "bloody" underwear. In April 2003, over three months after the murder, Gebauer was checking out a leak in the women's bathroom at Val's and removed some ceiling tiles and found a pair of men's underwear that had apparently been there for a while. Gebauer thought the underwear was stained with "a lot of blood." Def. Ex. 14 at 18. Some of the details here are not

crystal clear, but Gebauer apparently first gave the underwear to Vallone, the store manager and plaintiff's uncle. Vallone threw it away. Gebauer talked with his father and they went and retrieved the underwear and took it to the police station believing it might be relevant to the Carrick investigation. They talked to Officer Todd Colander and explained how they found the underwear and left it with him. Colander prepared a police report stating that he received a pair of underwear that "appeared to be for a male" and "appeared to be soiled with a brownish red color and the elastic band was cut in two places." Def. Ex. 26. The report states that he put the underwear, which was in a paper bag, into an evidence locker. But as it turns out, this was not true. Instead, he gave it to Von Allmen who threw it away because he believed it wasn't possibly relevant to the investigation.

Plaintiff claims that the underwear was potentially pivotal because, if testing had shown it was stained with Render's blood, this likely would have sealed the case against him. So the obvious question is—why did Von Allmen discard this evidence? In his deposition, he described his thought process when he was given the underwear:

> I pulled on the elastic and the elastic all snapped, like snap-crackle-pop. These underwear—and they were covered in dust. But these underwear had been up there [behind the ceiling tiles] for years and then—and then I remember I kind of opened and they had a stain in the underwear, like whoever it was had messed their pants. Okay. And they—and I know that Anthony Gebauer I believe has characterized these as bloody underwear, but these in no way were bloody underwear. I mean, this was a set of underwear that I'm – I'm making an assumption that some little boy messed his pants and then that's that.

Def. Ex. 2 at 179. In their briefs here, defendants stand by this explanation, arguing that Von Allmen's conclusion—that the underwear only "contained fecal matter and not blood"—was indisputably correct, such that no reasonable jury could believe otherwise. [165 at p. 12.] This conclusion is based primarily on Von Allmen's subjective assessment at the time after looking at the underwear. Defendants also note that Vallone also quickly decided to throw the underwear away when Gebauer first gave it to him at Val's. Defendants finally argue that, even if the underwear had blood on it, it was indisputably not Render's blood. He was wearing a short sleeve shirt that night, and no one observed any injuries or bandages on him. This includes Kepple who gave him a ride home. Defendants acknowledge that Render was seen mopping the floor somewhere near the murder scene (the exact location is not clear to the court) shortly after the likely time of the murder, but defendants brush off this fact by saying that one of Render's general assigned duties at the store was mopping. *Id.* at p. 13.

Several questions arise regarding this evidence. The first one is whether the underwear might have been material evidence linking Render (or someone else) to the crime. Although a jury might find defendants' arguments persuasive, a jury could also reasonably believe plaintiff's contrary reading of the evidence. Plaintiff notes that Gebauer and his father both believed it was blood on the underwear, and they immediately realized the possible connection to the murder case. Colander's police report described the stain as a "brownish red color," a description consistent

with dried blood. Even if Von Allmen's best guess was that the stain was fecal matter, how could he really know for sure by just looking at the underwear? Why not at least pursue this lead and test the evidence to confirm his suspicions? At this point, the murder was unsolved without any clear suspect. Another investigator, former defendant Brogan, was asked about the underwear in his deposition and whether it should have been tested.[5] He stated: "Well, sure. Anybody finding underwear in a suspended ceiling that supposedly had blood on it, I'd be interested in it to find out how or why it got there." Def. Ex. 10 at 106-07. Telander testified that he was not aware of the underwear (a fact defendants strongly dispute) and testified that it would have been a very important piece of evidence even if it were not tested. Here is a key part of his testimony on this topic, which starts with him answering a question about the possible significance of the stain being a brownish-red color:

> Well, I mean, I'm not a lab analyst, but I have tried a hundred of these or more, and blood when it dries is brownish-red. And why are underwear up in the ceiling at a crime scene where there's blood from a person who is not even charged? I mean, in my mind, it's very significant. Maybe it's Render, maybe he got cut and wiped the blood. He was clearly bleeding because his blood was on the scene. And again, that would be huge not only to show Render was involved but more importantly to show Shane Lamb was not worthy of belief, which he wasn't. [] I believe it would be a huge piece of evidence. You know, you can argue it both ways. If they didn't test it, but if I knew about it, I could cross, wait a minute, there's underwear up in the attic that has reddish-brown stains and you threw it away. It would be effective for me. Even if it's gone, I could have done ten minutes on that in closing argument because it smells.

Def. Ex. 13 at 17-18. Similarly, Combs testified that he might have prosecuted Render instead of plaintiff if the underwear had been tested and had Render's blood on it. Def. Ex. 9 at 143-44.

As for defendants' argument that no witness saw Render with blood on him that night, this argument is perplexing and seems to miss the point about why this evidence might have been so critical. It is undisputed that Render's blood was found all over the crime scene. How did it get there? This question must be answered under any theory, yet defendants do not have any coherent explanation, even now. As noted above, Combs argued in closing at the second trial that Render's blood was explained by his habit of biting his fingernails, which is an explanation the Illinois appellate court declared "outlandish" on its face. But if Render were involved in the killing, the underwear provides an explanation for why witnesses didn't later see any blood on him even though he was wearing a short sleeve shirt. He ran into the bathroom, used the underwear to wipe away the blood, and hid it behind the ceiling tiles. This explanation matches up in many respects with a statement he gave later in the investigation, which is discussed below.

