UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERNON HORN, Plaintiff,	:	CIVIL NO. 3:18-CV-1502 (RNC)
v.	:	
CITY OF NEW HAVEN, *et al.*,	:	
Defendants.	:	AUGUST 20, 2024

NOTICE OF APPEAL

Pursuant to Federal Rule of Appellate Procedure 3(a)(1), notice is hereby given that the undersigned Defendants, the ESTATE OF LEROY DEASE, PETISIA ADGER, and DARYLE BRELAND ("Defendants"), hereby appeal to the United States Court of Appeals for the Second Circuit from the following decision of this Court:

1. RULING ON MOTION FOR SUMMARY JUDGMENT [Doc. Nos. 308, 312, 320, 329, 331 and 332] final order dated March 19, 2024, by the Court, (*Chatigny J.)* denying summary judgment, in part, as to Defendants. The Defendants are specifically appealing the Court's denial of qualified immunity as to Defendants regarding the Plaintiff's §1983 *Brady* claims and failure to intervene claim. *See specifically*, Ruling on Motion for Summary Judgment [Doc. Nos. 320 and 331]. Order on Motion for Reconsideration [Doc. No. 364].

The Court ruled on the Defendants' Motion for Summary Judgment in several parts [Doc. Nos. 308, 312, 320, 329, 331 and 332]. The Court most recently ruled on Plaintiff's Motion for Reconsideration [Doc. Nos. 349 and 364] regarding fabrication claims on August 8, 2024. The Court's ruling pertaining to qualified immunity regarding the §1983 claims *at issue in this Appeal* occurred in multiple parts: (1) a hearing on November 13, 2023 (Doc. No. 308), thereafter transcribed (Doc. No. 312) and finalized/corrected (Doc. No. 320); and (2) a written opinion issued on March 19, 2024 (Doc. No. 329) and Docket Annotation (Doc. No. 331). For purposes of the time limitations imposed under Federal Rule of Appellate Procedure 4, the Court was clear that

the portion of the opinion issued on November 13, 2023 was not final and appealable until an order was issued on the docket that concluded the Court's rulings. (Doc. No. 320, pp. 49-50). Notably, the Court, on November 13, 2023, had requested additional briefing from parties and also had not fully ruled on claims relevant to this Notice of Appeal. The final ruling on the Defendants' Motion for Summary Judgment (Doc. No. 331), as it pertains to this Appeal, was issued on March 19, 2024 and is attached as Exhibit A. Further, the transcript from the Court's initial, partial rulings on November 13, 2023 (Doc. No. 320) is attached as Exhibit B as said rulings are referenced in the final ruling (Doc. No. 331). The order relating to the Plaintiff's Motion for Reconsideration is attached hereto as Exhibit C (Doc. No. 364).

The Defendants take this Interlocutory Appeal to the extent the District Court denied the Defendants' Motion for Summary Judgment premised on, *inter alia*, qualified immunity for the §1983 *Brady* claims and failure to intervene claim. *Mitchell v. Forsyth*, 472 U.S. 511, 526-30 (1985); *Washington Square Post #1212 v. Maduro*, 907 F.2d 1288, 1292 n.1 (2nd Cir. 1990).

In prosecuting this Interlocutory Appeal based on the denial of qualified immunity, the Defendants rely on undisputed facts, the Plaintiff's version of any disputed fact, and the facts clearly ascertainable from viewing the record evidence. Ordinarily, "the denial of a motion for summary judgment is not immediately appealable because such a decision is not a final judgment." *O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 38 (2d Cir.2003). But interlocutory appeals are encouraged in qualified immunity cases because, as the Supreme Court has emphasized, the qualified immunity issue should be resolved early in the proceedings since qualified immunity protects an officer from suit. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151. The denial of a motion for summary judgment on the ground of qualified immunity is thus immediately appealable, but only to the extent that the district court's denial turns on an issue of law. See, *Behrens v. Pelletier*, 516 U.S. 299, 313, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996); *Johnson v. Jones*,

515 U.S. 304, 317-20, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995); *Martinez v. Simonetti*, 202 F.3d 625, 632 (2d Cir.2000). In turn, even where the district court rules that material disputes of fact preclude summary judgment on qualified immunity, "we may still exercise interlocutory jurisdiction if the defendant contests the existence of a dispute or the materiality thereof, or contends that he is entitled to qualified immunity even under plaintiff's version of the facts." *Tierney v. Davidson*, 133 F.3d 189, 194 (2d Cir.1998); See, *O'Bert*, 331 F.3d at 38; *Salim v. Proulx*, 93 F.3d 86, 90-91 (2d Cir.1996); *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 761(2nd Cir. 2003).

The Defendants expressly reserve all rights to file an amendment to the foregoing Notice of Interlocutory Appeal and/or an Amended Notice of Interlocutory Appeal pertaining to any rulings, decisions, orders or judgments relating to any motions and/or objections pending before this Court.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on August 20, 2024, a copy of the above was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERNON HORN,

Plaintiff,

V. No. 3:18-cv-1502(RNC)

CITY OF NEW HAVEN, ET AL.,

Defendants.

MARQUIS JACKSON,

Plaintiff,

V. No. 3:19-cv-388(RNC)

CITY OF NEW HAVEN, ET AL.,

Defendants.

RULING AND ORDER

Plaintiffs Vernon Horn and Marquis Jackson bring these consolidated actions under 42 U.S.C. § 1983 and state law against the City of New Haven, former New Haven Police Department Detectives Leroy Dease, Petisia Adger and Daryle Breland, and State of Connecticut firearms examiner James Stephenson. Plaintiffs seek

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compensation for allegedly wrongful convictions that caused them to serve lengthy terms of imprisonment. This memorandum addresses the claims against the Detectives under § 1983.

The plaintiffs advance four legal theories in support of these claims: suppression of material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963); fabrication of false inculpatory evidence in violation of the Due Process Clause of the Fourteenth Amendment; mishandling of exculpatory evidence resulting in unreasonably prolonged detention in violation of the Fourth and Fourteenth Amendments; and failure to intervene to prevent others from committing the foregoing violations. The Detectives have moved for summary judgment on all these claims, and the plaintiffs have filed a cross-motion for partial summary judgment.

The parties' briefs are unusually extensive, as is the underlying record. After careful consideration, the Detectives' motion for summary judgment on the

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claims under § 1983 is denied as to the Brady claims, granted as to the claims alleging fabrication of evidence and unreasonably prolonged detention, and denied as to the claims for failure to intervene. The plaintiffs' cross-motion for partial summary judgment is denied.

I.

On January 24, 1999, at about 3:25 a.m., three gunmen entered the Dixwell Deli in New Haven, a 24-hour convenience store. Two wore full-face ski masks; the third wore a similar mask or bandana. Immediately upon entering, one of the three sprayed five or six bullets from a 9-millimeter pistol in the direction of the cash register. A customer of the Deli, Caprice Hardy, was standing there waiting to get change for his purchase of a pack of cigarettes. One of the bullets struck him in the back, killing him. Yousif Abbey, an employee of the Deli, was standing at the register facing Hardy. He was shot in the left shoulder and fell to the floor pretending to be dead. One of the robbers tried to

open the register but it was locked. He called out, "Get the n***** from the back." Vernon Butler, an off-duty employee of the Deli, was then brought at gunpoint from a back room to the front of the Deli to open the register but he did not have the key. One of the robbers then took $2,000 from Abbey's pocket. Small amounts of money were also taken from Kendall Thompson and Howard Roberts, both of whom entered the Deli during the robbery. In addition, a cell phone belonging to Butler was stolen from the back room. At the sound of an approaching siren, the three perpetrators fled. Butler called 911 and the police arrived almost immediately. Detective Dease was dispatched to the scene to lead the investigation. He was subsequently assisted by Detectives Adger and Breland.