A second question about the underwear is why Von Allmen did not a create police report documenting his decision to throw the evidence away. He apparently did not discuss this issue with anyone else on the investigation team. As a result, Colander's report stating that the

[5] He was no longer involved in the investigation at the time the underwear was found.

underwear was being kept in the evidence locker was false. Defendants argue that the decision to throw away the underwear and the decision not to write up a police report was at most negligence.[6] However, viewing the evidence solely in plaintiff's favor, a jury could conclude that Von Allmen intentionally destroyed the underwear knowing that there was a reasonable chance it would implicate Render.

One final argument made by defendants, which relates to the *Brady* claim, is that Telander was given Colander's (false) report stating that the underwear was in the evidence locker. According to defendants, Telander could have requested that the underwear be tested but did not do so because he believed it might implicate his client. (Of course, this whole argument is hypothetical in that the underwear had been destroyed and could not have been tested even if a request had been made.) Here again, a fact dispute exists. Telander testified that he was not aware of the Colander report and that he certainly would have requested that the underwear be tested. Here is Telander's explanation:

> Well, the evidence in the case suggested that, first of all, Mr. Casciaro's blood was nowhere to be found and there was another party whose blood was on the scene. Our belief always was that [Render] was involved significantly since he was bleeding, and that would, first of all, be totally inconsistent with Mr. Lamb's statements, and second, it would be great exculpatory evidence I believe for the defendant if, in fact, there was blood on those underwear that was anyone's but the defendant. Of course, as a defense attorney, there's always the risk if you ask that it be tested it might come up to the defendant and make it worse, *but I was absolutely convinced that Mr. Casciaro's blood would not be on that scene because I was convinced that he was not involved.*

Def. Ex. 13 at 12 (emphasis added).

Rydberg's Interview with Kepple In 2004. Kepple testified that he met with a police detective in the summer of 2004 and that he believes the person was defendant Rydberg. Kepple further testified that Rydberg asked him to change his account of what happened—specifically, Rydberg tried to pressure Kepple into saying that he saw Carrick and Lamb near the produce cooler at 7 p.m. Def. Ex. 8 at 87-88. Kepple could not provide a description of what the detective looked like, but his "best guess" was that it was Rydberg. *Id.* at 90. Defendants argue that this testimony is too speculative to rely on. It is true that this testimony is more tentative than some of the other testimony defendants have complained about, but it is not so speculative that it should be taken away from the jury. Related to this topic, plaintiff notes that Combs testified that had he known of Rydberg's attempt to coerce Kepple into changing his statement, he would have had an obligation to disclose it. Def. Ex. 9 at 217-18.

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[6] In his deposition, Von Allmen was equivocal about whether, in hindsight, he made a mistake in not preserving the underwear: "Would I do it differently today? I wouldn't be sitting here having to answer this if I had not thrown them away. So I would have—in hindsight, I would have kept them because we wouldn't be having this discussion." Def. Ex. 2 at 182.

Bank Surveillance Video. Another piece of evidence that plaintiff claims was not fully investigated or properly preserved was video footage from security camera located outside of the McHenry Savings Bank, which was across the street from Val's. Although this point is disputed, plaintiff claims that the camera could have potentially captured some of the comings and goings of cars into Val's parking lot. To recap the salient facts, Von Allmen and Gruenes went to the bank and viewed the video very early in the investigation, sometime before December 24, 2002. Von Allmen testified that the video was "terrible" and did not reveal any useful information. For this reason, he did not collect the video, nor prepare any police report memorializing this decision. Def. Ex. 2 at 138-40. However, an MIAT police report states that an investigator went to the bank two days later asking if there were any security camera video and was told that the video had already been "collected by Police." Def. Ex. 29. Aside from the the generic reference to "police," the MIAT report does not state who the person was that the bank gave the video to. But no video ever showed up in the evidence file in this case. So it is not known what happened to the video.

The parties argue whether the video could have provided useful information and whether defendants intentionally or negligently failed to preserve it. As with the underwear, these two questions are intertwined in that the more material the evidence was the more likely the failure to preserve it was not accidental (and vice versa). Defendants rely on Von Allmen's recollections that the video provided nothing useful and also on the deposition testimony of Bryan Nash, a long-time bank employee who was then in charge of technology. Nash testified that based on his general knowledge of how the camera worked at the time, any video probably would have been grainy and would have only captured vehicle headlights traveling in and out of the entrance to the Val's parking lot and not much more detail (and this all assumes that there was not a car parked in front of the camera at the relevant time). Def. Ex. 24 at 23, 33, 48. Defendants also argue that there is "zero evidence" linking them to the disappearance of the video.

Plaintiff responds that even a grainy video might have been able to show certain cars coming and going. In particular, plaintiff notes that Lamb was driving a distinctive vehicle (a dark blue Bravada with gold rims). Also, plaintiff notes that both Telander and Combs testified that the video (assuming it provided a clear enough picture) could have been used to impeach witnesses who claimed they came (or did not come) to the store at various times and, importantly, might have shown that Lamb did not return to the store in time to participate in the killing of Carrick, thus further weakening his already weak testimony. Def. Ex. 9 at 77-78 (Combs: "it would have been very helpful" and "there was a lot of things that video surveillance could have shown us").

In considering these arguments, the court again finds that fact issues exist. It is true that plaintiff's arguments about the video are more speculative than those relating to the underwear. For one thing, it is not clear how the video would have implicated Render, the person detectives were supposedly trying to protect. And unlike the underwear, there are no other witnesses who also saw the evidence to be able to confirm its potential relevance. Even so, there is still circumstantial evidence. Defendants were heavily involved in this initial investigation; Von Allmen visited the bank two days earlier; the bank employee stated that the video had been given to police; and there are no other individuals who have been identified who might have taken the video. Additionally, even if defendants did not take or destroy the video, it is undisputed that they

did not prepare a police report. Defendants argue that they do not have a duty to generate a police report for every encounter. But Rydberg agreed in his deposition that it was a mistake by Von Allmen and Gruenes not to collect the video and not to prepare a police report. Def. Ex. 3 at 230 ("If somebody went to get it, they should have gotten it. Yes. [] There should have been some kind of notes taken, possibly a report written."). If this video were the only piece of evidence in dispute, then defendants would stand on firmer ground. But plaintiff is alleging that this evidence is one part of a broader suspicious pattern of behavior.

Von Allmen's Conversations with Render's Father. To support the theory that Von Allmen was trying to protect Render, plaintiff relies on the fact that Von Allmen and Render Sr. were friends; that Von Allmen conducted more than 10 interviews with Render Sr. about the case; and that Von Allmen did not document these interviews in any police reports. Defendants again try to chip away at this testimony by suggesting it was uncertain—specifically that Render Sr. was not sure of the precise number of interviews. Pl. Dep. Ex. 5 at 33-34 ("I don't really know how many times [Von Allmen] was there, but I would think it was probably more than ten."). But this dispute over the exact number of visits is minor, and one for the jury in any event.

Defendants' other line of attack is to suggest that Telander was aware of the friendship based on a general reference in the 2007 grand jury testimony and that he chose not to bring up the issue at trial for strategic reasons. This argument relates to the *Brady* claim. However, plaintiff points out that Telander only had vague evidence to support the friendship theory. Here is the relevant testimony from Telander:

> I don't recall that specifically; but in fairness, I do remember having the belief that one reason that Render wasn't charged is he was somehow connected and being protected a little bit by the police department. Now, I don't think I have anything to prove that, but I remember thinking that as we were preparing the case because you got some guy's blood on the scene, I mean, come on.

Def. Ex. 13 at 48. Telander further stated that the trial judge would have been unlikely to allow him to introduce this issue at trial without stronger evidence: "I don't think that alone would be that powerful by itself. Certainly, *if there is more though*." *Id.* at 50-51 (emphasis added). Again taking plaintiff's viewpoint, this testimony suggests that police reports conclusively showing there were more frequent interviews might have changed this calculation.

The Pre-Indictment Meeting in 2010. Perhaps the most important issue in the briefs concerns causation and whether defendants' wrongdoing was the ultimate cause for plaintiff's harms. This issue surfaces repeatedly in the discussion of the individual counts. Defendants argue that Combs relied entirely on Lamb's confession (defendants refer to it as the "*sine qua non* of the State's case") and not on any police reports they prepared. Combs was "solely at the helm of Plaintiff's prosecution," and they were powerless to "second guess" him. [165 at pp. 7, 16] In their reply brief, they put it more forcefully, alleging that Combs "went completely rogue" in deciding to prosecute plaintiff and that he "shut down" their objections. [200 at p. 18]. Plaintiff disputes this characterization, arguing that Von Allmen was the "point man" throughout the entire

case and that he shaped the investigation in many ways, with the result being that Combs was not given the full picture.

These arguments center mainly on the pre-indictment meeting held in early 2010 in the office of Lou Bianchi, the state's attorney. Bianchi, Combs, Von Allmen, Rydberg, Casey Solana, and Ron Salgado were present. In his deposition, Combs described the purpose of the meeting as follows:

> Q. What was the reason for that meeting?
> A. Lou [Bianchi] was informing the FBI and Johnsburg Police Department that we were going to seek an indictment against Mario Casciaro. So he wanted to give [those present at the meeting] the opportunity if they had any concerns, issues, or anything, they wanted to say to say it and they also wanted Chief Rydberg to be there given Rydberg's constant complaining about lack of keeping him informed.
> Q. Was Rydberg present?
> A. He was.
> Q. And Von Allmen was present?
> A. Yes.
> Q. And Mr. Salgado said that Bianchi made it clear that everybody has to be on board in order for the prosecution to continue, is that your recollection?
> A. Yes.

Def. Ex. 9 at 164. Salgado echoed this view, stating in his deposition that Bianchi stated that "all the parties involved had to agree" to allow the prosecution to go forward. Def. Ex. 11 at 31.