Approximately one week after the robbery, the Detectives obtained a "call detail record" for the stolen cell phone from Omnipoint Communications, the service provider. The record showed that five calls

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were made from the phone before service was shut off.[1] The first call was made approximately forty-five minutes after the robbery to a number in Bridgeport associated with Willie Sadler. Through interviews of Sadler and his friend Willie Newkirk, the Detectives eventually learned that the first call was made by Steven Brown, a 16-year-old resident of Bridgeport. Brown's fingerprints matched prints found on a cigar box in the back room of the Deli. Detectives Dease and Adger obtained a warrant for Brown's arrest charging him with felony murder and other offenses.

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[1] The record shows the following five calls:

(1) a call to a Bridgeport number on January 24, at 4:14 a.m. (first call);

(2) a call to a Bridgeport number on January 24, at 10:48 p.m. (second call);

(3) a call to a Bridgeport number on January 25, at 10:40 a.m. (third call);

(4) a call to a New Haven number on January 25, at 11:07 a.m. (fourth call); and

(5) a call to a Bridgeport number on January 25, at 2:32 p.m. (fifth call).

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Brown was arrested at his residence in Bridgeport and transported to NHPD headquarters. Dease told Brown that they knew he used the stolen cell phone to call Sadler after the robbery and that his fingerprints were found at the Deli. Brown agreed to waive his Miranda rights. He was questioned by Dease and Adger during a "pre-interview" that lasted up to an hour. The pre-interview was not recorded.

After the pre-interview, Adger took a taped statement from Brown in which he admitted his involvement in the robbery and identified the other perpetrators as Horn and Jackson, both New Haven residents, then 17 and 19.

According to Brown's statement, he met Horn and Jackson at a club in Bridgeport a few hours before the robbery. He had met them in Bridgeport a few times before and knew them by their nicknames, "Tai" and "Son." After the club closed, the three drove around in Jackson's car smoking marijuana and eventually stopped at the Deli. Brown did not realize Horn and

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Jackson were planning to rob it. Horn entered first and started firing. At that point, it was too late for Brown to back out.

Arrest warrants were obtained for Horn and Jackson based principally on Brown's statement. Horn was charged with the murder of Caprice Hardy; Jackson was charged with felony murder. Brown agreed to testify against them. He subsequently pleaded guilty to manslaughter in exchange for a prison sentence capped at 25 years, suspended after 18, with a right to argue for a lesser sentence based on his truthful trial testimony.

In 2000, Horn and Jackson were tried together in Connecticut Superior Court. At the trial, the State relied primarily on Brown's testimony, which was generally consistent with his taped statement. To corroborate his testimony, the State presented the call detail record for the stolen cell phone. The time of each call and the number called were plainly set forth

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in the call detail record, but the site of the origin of each call was not.

Brown testified that he made the first call to Sadler, while he, Horn and Jackson were in Jackson's car driving from New Haven to Bridgeport after the robbery. He testified that he made the second call later that day, and the third call the next morning, both to acquaintances in Bridgeport. He testified that after making the third call, he gave the phone to Horn, who was with him in Bridgeport at the time.

Another witness for the State, Marcus Pearson, testified that he made the fourth call listed in the record. The record showed that the call was made to a landline at a West Haven residence not long after the third call. Pearson testified that he made the fourth call from his home in New Haven after borrowing the phone from Horn. Pearson testified that he used the phone to call his friend, Crystal Sykes, who worked as a live-in aide at the residence in West Haven.

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In addition to Brown and Pearson, the State presented a number of other witnesses, including the following:

Kendall Thompson testified that he entered the Deli during the robbery and was immediately confronted by a black male wearing a ski mask. He was ordered to the floor at gunpoint and robbed of his only dollar. When the robber went to the back of the Deli, Thompson got up and ran away.

Thompson testified that he could not say that Horn and Jackson were in the Deli at the time of the robbery because the robbers wore masks. But he acknowledged making an identification of Horn and Jackson when he was shown a photo array two days after the robbery. Thompson testified that he selected Horn's photo because the yellowish eyes and mouth of the person in the photo resembled the eyes and mouth of the person who took his dollar. He testified that he signed Jackson's photo because he was familiar with Jackson's complexion from seeing him in the neighborhood and his

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complexion looked like that of the gunman who tried to open the register.

Shaquan Pallet testified that on the day of the robbery, he and the murder victim, Cecil Hardy, took a taxi to the Deli after getting off work. As he and Hardy entered the Deli, he saw Horn and Jackson, both of whom he knew from the neighborhood, standing outside smoking "wet." Hardy bought a pack of cigarettes, gave Pallet a few from the pack and Pallet began to leave the Deli. As he exited, he saw Horn and Jackson outside with masks. Fearing he was going to be robbed, he hurried to the taxi and was driven away, leaving Hardy behind.

Regina Wolfinger testified that she was in a car outside the Deli at the time of the robbery when she saw a black male run out of the Deli and get into a car, which quickly took off. Then, two black males, possibly wearing hats, came out of the Deli. She testified that Horn looked like one of the two men she

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saw outside the Deli at that time. Her level of certainty was 75%.

In his closing argument, the prosecutor emphasized the importance of the testimony of Pearson and Thompson:

> [Counsel for Vernon Horn] will tell you, well, this is only a snitch case. Mr. Pallet, he's getting . . . something. Mr. Brown, he's getting something. Let me ask you this, ladies and gentlemen. What is Marcus Pearson getting out of this? Is he a snitch? Did he get some sort of consideration? He's a friend of Mr. Horn's. He is the one that puts that stolen cell phone in Mr. Horn's hands . . . . He signed those pictures three times. Why did the police have him do that? They wanted to make certain, one hundred percent certain, that Mr. Pearson was certain that he got that stolen cell phone from Mr. Horn. That's why they went to him numerous times and had him sign those pictures numerous times. . . .
>
> So, the defense would have you believe . . . [that] [i]f you don't believe Steven Brown and if you don't believe Shaquan Pallet the case is over. Well, how did Mr. Horn get that stolen cell phone a day after this murder and robbery? Marcus Pearson told you in his testimony and he told the New Haven police shortly after this incident happened that Mr. Horn gave him that phone. What are the chances, ladies and gentlemen, of all of these identifications and Mr. Horn having a piece of incriminating

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evidence that was stolen from the Deli that night? . . .

[Kendall Thompson] looks at these pictures and does he say that he's absolutely certain that it's Mr. Horn and Mr. Jackson[?] No, he doesn't say that. He says these are the guys I believe were in the store. That's what he says. What a coincidence. Did Mr. Thompson know Regina Wolfinger? Did he know Shaquan Pallet? Did he know Steven Brown? Did they all get together and frame Mr. Horn and Mr. Jackson? . . . You've now got several different people who don't even know each other picking out the same photographs. The same photographs.

Kendall Thompson, how could he have possibly known who did this robbery, they had masks on. Kendall Thompson knew these people. So don't isolate each single piece of evidence. If you do that the State wouldn't ask you to return verdicts of guilty on just an identification of Kendall Thompson . . . . But when you examine [the evidence] in its totality, when you examine all of those identifications, when you examine Mr. Horn's conduct and statements following the crime, when you examine Mr. Marquis Jackson's misstatements and the lies about where he was, and when you consider all of that, all of those identifications made by independent, separate people, and when you consider the fact that Mr. Horn, the day after this murder had Mr. Butler's stolen cell phone, when you examine all of that, the only reasonable and logical conclusion that you can come to is that both of these defendants had been proven guilty beyond a reasonable doubt.

ECF 237-1 at 36, 53-54, 56-58.