Combs gave the following testimony as to how the participants at the meeting responded to this "put up or shut up" question:

> Q. What, if anything was their response at the time you asked for their input?
> A. Keith Von Allmen just indicated he supported whatever decision was made. Casey Solana indicated he supported whatever decision we made. Chief Rydberg asked some questions. He seemed to be I'd say lukewarm to the idea, was concerned about Shane Lamb's credibility, was concerned about the lack of Brian Carrick's body, but did acknowledge that if it was our decision, we could do it and there was nothing he could do to stop it.
> Q. What do you mean by there was nothing they could do to stop it?
> A. The state's attorney makes that decision. Police come to us. They want felony review, we can say no, and that's at our discretion. The ultimate decision to indict [the] case came in the elected state's attorney and that was Lou Bianchi. *If they had strenuous objection to not do it, we certainly would have listened to that, but there was not an objection.* Rydberg just said these are my concerns and that was the extent of the conversation.

Def. Ex. 9 at 191-92 (emphasis added).

In his deposition, Von Allmen testified that both he and Rydberg believed at the time of this meeting that the case against plaintiff was "very weak." *See* Def. Ex. 2 at 136 ("Q. Do you share the sentiment of Chief Rydberg that the State's Attorney did not have probable cause to indict Mario for the crime? A. I believe that it was a circumstantial case and I think it was very weak."). A jury could find that Von Allmen's failure to speak up and voice his private doubts publicly at a meeting in which the prosecutor was specifically asking him to express any such doubts is evidence supporting plaintiff's theory, which is basically that Von Allmen was quietly nudging the investigation away from Render whenever he could but was doing so in a way as to not be too obvious. It is true that Rydberg did voice some concerns, but they appear to have been tepid objections and the specific reasons he gave were unrelated to Render.

In addition to Combs' testimony, plaintiff is also relying on the nature of the relationship between defendants and Combs during this long investigation. Plaintiff highlights the following statements made by Combs at his deposition:

- The Johnsburg Police Department came up with the theory to charge plaintiff because "I wasn't involved until six years after the fact."
- "Von Allmen and Colander were the ones that knew the case."
- "I didn't do anything without talking to Keith Von Allmen."
- "I had Keith's cell phone on speed dial."

PAF 37; Def. Ex. 9 at 35-36, 120, 139.

In sum, on this critical issue of causation, the evidence is strongly in dispute. A jury perhaps could agree with defendants' rogue prosecutor theory, but a jury also could agree with plaintiff's theory that defendants purposely failed to speak up in a forceful way at the pre-indictment meeting (or on any other occasion) and instead only gave a few token objections that were effectively fig leaves hiding their true motives and opinions.

Combs Memo Revealing New Facts From An Undisclosed Render Interview. On February 29, 2011, in preparation for trial, Combs sent a memo to Telander disclosing that Combs and Von Allmen had interviewed Render a second time at the Lake County Jail on some unspecified date and that this interview had not been previously documented or disclosed. Pl. Ex. 9. In the memo, Combs stated that Render again stated, as he had done at the first interview, that he saw Carrick at some point by the produce cooler arguing with plaintiff. *Id.* But in this second interview, according to the memo, Render added some new facts. He stated that he confronted Lamb that night outside the produce cooler. Lamb supposedly had a knife. When Render asked Lamb what he was doing, Lamb cut Render, and then Render ran into the bathroom and bandaged his arm with toilet paper. *Id.* Render also stated that he helped plaintiff take out a garbage can and that "when they dumped the garbage can he saw 'legs' and 'feet' [] that 'theoretically' could have belonged to Brian Carrick." *Id.* Combs stated in the memo that he did not believe Render's story and thought he was lying. At his deposition, Combs stated that he did not know why Von Allmen did not create a police report about this interview. Def. Ex. 9 at 91. Combs concluded that he was ethically bound to create a memo and give it to Telander. Plaintiff argues that Von Allmen's failure

to prepare a police report is yet another suspicious anomaly.

* * *

To sum up thus far, the court finds that there are multiple disputes of material fact. Viewing this evidence collectively and solely from plaintiff's perspective, a jury could find that defendants manipulated the investigation to protect Render, which in turn led to plaintiff being wrongfully charged, imprisoned, and convicted for murder. The court acknowledges that both sides will be relying on additional evidence and arguments to further support their theories at trial. We have not summarized all of them here. But further discussion would not change the result and would risk turning this ruling into a paper trial. *See Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994) ("[B]ecause summary judgment is not a paper trial, the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe. The court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.").

LEGAL ARGUMENTS

The overarching conclusion set forth above—that a jury could conclude that defendants intentionally manipulated a murder investigation for improper purposes—goes a long way to resolving defendants' legal arguments, which in this court's view are predominantly fact disputes in disguise. Defendants have raised arguments directed at the five § 1983 claims (Counts I-V) and three supplemental Illinois state law claims (Counts VI-VIII) in the Third Amended Complaint.[7] The specific arguments geared to each count are similar and somewhat repetitive. In most cases, the discussion eventually winds up with defendants reiterating their fact-based themes that they were at most negligent or that Combs was a rogue prosecutor or that Telander should have discovered the suppressed evidence.

The "Fabrication of Evidence" § 1983 Claims. Count I is titled as a § 1983 claim for violation of due process, and Count II as a claim for post-charging deprivation of liberty. Although the parties discuss these two counts in separate sections, their arguments are similar and will be discussed together. The law regarding § 1983 fabrication-of-evidence claims is complex and evolving, and the court will not attempt to summarize it here, but instead will address the particular arguments and cases presented by defendants.[8]

Defendants suggest at multiple points in their briefs that the fabrication claims are lacking because they are based on acts of omission rather than affirmative wrongdoing. According to defendants, the "traditional" understanding of a fabrication claim is that it requires "manufactured" or "falsified" evidence. *See, e.g.*, *Whitlock v. Brueggemann*, 682 F.3d 567, 580 (7th Cir. 2012) ("We have consistently held that a police officer who manufactures false evidence against a

[7] By agreement with plaintiff, the state law claims against defendant Rydberg were dismissed [163, 168].

[8] However, it should be noted that, since *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017), a fabrication claim for pre-trial detention should not be brought under the due process clause but instead should be analyzed under the Fourth Amendment. *See Lewis v. City of Chicago*, 914 F.3d 472, 478 (7th Cir. 2019) ("It's now clear that a §1983 claim for unlawful pretrial detention rests *exclusively* on the Fourth Amendment.") (emphasis in original).

criminal defendant violates due process if that evidence is later used to deprive the defendant of her liberty in some way."); *Lewis*, 914 F.3d at 476 (referring to "falsified evidence" and "falsified police reports"). Defendants claim that there is no allegation that they "invented" evidence as opposed to having merely "omitted" evidence from police reports. However, plaintiff responds that fabrication claims can also be based on omissions. *See Hurt v. Wise*, 880 F.3d 831, 838 (7th Cir. 2018) (finding that an officer's failure to mention "the most important details" in a report memorializing a witness interview could be sufficient). Also, plaintiff points out that there was in fact affirmative wrongdoing here—specifically, the inclusion of the false statement that Kepple saw Render in the breakroom at the time of the murder. Even though defendants mention often in their briefs their arguments about there being only omissions, they ultimately agree with plaintiff that, under *Hurt v. Wise*, a § 1983 fabrication claim may proceed if the officers failed to memorialize "the most important details" of a witness interview. Given that there is agreement on this legal standard, the issue then becomes a fact question as to whether the various omissions could be viewed as important. As explained above, a jury clearly could find that (among other evidence) the omission of Gebauer's statements that Render said a week before the murder that he planned to hurt Carrick with a weapon would meet this importance standard.

Another recurring argument by defendants is to point out that they did not author the police reports at issue. But the problem with this argument, as plaintiff points out, is that defendants have not provided any clear authority suggesting there is any bright-line rule that only the author of the report can be blamed for an omission. When this court denied the motions to dismiss in 2017, the court rejected a similar argument, stating: "Defendants' argument is essentially that so long as a police officer does not create a written record of interviews which yield exculpatory evidence, the officer has no obligation to disclose the evidence. But, not creating a record of exculpatory evidence is no better than creating records of such evidence and hiding them." [49 at pp. 4-5.]

Defendants rely heavily on one district court case—*Hyung Seok Koh v. Graf*, 307 F.Supp.3d 827 (N.D. Ill. 2018)—to support their fabrication arguments. In this case, the district court granted summary judgment to police officers on a § 1983 claim alleging that they lied in a police report. This decision is lengthy, and the facts are complicated, but defendants rely on the following language from that decision:

> It is true that these [police] reports could have been more detailed, and that if they had been more detailed they would have presented a fairer picture of the interrogation. But the Constitution does not guarantee perfectly fair police reports (or perfectly accurate translations). To be sure, there must be some point where omissions become egregious enough to render a police report effectively false. But in this case, the omissions in Graf's and Kim's police reports were not so misleading as to give rise to an inference that Graf and Kim were deliberately falsifying evidence in order to mislead the prosecutors.

Id. at 858. Plaintiff argues, however, that the facts in *Hyung Seok Koh* are completely distinguishable. The police report stated explicitly that it was a "summary, not [a] verbatim" account of the witness statements, and there also was a videotape of the full interrogation given to

plaintiffs. *Id.* at 858-59. The case also concerned the specific issue of translations from Korean to English—hence, the reference to "perfectly accurate translations." The court agrees with plaintiff that *Hyung Seok Koh*, which is not binding in any event, is factually distinguishable and does not set forth any legal rule that would provide the kind of solid footing to grant summary judgment. In fact, in the passage quoted above, the court acknowledged the viability of the theory under which plaintiff is proceeding here—namely, that at some point "omissions become egregious enough to render a police report effectively false."[9]

This case thus returns us back to the specific fact disputes here and whether the omitted and falsified details were important or whether instead they "amount to semantics" as defendants claim. For the reasons explained already, a jury could find that the omissions, particularly Gebauer's statement about Render, were important. Also, it should be noted that plaintiff's case rests not just on a single police report or even several of them, but instead on a long pattern of alleged wrongdoing involving police reports, intimidation of witnesses, evidence tampering, and other investigative irregularities. Considering all this evidence as part of a larger mosaic, a jury could find that defendants were aware of and condoned the alleged omissions and false statements in the police reports. Of course, defendants may use the fact that they didn't actually draft or sign the offending reports as a counter argument when presenting their case and they may bring out that there were other contemporaneous police reports that may have provided some of the additional information allegedly omitted. But these are fact-based issues better left to the jury, rather than decided conclusively by this court on summary judgment.