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The jury convicted Horn on ten counts and Jackson on seven counts, and they were sentenced to prison for 70 years and 45 years, respectively.

II.

After unsuccessful appeals, Horn and Jackson challenged their convictions through state habeas proceedings. Jackson's habeas petition alleged that his counsel rendered ineffective assistance in failing to present alibi witnesses and in failing to develop and present a defense of third-party culpability. In support of the latter claim, Jackson alleged that Brown's co-perpetrators were part of a network of violent drug dealers in Bridgeport that included Sadler, Newkirk and Brown's brother-in-law. In addition, Jackson's habeas petition included a claim of actual innocence.

After a trial, the habeas court ruled that Jackson's counsel's performance was not deficient: the alibi witnesses who testified that they saw Jackson with Horn in the hours leading up to the robbery could

not account for his whereabouts at the time of the robbery; and no evidence placed any of the allegedly culpable third parties at the scene of the robbery or in possession of any proceeds. Jackson's claim of actual innocence was rejected because the evidence at the habeas trial, although creating a reasonable doubt as to his guilt, failed to demonstrate that he could not have committed the crimes. Jackson's appeal from the denial of his habeas petition was unavailing. See Jackson v. Comm'r of Corr., 149 Conn. App. 681 (2014), appeal dismissed, 321 Conn. 765 (2016).

Like Jackson's habeas petition, Horn's included claims of ineffective assistance of counsel and actual innocence. In particular, he claimed that his counsel failed to investigate the State's theory that he was in possession of the stolen cell phone the day after the robbery. At his habeas trial, Horn presented evidence that an adequate investigation would have revealed that Pearson's testimony concerning the fourth call was false. This evidence included testimony by Sadler,

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Newkirk and Pearson. Sadler testified that he made the fourth call to the residence in West Haven where Sykes worked in order to speak with Newkirk, her boyfriend at the time. Newkirk testified that he received the fourth call from Sadler while visiting Sykes. And Pearson admitted that his criminal trial testimony concerning his use of the phone was false. A representative of Omnipoint testified that information concerning the location of the origin of the calls could have been obtained at the time of the criminal trial by Horn's counsel had it been requested.

In 2013, Horn's habeas petition was granted by the trial court. The court found that Horn's counsel rendered deficient performance in failing to investigate the use of the cell phone in the days after the robbery. It was incumbent on Horn's counsel to conduct an investigation in light of the implausibility of the State's claim that Horn (1) took the phone from Brown in Bridgeport after 10:40 a.m., (2) gave it to Pearson in New Haven before 11:07 a.m., and (3)

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returned it to Brown in Bridgeport before 2:32 p.m. Had Horn's counsel obtained origination information from Omnipoint, the information would have established that all five calls were actually made in Bridgeport, contrary to Pearson's testimony that he made the fourth call in New Haven after borrowing the phone from Horn. Further, an adequate investigation would have shown that the fourth call was made by Sadler to Newkirk and that Pearson never got the phone from Horn. The court ruled that Horn's counsel's deficient performance was prejudicial under Strickland v. Washington, 466 U.S. 668, 688, 698-700 (1984). On this basis, it ordered that Horn's convictions be set aside. Horn was then released from prison pending the State's appeal. See Horn v. Warden, No. CV010456995, 2014 WL 3397826 (Conn. Super. Ct. June 3, 2014)(Young, J.).

In 2016, the Connecticut Supreme Court reversed the grant of habeas relief, and Horn was returned to prison. See Horn v. Comm'r of Corr., 321 Conn. 767 (2016). On the appeal, the State conceded that Horn's

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counsel was ineffective in failing to conduct an adequate investigation regarding the use of the stolen cell phone but argued that this deficiency was not prejudicial. The Supreme Court agreed. Horn's counsel's failure to investigate was not prejudicial, the Court stated, because the evidence presented at the habeas hearing concerning the use of the phone did not conclusively establish that Pearson could not have made the fourth call after borrowing the phone from Horn, nor give rise to a reasonable probability that the verdict would have been different if the evidence had been presented to the jury. 321 Conn. at 791. No such reasonable probability had been shown because the evidence presented at the habeas trial relating to the use of the cell phone did not cast doubt on the criminal trial testimony of the witnesses who placed Horn at the Deli before, during and after the robbery.

Horn and Jackson remained incarcerated until 2018, when the State moved to vacate their convictions. The State's motion was precipitated by evidence brought to

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light by Horn's counsel in a then-pending federal habeas case. The new evidence included F.B.I. analysis of records showing the location of the origin of the calls made from the stolen cell phone. The analysis established that all five calls were indeed made in Bridgeport. This evidence cast doubt on the credibility of Brown's trial testimony that Horn and Jackson were with him when he made the first call. More importantly, it refuted Pearson's trial testimony concerning the fourth call, which was the only evidence besides Brown's testimony linking Horn to the stolen phone.

The State's motion to vacate the convictions also took account of telephone records for a number of phones, including Sadler's and the phone at the West Haven residence. These records had been obtained by Detective Adger prior to the criminal trial - Sadler's by means of a letter to his service provider, and the residence's by means of a search warrant served on Southern New England Telephone Company. In 2018,

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Horn's habeas counsel found the letter and search warrant in NHPD's files on the Dixwell Deli case but not the telephone records. Adger, by then retired, was contacted and asked whether she had any records. Her working copy of the telephone records was in a box in the basement of her home. She retrieved the records so they could be turned over to Horn.

The records show that the fourth call listed in the call detail record was made in response to a call from the residence to Sadler's pager two minutes earlier. This evidence vindicated the findings of the Superior Court in Horn's habeas trial that the fourth call was made not by Pearson to Sykes but by Sadler to Newkirk.

The State's motion to vacate the conviction was granted, and the plaintiffs were released from prison. The charges against them were later dropped. The prosecutor responsible for making the decision concluded that although the newly discovered evidence

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did not exonerate the plaintiffs, it sufficiently undercut the State's case to prevent a retrial.

The plaintiffs then brought these actions.

III.

The plaintiffs make the following claims against the Detectives under § 1983:

First, they claim that the Detectives withheld from the prosecutor information favorable to the defense in violation of the Due Process Clause of the Fourteenth Amendment as construed in Brady.

Second, they claim that the Detectives fabricated evidence used to convict the plaintiffs despite knowing the plaintiffs were innocent in violation of the Due Process Clause.

Third, they claim that they were subjected to unreasonably prolonged detention due to conscience-shocking conduct on the part of the Detectives in violation of the Fourth and Fourteenth Amendments. And

Fourth, they claim that each Detective is liable for failing to intervene to prevent the others from violating the plaintiffs' constitutional rights.

A.

Under Brady, due process requires a police officer to disclose to a prosecutor evidence in the officer's possession that is favorable to an accused either because it is exculpatory or can be used to impeach a prosecution witness. A Brady violation occurs when evidence of this nature is not disclosed and there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different. United States v. Bagley, 473 U.S. 667, 682 (1985). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown

when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995)(quoting Bagley, 473 U.S. at 678).

In support of the Brady claims, the plaintiffs allege that the Detectives engaged in improper tactics in witness interviews in order to obtain evidence to sustain Dease's theory that the plaintiffs were guilty. These tactics included coercing witnesses in off-the-record interviews to get them to say what the Detectives wanted them to say, then taking formal statements omitting information that could be used to impeach the witnesses.

The plaintiffs' primary claims are that the Detectives failed to disclose information relating to off-the-record interviews of Thompson and Pearson. These claims are based principally on Thompson's and Pearson's deposition testimony that Dease and Breland

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coerced them to make false statements.[2] In addition, they advance a claim based on Detective Adger's failure to disclose the telephone records showing that the fourth call was made by Sadler to Newkirk.

With regard to the Brady claims relating to Thompson and Pearson, evidence in the summary judgment record, viewed most favorably to the plaintiffs, would permit a jury to find the following.

Kendall Thompson

Two days after the robbery, Dease and Breland interviewed Thompson. Then 19, Thompson was on adult probation. He did not want to speak with the Detectives about what happened at the Deli. He was afraid he would be charged simply because he was there. But Breland threatened to tell his probation officer if he failed to cooperate.

[2] As pleaded and briefed, the Brady claims do not encompass failure to disclose information relating to the post-arrest interview of Brown. The Brady claims do include a claim arising from Dease's interview of Pallet on March 23. However, this claim fails as a matter of law because it is undisputed that the prosecutor was present throughout the interview.

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The Detectives showed Thompson a photo array and asked if he could identify the gunman who robbed him. The array included photos of Horn and Jackson because, although no physical evidence linked either of them to the robbery/murder, Dease had reason to view them as suspects. Thompson said "about eighteen times" that it was impossible for him to provide an identification because the robbers wore masks.

Dease and Breland disputed Thompson's statements that no identification was possible. They pointed out that the robber's eyes and mouth could have been visible through holes in the mask.

Dease kept putting Horn's picture in front of Thompson telling him to look at the eyes. Thompson eventually gave in and provided an identification. At Dease's request, he signed not just Horn's photo but also Jackson's.

Marcus Pearson

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After obtaining the call detail record and interviewing Sykes, Detectives Dease and Breland interviewed Pearson. They showed him the call detail record and told him it showed that the fourth call was made from his porch to Sykes while Horn was visiting him the day after the robbery. He told them he had no idea what they were talking about and denied that he made any call using any phone. They falsely insisted that the call detail record proved the call was made. They told him that either Horn let him use the phone or he stole it himself from the Deli and kept asking "Which one is it?" They said they were going to charge one of them, so unless he said he got the phone from Horn, he would be charged with Hardy's murder. Pearson was afraid they would arrest him and he would lose custody of his children, so he ultimately capitulated and said he used the phone to call Sykes after getting it from Horn.

In a prior oral ruling, I addressed the Brady claims relating to Thompson and Pearson and concluded

that they raise genuine issues for trial as to Dease and Breland. See Oral Ruling, Tr. 13-17 (ECF 320). I adhere to that ruling.

The defendants do not dispute (and defense experts admit) that the matters described in Thompson's and Pearson's deposition testimony concerning their interactions with Dease and Breland constitute impeachment material that must be disclosed under Brady. And it is undisputed that these matters were not disclosed to the prosecutor.[3] Accordingly, the issue is whether there is a reasonable probability that, had these matters been disclosed, the result of the trial would have been different.

To be clear, the undisclosed matters encompass at least the following: (1) as to Thompson, Breland's threat to call Thompson's probation officer if he failed to cooperate; Thompson's repeated statements

[3] The defendants contend that the interactions now described by Thompson and Pearson did not happen. However, Thompson's and Pearson's recantations are not so incredible that they can be rejected as a matter of law.

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that he could not make an identification of anyone; the Detectives' insistence that Thompson could see the robber's eyes and mouth; and Dease's persistent demands that Thompson look closely at Horn's photo, especially the eyes; (2) as to Pearson, Pearson's repeated denials that he used the stolen phone to call Sykes; and the Detectives' explicit threats to charge Pearson with Hardy's murder unless he said he got the phone from Horn.

The plaintiffs contend that, considered in the aggregate, these matters "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles, 514 U.S. at 435. I agree.

As shown by the excerpts from the prosecutor's closing argument set forth above, the State relied heavily on the testimony of Pearson (Horn's "friend") and Thompson (who "knew" both Horn and Jackson) to dispel misgivings the jury could have about relying on the testimony of Brown and Pallet, both of whom were

cooperating in exchange for leniency. Had Thompson's and Pearson's interactions with Dease and Breland, as now described, been available for impeachment of their trial testimony, the value of their testimony to the prosecution would have been substantially reduced, if not destroyed. A reasonable juror likely would have rejected both Thompson's identification testimony and Pearson's testimony regarding the fourth call. Moreover, disclosure of these matters would have provided defense counsel with grounds to attack the good faith of the investigation. At a bare minimum, it would have caused a reasonable juror to view the testimony of Brown and Pallet with heightened skepticism. Accordingly, the reasonable likelihood standard is satisfied. See Kyles, 514 U.S. at 441-49.

The Detectives contend that they are entitled to qualified immunity on these claims. Accepting Thompson's and Pearson's deposition testimony as true, Dease and Breland are not protected by qualified immunity on the Thompson- and Breland-related Brady

claims insofar as the claims are based on their failure to disclose the witnesses' off-the-record statements. Whether qualified immunity protects them against liability for failure to disclose the methods they allegedly used to get the witnesses to change their statements presents a closer question. But neither side has grappled with this question, so I do not reach it.

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." Messerschmidt v. Millender, 565 U.S. 535, 546 (2012)(internal quotations omitted). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time the action was taken." Id.

(quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

The defendants suggest that because Thompson and Pearson were reluctant to cooperate, just like many witnesses in similar circumstances, their initial denials could reasonably be considered immaterial under Brady. However, the witnesses' off-the-record statements flatly contradicted the statements the officers forwarded to the prosecutor. Any reasonable officer would have known that failure to reveal the off-the-record statements to the prosecutor would violate an officer's disclosure obligations under Brady.

That the officers had a similarly obvious obligation to disclose the coercive methods they allegedly used to get the witnesses to contradict themselves is less clear-cut. In 1999, an officer's obligation under Brady to disclose coercive methods used to obtain inculpatory evidence co-existed with widespread use of "the Reid technique," an

interrogation strategy that included outright deception and refusal to take no for an answer. Because the Reid technique was widely used at the time, perhaps a reasonable officer in the Detectives' position could think that their alleged threats and persistent refusal to take no for an answer did not have to be disclosed to the prosecutor. In that case, partial summary judgment based on qualified immunity could be available to the Detectives on the Thompson- and Pearson-related Brady claims to the extent the claims go beyond nondisclosure of the witnesses' off-the-record statements. But this argument has not been raised by the defendants specifically, and I do not think it is fairly raised by their overall reliance on qualified immunity generally. Accordingly, I conclude that they are not entitled to partial summary judgment.

With regard to the claim based on Detective Adger's alleged concealment of the telephone records, I previously ruled that the records are material and adhere to that ruling. The records show that the

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fourth call was made to the West Haven residence two minutes after a call was made from the residence to Sadler's pager. Disclosure of this information would have had a significant impact on the State's case against Horn. In addition, it would have bolstered a third-party culpability defense by placing the phone in Sadler's possession within 36 hours of the robbery.[4]

I previously ruled that whether the records were intentionally withheld also presents a genuine issue for trial. I adhere to this ruling as well.

The defendants contend that a jury would have to credit Detective Adger's testimony that she put the records in the records room at NHPD, where they would be available to the prosecutor. Detective Adger's plausible testimony might well be accepted by a jury.

[4] The defendants contend that the records do not support a third-party culpability instruction because they disclose no direct connection between the robbery and Sadler, Newkirk or anyone else, as required to support such an instruction under State v. Sauris, 227 Conn. 389, 401 (1993). In the context of the record developed at the criminal trial, however, Sadler's possession of the phone established a sufficiently direct connection between him and the robbery to warrant a third-party culpability instruction.

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However, whether she put the records there or decided not to presents an issue of fact that is genuinely disputed.

In 1999, proper handling of the records required that they be put in the records room so they would be available to the prosecutor. The prosecutor had an open file policy for discovery. It is undisputed that the records were not made available to the defense in discovery. They were not produced during the state habeas litigation. And when Horn's federal habeas counsel looked for them, they could not be found.