Defendants next attempt to distinguish two Seventh Circuit cases—*Hurt v. Wise*, 880 F.3d 831, 837-44 (7th Cir. 2018) and *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988). In both cases, the Seventh Circuit held that the § 1983 fabrication claims were properly to be decided by the jury. So at least in terms of result, these cases support plaintiff. However, defendants suggest that these cases illustrate the type of more egregious wrongdoing supposedly lacking here. But as with *Hyung Seok Koh*, defendants rely on a fact comparison and not on any binding rule or legal principle. One could perhaps argue that the plaintiffs in those two cases had stronger, or perhaps just more direct, evidence of fabrication by the officers or lab technicians. But this court need not go through a fact comparison because even if true, this does not mean that a more circumstantial case, as here, is necessarily insufficient by comparison. If the jury accepts all of plaintiff's inferences, the wrongdoing and harm here are undeniably significant.

Defendants also raise various causation arguments in response to the fabrication claims, asserting that prosecutor Combs relied "exclusively" on Lamb's two video-recorded interviews at which neither defendant was present. According to this argument, any misstatements defendants may have made in police reports, or any evidence they may have failed to preserve, didn't matter in the end because none of this earlier investigative work was "actually used as a basis for arresting, charging and detaining" plaintiff. [165 at p. 7.] However, as explained above, a jury would not be obligated to accept this rogue prosecutor theory. The main stumbling block is that it fails to acknowledge that plaintiff's case rests on a counterfactual. Plaintiff is alleging that *if* defendants

[9] It is worth noting that the court in *Hyung Seok Koh* denied summary judgment on other counts, and the case is now proceeding to trial.

had included the important details in police reports and *if* defendants had not destroyed other evidence, then the prosecutor would have relied on this evidence and would have decided not to prosecute plaintiff. Stated more directly, if the evidence inculpating Render was hidden, then there was nothing to rely on. Moreover, prosecutors did not have an especially strong case even without knowing about all the allegedly non-disclosed evidence. The Illinois appellate court's decision certainly makes this point strongly. Prosecutors waited many years to file charges. The case was narrowly built around the testimony of a shaky and dubious witness. Given all this uncertainty, if the person most knowledgeable about the entire investigation had simply spoken up at the pre-indictment meeting and expressed his belief that plaintiff was not involved in the murder, then this might have been the straw that broke the camel's back so to speak. In sum, accepting plaintiff's view, a jury could find that defendants had multiple chances to prevent plaintiff from being charged, prosecuted, and convicted for murder.

In a related argument, defendants assert that this case "does not at all fit the *Manuel* mold," referring to the part of the fabrication claim seeking damages for post-legal-process pre-trial detention under *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017). [165 at p. 15.] Defendants argue that, unlike that case, in which there was no probable cause determination, the pre-trial detention here "came about entirely via Grand Jury indictment," which defendants state "conclusively determines the existence of probable cause." *Id.* (citing *United States v. Schreiber*, 866 F.3d 776, 780 (7th Cir. 2017)). Defendants additionally note that they did not testify before the grand jury. But these arguments suffer from the same problem just mentioned, which is that the grand jury did not have a full or fair picture of the facts due to defendants' alleged malfeasance. As the Seventh Circuit noted in *Jones*, "a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision." 856 F.2d at 994; *see also Serrano v. Guevara*, 2020 WL 3000284, at *17 (N.D. Ill. June 4, 2020) (" '[T]he obvious assumption is that there will be a *truthful* showing' of probable cause.") (emphasis in original; quoting *Franks v. Delaware*, 438 U.S. 154, 164-65 (1978)). As plaintiff argues, a police officer should not be allowed to hide behind the officials he has defrauded.

The § 1983 *Brady* Claim. The parties agree on the applicable framework, summarized by the Seventh Circuit as follows:

> To prevail on a claim for violation of the due-process disclosure duty announced in *Brady*, a plaintiff must establish three things:
>
> > (1) the evidence at issue was favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, meaning there is a reasonable probability that the result of the proceeding would have been different.
> >
> > Evidence is suppressed for *Brady* purposes only if (1) the prosecution failed to disclose evidence that it or law enforcement was aware of before it was

> too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.

Camm v. Faith, 937 F.3d 1096, 1108 (7th Cir. 2019) (quotation is cleaned up).

Defendants analyze the *Brady* claim by grouping the evidence into three categories: (i) the failure to document information in police reports; (ii) the bank videotape; and (iii) the bloody underwear. As a preliminary point, this type of divide-and-conquer approach, in which pieces of evidence are viewed in isolation, is in tension with the Seventh Circuit's admonition that normal approach is to consider all the evidence "cumulatively" by looking at the entire record. *Id.* at 1109-10 (citing *Kyles v. Whitley*, 514 U.S. 419, 436 (1995)). Defendants' main argument as to all this evidence is to claim that Telander knew about it, or could have known about it, if he had been more diligent in his pre-trial preparation. In this instance, rather than blaming the prosecutor, defendants are blaming the defense attorney.[10]

It makes sense to begin with the underwear because the court has already concluded that a jury could find (again if it construed all the evidence in plaintiff's favor) that Von Allmen intentionally destroyed the underwear in bad faith. As defendants implicitly recognize in their briefs, a finding of bad faith would be enough to sustain the *Brady* claim as to the underwear. [165 at p. 14 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).] *See also Armstrong v. Daily*, 786 F.3d 529, 551 (7th Cir. 2015) (holding that a *Brady* due process claim is viable even if the evidence was "only potentially exculpatory" *if* it was destroyed in bad faith); *Bolden v. City of Chicago*, 293 F.Supp.3d 772, 779 (N.D. Ill. 2017) ("The bad-faith test in *Armstrong* is not limited to its specific facts. Here, the entire complaint adequately paints a picture of defendants taking any action necessary to close the case, including by framing Bolden.").

Given the conclusion that the *Brady* claim must go forward at least in part, the court is less inclined to try and carve out single pieces of evidence from the overall claim. Defendants have raised stronger arguments regarding whether the bank video could have been material and whether it was intentionally destroyed. This evidence does not readily fit into the larger theory of protecting Render. So this is a much closer call, and if this were the only piece of evidence at issue, the analysis might be different. But given all the cumulative evidence, the court finds that this issue should be decided by the jury.

As for the final category, the failure to create police reports, the court finds that fact issues are also present. Defendants have advanced arguments that might be convincing at trial. They argue, among other things, that the general fact that Render Sr. and Von Allmen were friends was

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[10] Although this court does not make credibility judgments when considering a summary judgment motion, a jury will be free to do so at trial. In this regard, the court notes for the record that Telander has extensive legal experience. At his deposition, he described this experience as follows: since 2014, he has been a judge in the felony division of the 18th Judicial Circuit; from 1991 through 2013, he was a criminal defense attorney; from 1988 to 1991, he was an associate judge in DuPage County assigned to the misdemeanor and felony divisions; from 1984 to 1988, he was chief of the criminal division of the DuPage County State's Attorney's Office; and from 1976 to 1984, he was a Cook County State's Attorney at 26th and California. Def. Ex. 13 at 5-6.

disclosed in the 2007 grand jury transcripts given to Telander; that the "existing discord" between Render and Carrick was also disclosed in those transcripts; that Kepple left two voicemails with Telander before the *second* criminal trial but that Telander never followed up on them; and that Vallone's statement about Render asking for the key to the door leading to the dumpster was actually in one police report. Plaintiff disputes whether all this information was disclosed fully. For example, he notes that Von Allmen had 10 or so interviews with Render and his parents and that Von Allmen did not write up reports for these interviews. This information was apparently not revealed in the grand jury transcripts. In sum, given that this case is going to trial on other counts, and given that the *Brady* claim must go forward based on the underwear alone, it is not a productive use of time here to try and parse out the competing inferences relating to these additional pieces of evidence, especially since plaintiff's case is built upon numerous overlapping inferences. *See generally Myvett v. Chicago Police Detective Edward Heerdt*, 232 F.Supp.3d 1005, 1032-33 (N.D. Ill. 2017) ("To require [a plaintiff] to quantify the impact of a single piece of information on an aggregate assessment based on multiple factors demands the impossible.").

Conspiracy Claims. Both sides agree that the standards governing both the § 1983 and the state law conspiracy claims (Counts IV and VIII) are effectively the same. To sustain a § 1983 conspiracy claim, plaintiff must show that defendants reached an understanding to deprive plaintiff of his constitutional rights. *Williams v. Seniff*, 342 F.3d 774, 785 (7th Cir. 2003). However, evidence of this understanding or agreement can be circumstantial, although it must be more than purely speculative. *Id.* The conspirators need not have agreed upon all the details of the scheme. "It is enough if you understand the general objectives of the scheme, accept them, and agree, either explicitly or implicitly, to do your part to further them." *Jones*, 856 F.2d at 992.

Plaintiff argues that his evidence meets these standards because it shows, when viewed collectively, that defendants deliberately turned a blind eye to overwhelming evidence against Render and convinced prosecutors of Render's theory that it was Lamb and plaintiff who killed Carrick while trying to enforce a drug debt. Among other things, plaintiff relies on the forensic evidence connecting Render to the crime scene; Render suspiciously quitting his job after the murder and fleeing from police at one point; and Render later confessing to police that he was at the crime scene and was cut by Lamb. Plaintiff also notes that defendants did not seek an arrest warrant for Render and even told Officer Brogan that Render had been ruled out as a suspect. Defs. Ex. 10 at 135.[11] There is more, but this evidence is sufficient as to Von Allmen.

As for Rydberg, however, defendants argue that he took a less active role in the investigation and did not participate directly in some of the alleged acts of wrongdoing. For example, there is no evidence that he was involved in the destruction of the underwear. Although these facts make the case weaker on the whole as against Rydberg, the court still finds there is enough to go forward regarding his involvement in the alleged conspiracy. Plaintiff has submitted evidence that Rydberg pressured Kepple in 2004 to change his official statement by placing Lamb at Val's at the time of the murder. The court agrees with plaintiff that this action shows an overt act in furtherance of the conspiracy. And although Rydberg may not have prepared the police

[11] Defendants dispute that they ever ruled Render out as a suspect. *See* Def. Ex. 2 at 113 (Von Allmen: "I still haven't eliminated Rob Render [as a suspect].").

reports at issue, he was undeniably involved in the early investigation and worked with Von Allmen closely. Rydberg was also at the pre-indictment meeting and was asked for his opinion about the evidence. He did not refuse to give one on the grounds that he didn't know much about the case or had been too busy with other matters. Combs testified that the meeting was held in part because Rydberg was constantly bugging them about the case. Viewing this evidence in plaintiff's favor, the court is not willing to grant summary judgment to either defendant on the conspiracy claims.