The parties advance competing explanations for this state of affairs. The plaintiffs contend that a jury could reasonably infer that Adger failed to put the records in the records room in the first place. The better inference in the defendants' view is that she put them there, and they were removed by third parties.

In support of their respective positions, the parties present detailed arguments concerning the

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possible inferences that may be drawn from careful analysis and weighing of the evidence (or lack of evidence). These arguments are more in keeping with closing arguments in a jury trial.

Having considered the parties' arguments, I conclude that a jury could reasonably find that the records were not placed in the records room. Were a jury to make that finding, it would then be up to the jury to decide whether the records were intentionally withheld from the prosecutor.

In a recent submission following my oral ruling, Jackson's counsel have clarified that the Brady claim is based not only on Detective Adger's failure to disclose the original records but also her failure to disclose her working copy of the records, which she marked up and used to create a flow chart of the calls. Adger has testified that she simply did not see the connection between the fourth call to the West Haven number and the call to Sadler's pager two minutes earlier. Construing her deposition testimony most

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favorably to the plaintiffs, and giving them the benefit of reasonable inferences, a jury could find that Adger and Dease went over her working copy and flow chart of the calls, saw the connection, and decided not to disclose these materials to the prosecutor.[5]

This leaves the issue whether no Brady violation occurred because the plaintiffs' defense counsel could have obtained the telephone records themselves from other sources. The plaintiffs do not dispute that their counsel could have obtained the records with minimal effort. But they argue that this did not absolve the defendants of their obligation under Brady to disclose the records to the prosecutor.

The plaintiffs are correct. In the Second Circuit, if the prosecution fails to disclose Brady material to the defense, due process is violated although the material was available to the defense from

[5] There is no evidence that Breland saw the records or discussed their contents with Adger or Dease.

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another source. See Lewis v. Conn. Comm'r of Corr., 790 F.3d 109, 121 (2d Cir. 2015) ("[Brady] imposes no duty upon a defendant, who was reasonably unaware of exculpatory information, to take affirmative steps to seek out and uncover such information in the possession of the prosecution in order to prevail."); 6 Wayne R. LaFave, et al., Criminal Procedure § 24.3(b) n.87 (4th ed. 2023 update). Thus, the ability of the plaintiffs' defense counsel to obtain the records from other sources does not necessarily preclude the Brady claim as a matter of law.

The defendants do not contend that the availability of the records from other sources would compel a jury to find that Adger lacked the state of mind required for liability. Even so, I have considered whether the evidence is insufficient to support a reasonable inference that she withheld the records for the purpose of preventing their use at trial. Since Horn's counsel had not only the ability to get the records but also a duty to investigate the

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use of the stolen phone (as established in the habeas litigation), a jury may find that Adger reasonably expected him to get the records and thus lacked the culpable state of mind necessary for liability. But the evidence is not so clear that the suppression issue can be decided in her favor as a matter of law.[6]

B.

Turning to the fabrication claims, the plaintiffs allege that the Detectives framed them for Hardy's murder, knowing they were innocent, by manufacturing the evidence that was used to convict them. They point to Brown's testimony identifying them as perpetrators; Pallet's testimony that he saw them as he was leaving the Deli; and Pearson's testimony that he borrowed the phone from Horn and used it to call Sykes.

[6] The defendants' arguments regarding qualified immunity do not include an argument that a reasonable officer in Adger's position in 1999 could think that because Horn's counsel was able to get the records himself, she did not have to disclose them to the prosecutor. Accordingly, I do not address the issue here.

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"To succeed on a fabricated-evidence claim, a plaintiff must establish that 'an (1) investigating official (2) fabricate[d] information (3) that is likely to influence a jury's verdict, (4) forward[ed] that information to prosecutors, and (5) the plaintiff suffer[red] [sic] a deprivation of life, liberty, or property as a result.'" Ashley v. City of New York, 992 F.3d 128, 139 (2d Cir. 2021) (quoting Garnett v. Undercover Officer C0039, 838 F.3d 265, 279 (2d Cir. 2016)); see Barnes v. City of New York, 68 Fed.4th 123, 128 (2d Cir. 2023); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997).

A fabrication claim against an officer differs significantly from a claim that the officer used improper methods to obtain evidence. As the Seventh Circuit has stated:

> 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.

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Petty v. City of Chicago, 754 F.3d 416, 422 (7th Cir. 2014) (quoting Fields v. Wharrie, 740 F.3d 1107, 1114 (7th Cir. 2014)); see also Anderson v. City of Rockford, 932 F.3d 494, 510-11 (7th Cir. 2019).

Stated differently, it is one thing for a detective to use improper tactics to pressure a witness to provide a statement that may be true and the witness believes to be true. It is another to use such tactics to force a witness to provide a statement that is false and known to be false by both the detective and the witness. Only the latter provides a basis for a fabrication claim.

Second Circuit decisions in fabrication cases reflect this distinction. Compare Norales v. Acevedo, No. 21-549, 2022 WL 17958450, at *4-5 (2d Cir. Dec. 27, 2022)(fabrication claim based on allegations that officer coerced witness to make unreliable identification through promise of leniency and threat of prosecution properly dismissed; witness testified

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that she truthfully identified the plaintiff) with Frost v. N.Y.C. Police Dep't, 980 F.3d 231, 251 (2d Cir. 2020)(fabrication claim sufficiently supported to survive motion for summary judgment in view of recanting witness's affidavit stating that he falsely identified the plaintiff because the officer made it clear to him that he would need to do so in order to get a deal).

In a prior oral ruling, I concluded that the Detectives' motion for summary judgment on the fabrication claims must be granted because the evidence is insufficient to raise a genuine issue on the element of knowing falsity. Oral Ruling, Tr. 30-41 (ECF 320). I adhere to that ruling.[7]

[7] The plaintiffs claim that Dease and Breland fabricated Sykes's statement that Pearson made the fourth call then used it to pressure Pearson to falsely confirm that in fact he did make the call. In my prior ruling, I agreed that the evidence permits a reasonable finding that Dease and Breland manufactured Sykes's statement but not the further finding required for a fabrication claim that they knew her statement was false. I adhere to that conclusion.

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With regard to Brown's testimony, the plaintiffs allege that Dease manipulated Brown to identify the plaintiffs as perpetrators and that Brown went along with the fraud to protect his friends in Bridgeport. A reasonable jury could credit the plaintiffs' testimony that they are innocent and therefore find that Brown's identification of them was false. But Brown has never recanted, and his testimony against them may be true. Moreover, even assuming the plaintiffs are actually innocent, they offer no evidence to support their assertion that Dease knew they were innocent when he interviewed Brown. The claim that Dease used Brown to frame them thus fails to raise a genuine issue for trial.

Pallet's testimony that he saw the plaintiffs as he exited the Deli after getting cigarettes from Hardy may be false. The taxi driver does not recall Pallet getting out of the taxi and accompanying Hardy into the Deli; and a crime scene photo shows an unopened pack of cigarettes on the counter where Hardy was standing when

he was shot. In addition, were Pallet to testify at a trial in these cases, he could be impeached based on out-of-court statements he has allegedly made admitting that he falsely implicated the plaintiffs. The issue, however, is not whether a jury could reasonably reject Pallet's testimony that he saw the plaintiffs at the Deli but whether a jury could reasonably find that Dease manufactured Pallet's testimony knowing the plaintiffs were not there. The record evidence, viewed most favorably to the plaintiffs, is insufficient to make this a genuine issue for trial.

The evidence supporting the Pearson-related fabrication claim is also insufficient. The Detectives interviewed Pearson about the fourth call because Sykes, after saying she knew him, agreed there was a good possibility he made the call. Pearson had previously admitted that he and Horn were together on his porch the morning the call was made. In the circumstances, the Detectives could credit Pearson's statement that he did make the call to Sykes,

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notwithstanding his previous denials. In any event, there is no evidence they knew the call was made by someone else.

C.

Plaintiffs' unreasonably prolonged detention claims seek damages for the Detectives' failure to investigate the numbers in the "ORIG" column of the call detail record, which show that all the calls originated in Bridgeport, and the telephone records, which show that the fourth call was made by Sadler to Newkirk. Plaintiffs contend that these claims fit within the scope of the cause of action for unreasonably prolonged detention recognized by the Second Circuit in Russo v. City of Bridgeport, 479 F.3d 196, 205 (2d Cir. 2007). The defendants move for summary judgment arguing that Russo cannot be extended to apply to the facts presented here. I agree.

It is well-established that an arrest based on probable cause prevents recovery of damages against an arresting officer for pretrial detention caused by the

officer's failure to conduct an inadequate investigation. See Curley v. Vill. of Suffern, 268 F.3d 65, 70 (2d Cir. 2001) ("Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest.") (alteration omitted) (citation omitted); Krause v. Bennett, 887 F.2d 362, 372 (2d Cir. 1989)("[An officer's] function is to apprehend those suspected of wrongdoing, and not to finally determine guilt through a weighing of the evidence."). The decision in Russo does not disturb this rule. Rather, it speaks to the availability of a damages remedy when a person arrested on probable cause suffers prolonged detention due to the arresting officer's conscience-shocking failure to promptly disclose to the prosecutor exculpatory evidence of great significance in the officer's exclusive possession.

In Russo, the plaintiff was arrested for armed robbery of a convenience store. The arresting officers

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told him they had a surveillance camera videotape of the crime. The plaintiff, who had prominent body tattoos covering his neck and arms, insisted he was innocent and asked the officers to check the video for tattoos. They later told him that they checked the video, and it showed tattoos. In fact, the video showed that the perpetrator had no tattoos on his forearms. The plaintiff remained in pretrial detention for months until the prosecutor looked at the videotape and realized the plaintiff was innocent.

The plaintiff sued the officers claiming that their conduct violated his right to due process. The District Court ruled that the officers had no due process duty to investigate the plaintiff's assertion of innocence. The Second Circuit reversed. The Court held that in the circumstances, the officers had a duty to check the videotape for tattoos. The plaintiff's continued detention caused by the officers' conscience-shocking failure to disclose the video to the prosecutor within a reasonable time violated the

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plaintiff's Fourth Amendment right to be free from an unreasonable seizure.[8]

In accordance with the holding in Russo, district courts in the Second Circuit have recognized that to recover damages for unreasonably prolonged detention, the plaintiff must prove that he would have been released were it not for the defendant's conscience-shocking mishandling of highly significant evidence of the plaintiffs' actual innocence. See Connelly v. Komm, 20-cv-1060, 2022 WL 13679562, at *6 n.9 (D. Conn. Oct. 21, 2022); Cafasso v. Nappe, 15-cv-920, 2017 WL

[8] Since Russo, the Second Circuit has considered the legal sufficiency of claims for unreasonably prolonged pretrial detention in six cases. In all six, the claim failed. In Waldron v. Milana, 541 Fed. Appx. 5, 8-9 (2d Cir. 2013), the claim failed because the evidence was not "plainly exculpatory." See Panetta v. Crowley, 460 F.3d 388, 395 (2d Cir. 2006). In Wilson v. City of New York, 480 Fed. Appx. 592, 595 (2d Cir. 2012), the claim failed because some of the evidence at issue actually supported the charge against the detainee. In Nzegwu v. Friedman, 605 Fed. Appx. 27, 32 (2d Cir. 2015), there was no proof the officer "tampered with, lost, tainted or concealed" exculpatory evidence. In Virgil v. Town of Gates, 455 Fed. Appx. 36, 40 (2d Cir. 2012), the pleadings did not "support an inference that [the] defendants 'actively hid . . . exculpatory evidence.'" See Russo, 479 F.3d at 210. In two other cases, the period of pretrial detention was not sufficiently prolonged to support a claim. See Husbands ex rel. Forde v. City of New York, 335 Fed. Appx. 124, 129 (2d Cir. 2009); Marchand v. Hartman, 395 F. Supp. 3d 202, 224-25 (D. Conn. 2019).

4167746, at *7 (D. Conn. Sept. 20, 2017); Jackson v. City of New York, 29 F. Supp. 3d 161, 179 (E.D.N.Y. 2014); Creighton v. City of New York, 12-cv-7454, 2017 WL 636415, at *46 (S.D.N.Y. Feb. 14, 2017); Pierre v. City of Rochester, 16-CV-6428, 2018 WL 10072453, at *14 (W.D.N.Y. Sept. 7, 2018); Vazquez-Mentado v. Buitron, 12-CV-0797, 2014 WL 12894096, at *3 (N.D.N.Y. July 9, 2014).[9]

Plaintiffs allege that it would have been obvious to anyone looking at the call detail record in 1999 that "ORIG" was an abbreviation for "origination." They further allege that, in view of the potential significance of the calls listed in the "ORIG" column,

[9] The parties appear to assume that a Russo claim can be brought to recover for unreasonably prolonged imprisonment following a conviction. Whether a Russo claim is available in the post-conviction context is questionable. However, since an officer's disclosure obligations under Brady continue after conviction, the duty recognized in Russo may logically continue as well (predicated on the Due Process Clause of the Fourteenth Amendment rather than the Fourth Amendment). In any event, I assume without deciding that a claim can be brought under § 1983 to obtain redress for a sentenced prisoner's unreasonably prolonged imprisonment caused by conscience-shocking conduct that would support a Russo claim based on unreasonably prolonged pretrial detention.

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the Detectives' failure to investigate what the numbers meant may reasonably be viewed as conscience-shocking. But the numbers in the "ORIG" column are readily distinguishable from the videotape in Russo.

In Russo, the videotape itself exonerated the plaintiff, just as he said it would. No investigation was required to verify the plaintiff's actual innocence beyond simply examining the videotape, as he requested. Anyone looking at the tape for evidence of the plaintiff's tattoos would have realized that his assertion of innocence was true. Yet the officers either failed to look at the tape or, if they did look, they lied to the plaintiff about what it showed. Either way, their conduct was conscience-shocking.

Unlike the videotape in Russo, the numbers in the "ORIG" column were not in the Detectives' exclusive possession, and they did not have obvious significance as evidence of the plaintiffs' actual innocence. Plaintiffs' assertion that they did is belied by the history of the proceedings arising from the

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robbery/murder. As far as the record shows, at no point prior to 2018 did any lawyer, investigator, witness, or judge recognize the potential significance of the numbers in the "ORIG" column. Moreover, unlike the videotape in Russo, the F.B.I.'s analysis in 2018 falls well short of establishing that the plaintiffs are actually innocent. In these circumstances, the Detectives' failure to look into the meaning of the numbers in the "ORIG" column cannot reasonably be considered conscience-shocking.

Nor are the telephone records comparable to the videotape in Russo. The plaintiffs allege that Detective Adger should have used the records to develop a case against Brown's associates in Bridgeport. For reasons discussed above, the records' value as exculpatory evidence is sufficient to satisfy the materiality standard applicable to a Brady claim. But the standard applicable to a Russo claim is more demanding. The exculpatory evidence must be highly significant if not dispositive. Because the plaintiffs

cannot satisfy this requirement, the Russo claims fail as a matter of law.

D.

To prevail on a § 1983 claim against a police officer for failure to intervene, a plaintiff must prove that (1) a violation of his constitutional rights was ongoing or about to occur, (2) the defendant knew this at the time, (3) the defendant had a reasonable opportunity to intervene to prevent harm to the plaintiff, and (4) the defendant failed to take reasonable steps to intervene. Jean-Laurent v. Wilkinson, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008) (citing O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988)).