Supervisory Liability Under § 1983. Defendants seek summary judgment on the § 1983 for supervisory liability claim (Count V). Supervisors can be held personally liable for subordinates under § 1983 liability if they "know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see. They must in other words act either knowingly or with deliberate indifference." *Jones*, 856 F.2d at 992-993. Mere negligence is not enough. *Id.* Different arguments are made as to each individual defendant.

As for Rydberg, defendants again argue he was less involved (*e.g.* not a part of the MIAT chain of command; not involved in the underwear destruction). However, as plaintiff points out, Rydberg agreed in his deposition that he was supposed to review the police reports to ensure that the officers "got the important facts in there." Def. Ex. 3 at 70. Also, as plaintiff argues, the Johnsburg Police Department could have fired MIAT at any time, and MIAT disengaged from the case about a month after Carrick went missing. PAF 39b. Also Rydberg testified that it was "[his] case ultimately" and that he was "responsible for all [his] officers." Def. Ex. 3 at 44, 181. Moreover, there is evidence that the failure to provide police reports was a more general and continuing problem in the investigation, as both Combs and Telander repeatedly complained that reports were missing or incomplete. PAF 32, 37h.

As for Von Allmen, defendants raise a more targeted argument, stating that he could be held liable for supervisory liability only from the time he became Police Chief (in July 2010) and then they argue that none of his subordinates have been accused of misconduct since that time. Plaintiff has not provided any response to this point, and the court finds it persuasive. The heart of plaintiff's case is that Von Allmen was the active wrongdoer, not that he was in charge of someone else. For these reasons, the court grants summary judgment, as to Von Allmen only, on this count.

Illinois Malicious Prosecution Claim. As articulated by defendants, plaintiff must show: "(1) Von Allmen commenced or continued a criminal proceeding against the Plaintiff; (2) the proceeding terminated in a manner indicative of innocence; (3) Von Allmen lacked probable cause to bring the proceeding; (4) Von Allmen acted out of malice; and (5) injury resulting to the Plaintiff." [165 at p. 20 (citing *Porter v. City of Chicago*, 912 N.E.2d 1262, 1265 (Ill. App. Ct. 2009)).] Defendants raise four arguments against this claim, but they are reiterations of earlier arguments.

The first argument is a replay of the causation argument. Defendants claim that they did not commence or continue the proceedings because Combs made the decision solely by himself without their input. But as defendants acknowledge, plaintiff can meet this requirement if he can

show that defendants "played a significant role" or if they were "actively instrumental" or if they "duped" the prosecutor. *Id.* at 21 (citing various cases). As noted above, a jury could find that defendants' alleged acts meet this standard. The second argument is that there was "ample" probable cause based solely on Lamb's confession, as confirmed by the grand jury's indictment and the jury's verdict. This argument likewise has already been addressed. *See, e.g., Jones*, 856 F.2d at 994. The third argument is that there is no evidence of any malice. But this argument also assumes defendants' version of the facts—*i.e.* that there was no intentional hiding or destruction of evidence. The fourth argument is that the criminal proceeding "hardly ended in a manner indicative of his innocence." [165 at p. 22.] This court disagrees. The Illinois appellate court's decision strongly indicates that plaintiff was innocent.

The Illinois Claim for Intentional Infliction of Emotional Distress. The gist of the defendants' argument on this count is that they only engaged in negligent behavior and did not do anything extreme or egregious as defined by the Illinois cases. But this argument also rests on a disputed version of the facts.

Qualified Immunity. The last argument offered by defendants is a brief one, raised almost as an afterthought. A public official may be protected by qualified immunity unless (1) "the evidence construed in the light most favorable to the plaintiff must support a finding that the defendant violated the plaintiff's constitutional right" and (2) "that right [was] clearly established at the time of the violation." *Day v. Wooten*, 947 F.3d 453, 460 (7th Cir. 2020). Here, defendants claim again that their actions were "mistaken judgments" and thus should be protected by the doctrine of qualified immunity. Defendants specifically argue that "no defendant would be informed that failing to record witness statements verbatim in police reports constitutes evidence fabrication for Due Process purposes." [165 at p. 24.] But this argument fails to construe the evidence favorably to plaintiff and unfairly reduces his case to a straw man. By this point, it should be clear that plaintiff's case, if believed, is much more than just a failure to write down every single witness statement verbatim. The Seventh Circuit's decision in *Jones*, rendered in 1988, along with other similar cases from the Seventh Circuit for many years, provided sufficient notice to defendants that they should not frame a person for murder.

For all the reasons set forth above, the motion for summary judgment [164], filed by defendants Keith Von Allmen, Kenneth Rydberg, and the Village of Johnsburg, is denied in all respects except that summary judgment is granted to defendant Von Allmen on the §1983 supervisory liability claim (Count V). The parties are directed to contact the court's courtroom deputy within 30 days to arrange a telephonic conference with this court to discuss settlement options.

Date: 3/26/2021

ENTER:

Philip G. Reinhard

United States District Court Judge

Electronic Notices (LC)