Consistent with the foregoing discussion, Dease and Breland are each potentially liable for failing to intervene to prevent the other from withholding Thompson- and Pearson-related Brady material. And Dease is potentially liable for failing to intervene to prevent Adger from withholding the telephone records,

if not the originals, then her working copy and flow chart of the calls.[10]

V.

Plaintiffs contend that they are entitled to summary judgment on the Pearson- and Thompson-related Brady claims because Dease and Breland do not dispute that they failed to disclose the following: Pearson's denial that he called Sykes, Thompson's statement that he could not identify the robbers, and Breland's statement to Thompson that unless he cooperated they would call his probation officer. Defendants contend that their admitted failure to disclose this information does not automatically entitle the plaintiffs to summary judgment. I agree.

[10] District courts in other circuits have ruled that qualified immunity applied to similar failure-to-intervene Brady claims because it was not clearly established at the pertinent time that an officer had a duty to prevent another from withholding Brady material. See Virgil v. City of Newport, 545 F.Supp.3d 444, 488 (E.D. Ky. 2021); Elkins v. Summit County, No. 5:06-cv-3004, 2009 WL 1150114, at *9 (N.D. Ohio Apr. 28, 2009). However, the defendants have not pressed this argument, so I do not address it here.

Plaintiffs' motion is based on the standards that govern a criminal defendant's ability to obtain relief from a conviction based on a Brady violation. A prosecutor's failure to disclose information favorable to the defense, whether intentional or inadvertent, provides a basis for setting aside a conviction, and a conviction will be vacated if the undisclosed information undermines confidence in the verdict. Brady, 373 U.S. at 87. However, in a suit for damages against a police officer under § 1983, the plaintiff must prove that the officer concealed the information from the prosecutor with a sufficiently culpable state of mind and that but for the officer's wrongful conduct the outcome would have been different.

The plaintiffs contend that, even assuming these standards apply, they are still entitled to summary judgment. But the evidence regarding the Detectives' state of mind, viewed fully and most favorably to the Detectives, does not permit me to find as a matter of law that they concealed the information in bad faith to

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prevent its use at trial. Nor can I find as a matter of law that but for the Detectives' concealment of the information, the plaintiffs would not have been convicted.

VI.

Accordingly, the Detectives' motion for summary judgment is denied as to the Brady claims, granted as to the claims for fabrication of evidence and unreasonably prolonged detention, and denied as to the claims for failure to intervene, and the plaintiffs' cross-motion for partial summary judgment is denied.

So ordered this 19th day of March 2024.

/s/ RNC

Robert N. Chatigny

United States District Judge

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UNITED ST TES DISTRICT COURT
DISTRICT OF CONNECTICUT

VERNON HORN, Plaintiff,	No. 3:18-cv-01502-RNC
v.	November 13, 2023
NEW H VEN, ET L. Defendants.	2:00 p.m.

braham . Ribicoff
Federal Building
450 Main Street
Hartford, CT 06103

TELEPHONIC CONFERENCE

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(Call to order, 2:00 p.m.)

THE COURT: Good afternoon. This is Judge Chatigny speaking. I hope you're able to hear me. This is a telephone conference in the consolidated *Horn* and *Jackson* cases.

May I please have the appearances of counsel, starting with counsel for Mr. Horn.

MR. M ZEL: Good afternoon, Your Honor. Ilann Maazel of the Emery Celli firm. I'm joined by my colleague, Nick Bourland, and co-counsel, Tamar Birckhead, and Mr. Horn is also on the line.

THE COURT: Thank you.

Counsel for Mr. Jackson?

Do we have counsel for Mr. Jackson? Is anyone on the line?

MR. GER RDE: Judge, it's Tom Gerarde, and I'm the City of New Haven's lawyer. This is a request made by the *Horn* team, and the *Jackson* team did not join in the request. Maybe they think that that's why they need not attend.

THE COURT: I see. Well, I'm sorry about that. But I think we can proceed in the absence of counsel for Mr. Jackson, unless anybody thinks otherwise. I'll proceed in the belief that we can do that without prejudice to any parties, including Mr. Jackson.

Do we have --

MR. GER RDE: Yes. I'll continue with that, Judge. Good afternoon. It's Tom Gerarde. I represent the City of New Haven. I have ttorney manda Stone with me on the line.

THE COURT: Thank you. nybody else?

MR. KR USE: Yes, Your Honor. This is Brad Krause. I represent Defendants Petisia dger, Daryle Breland, and the Estate of Dease.

THE COURT: Okay.

MR. K G N: nd, Your Honor, it's Thomas Kagan. I also represent the Defendants dger, Breland, and Estate of Dease.

THE COURT: Thank you.

MR. FINUC NE: Good afternoon, Your Honor. Stephen Finucane from the Connecticut G's office, along with G Ed Rowley. We represent Defendant James Stephenson, and no objection to us proceeding today without counsel for Mr. Jackson. We interpreted the objection as to only in the *Horn* case by the *Horn* team.

THE COURT: Okay, fine. I'm assuming that because the cases are, for all intents and purposes, consolidated, setting the conference would cause others to realize that I was interested in having everybody on the call, but let me move ahead.

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I'm prepared to speak with you about the status of the numerous pending motions, and my intention is to give you some oral rulings so as not to keep you waiting any longer.

But adjudicating these motions is a significant undertaking for me. You have, no doubt, invested very considerable resources in the motions. nd to put my comments today in proper context, I'd like to tell you that I have, too. Specifically, I have spent literally hundreds of hours examining the voluminous record in detail, many parts of it more than a few times, reading and analyzing all of the prior proceedings -- and I mean all of them -- the joint criminal trial, the direct appeals, the habeas proceedings, and the appeals in those proceedings. In addition, I've researched the case law in the Second Circuit and elsewhere on the numerous complicated legal issues that are presented by these motions and in other Circuits in the hope that I might give you fair and well-reasoned rulings.

That preface having been presented, I'll tell you how I'm looking at these motions. To my mind as a trial judge, the right to a jury trial is, of course, fundamental, and I need to err, if I do err, on the side of allowing a contested claim to be resolved by jury.

The function of the summary judgment motion is

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to enable the Court to dispose of claims that don't merit a trial, claims that would entail a wasted trial, a trial that would be a futile exercise because if the jury were to return a verdict for the non-movant, I would have to set aside that verdict as a matter of law.

So when I look at a paper record like the one I have here, I ask myself with regard to any given claim: If a jury were to return a verdict for the non-movant on this claim, would I have to set it aside?

Bear in mind, we have a lot of claims here. If you think of the scope of the claims in terms of what a verdict form would look like, you would appreciate, I think, that the verdict form could span perhaps dozens of pages, encompassing a total, perhaps, of 50 claims. We're talking about each plaintiff making a claim against each defendant, and within each of those claims there are subparts.

So it's not just, you know, Mr. Horn against the detectives; it's Mr. Horn against each of the three New Haven detectives and [possibly] against, you know, Mr. Stephenson. Looking just at the New Haven detectives, each of those people is entitled to separate consideration of each claim made against them by each plaintiff. That would be the case at a jury trial. nd so we would ask a jury to tell us how they rule on each of those claims.

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nd, again, when you do accounting -- which I haven't done, but I estimate -- the claims approach 50 claims in total. So that's the framework.

nd, you know, I don't want to keep you on the phone all day, but I will tell you that this is going to take a little time. So, you know, if you want to relax and have a cup of coffee, I encourage you to do so. It may make this less burdensome for you.

The bottom line is today I want to give you all rulings on the claims against the detectives, and by that I mean the claims under Section 1983 for a *Brady* violation and fabrication of evidence. I may be able to accomplish more, but we'll see.

The reason I am addressing these motions first is because they were filed more or less simultaneously with the City's motion, and, as usual, it's best to address the motion filed by the individuals before the motion filed by the City. Let's look at these claims.

The first cause of action alleges *Brady* violations by Detectives Dease, dger, and Breland. Specifically, the parties have briefed violations involving Pearson's statements that he did not make the fourth phone call and the detectives' threats to him as alleged by him in his deposition testimony as well as his prior testimony in the habeas proceeding.

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In addition, you have briefed the question whether Thompson's statements that he could not identify either of the plaintiffs and the detectives coerced him, as recounted in his deposition testimony, whether those statements and threats had to be disclosed to comply with *Brady*. nd then you have, of course, briefed the nondisclosure of the phone records that Detective dger gathered during the investigation, a working copy of which was eventually retrieved from her basement.

I want to note here that as I read the complaint and the briefs, the plaintiffs have not undertaken to explicitly argue in so many terms that the detectives, specifically Dease and dger, may be liable for having failed to reveal the methods that were used in the interview of Stephen Brown after his arrest. That needs to be put on the table at this time because, as will become clear shortly, the availability of such a claim may be of some interest to Mr. Horn and the New Haven detectives.

Preliminarily, I want to mention a number of legal issues relating to the *Brady* claims. First, as you know, we need to decide the degree of culpability required to support a damages claim for a *Brady* violation.

nother issue that I don't think you have briefed or, if you've mentioned it, you haven't fully

briefed, is whether the materiality element of a *Brady* claim under Section 1983 is an issue for the jury or the Court.

nd then, third, I think we need to be clear about whether plaintiff bringing such a claim, in addition to establishing the materiality of the evidence, must prove that but-for the failure to disclose the evidence, the outcome would have been different in that he would not have been convicted. Each of these issues has required significant research.

Taking them in turn, I start with the degree of culpability required for damages liability. You know, the defendants say that in this case, under Section 1983, the plaintiffs, Mr. Horn and Mr. Jackson, have to prove that a defendant -- Detective Dease, Detective dger, Detective Breland -- intentionally suppressed exculpatory evidence.

Based on your briefing, you appear to agree that the no-fault standard that's applicable to a *Brady* claim in criminal proceedings does not apply. nd, in any case, I am quite sure that it does not apply. Imposing liability under Section 1983 for negligent or inadvertent nondisclosure would be contrary to the Supreme Court's holding in *Daniels against Williams* that negligence could not support a Section 1983 due process claim. For that reason, most, if not all, Circuits seem to agree that the

no-fault standard does not apply here.

Proceeding to the next step in the analysis. The issue is whether a plaintiff has to prove that the exculpatory evidence was intentionally withheld, as the detectives argue, or whether reckless or deliberate indifference is sufficient, as the plaintiffs suggest.

s you know, the plaintiffs -- the defendants rely on *Fappiano*. In that case, the Court said, quote, "We have never held that anything less than an intentional *Brady* violation establishes a Section 1983 due-process claim for damages, and we decline to do so here."

Since *Fappiano*, as far as I can tell, the Court has given no indication that less-than-intentional withholding will support a *Brady* claim for damages.

The plaintiffs point to a footnote in *Bellamy* where the panel suggested that the issue is open, but I don't see any other decisions that cause me to think less-than-intentional withholding would be sufficient.

So I conclude that to prevail on a *Brady* claim against a defendant, the plaintiff must prove that the defendant intentionally withheld the evidence for the purpose of depriving the plaintiff of the use of the evidence at his criminal trial.

Turning to materiality as an element of this claim, the standard of materiality is well-established,

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but it is, perhaps oddly, unclear to me whether that standard is to be applied by the Court or by the jury in the first instance. The plaintiffs' submissions can be understood to suggest that materiality is an issue for the jury. I don't see that the defense has addressed the issue. I haven't been able to find a clear holding in any Circuit one way or the other.

There was one case in the Third Circuit where the trial judge submitted the issue of materiality to the jury by way of a special interrogatory. The Court of ppeals said that it was not going to address that jury interrogatory because the Court -- the District Court -- said that it would have agreed with the jury's response to that interrogatory. nd so no decision was made. For purposes of ruling on these -- on the detectives' motion, I'm going to assume that it is a jury issue.

Turning to causation. I have asked myself whether a plaintiff has to prove that but for the nondisclosure, he would not have been convicted. This is another issue that doesn't admit a ready answer, although what law exists requires that the plaintiff bear that burden, and indeed that led to the undoing of a $14 million plaintiff's verdict in a case called *Drumgold v. Callahan*.

For purposes of ruling on the defendants'

motions, I'm going to assume that but-for causation has to be established.

With those principles in mind, I now turn to the alleged *Brady* violations here. nd I start with Pearson's denials that he made the fourth call after getting the stolen cell phone for Mr. Horn, and the detectives' alleged threats to him.

In ruling on the detectives' motions on this claim, Pearson's deposition testimony about his denials and the detectives' threats must be credited. To the extent the defense is suggesting that his declaration or his deposition testimony is incredible as a matter of law -- and I don't understand the defense to be making that argument, but to the extent that argument is suggested -- the Second Circuit made it clear in a case involving fabricated evidence claims that even if a given witness's testimony -- in that case, it took the form of a written declaration submitted in opposition to summary judgment -- is highly vulnerable to impeachment, the narrow exception that permits a district judge to disregard a witness's statement in deciding whether there is a genuine issue for trial did not apply. So I take it for granted that I have to credit Mr. Pearson's testimony as well as Mr. Thompson's testimony, which I'll discuss separately.

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Crediting Mr. Pearson's testimony, I think I am bound to conclude that his denials and the detectives' threats constitute *Brady* material. In fact, as the plaintiffs point out in their brief, the defense experts, Mr. Stein and Mr. Spector, effectively stipulate to that -- again, if one credits Mr. Pearson's testimony, as I believe we are bound to do. These denials and threats could be used to impeach his trial testimony that he got the stolen cell phone from Mr. Horn soon after the crime.

Is the evidence material in the sense that its disclosure might well have resulted in a different outcome? I think so, for substantially the reasons stated by Mr. Horn. State's ttorney Nicholson and State's ttorney Griffin will testify that Pearson's testimony that he made the fourth call using a phone he got from Mr. Horn was critical evidence and highly incriminating. Detective Dease in his testimony said it was critical to the investigation.

Putting aside their opinions, Pearson's testimony about the fourth phone call significantly bolstered the credibility of Brown's testimony that he knew the plaintiffs and that they were his co-perpetrators. That testimony was more clearly material to the outcome of the case against Mr. Horn because it put the stolen cell phone in his hand soon after the crime.

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But I think a jury could also find that it was material to the outcome of the case against Mr. Jackson. If the jury were to find that Mr. Horn did not have the stolen cell phone, that would detract significantly from the case against him and in doing so simultaneously detract in a significant way from the case against Mr. Jackson.

To the extent there's an argument about qualified immunity, I think that if we credit Pearson's testimony, qualified immunity is not available.

So with regard to the Pearson-related *Brady* violations, I conclude that the motion for summary judgment by the detectives must be denied with regard to Detectives Dease and Breland.

gain, the claims against each individual defendant require separate consideration. nd so I've asked myself, what about Detective dger? Is she culpable for -- or I should say potentially liable for a *Brady* violation based on the Pearson-related violations?

s far as I can see, the plaintiffs haven't argued or produced evidence that she knew about Pearson's denials or the detectives' alleged threats, and, therefore, I believe that the motion for summary judgment on this claim should be granted in her favor as to both plaintiffs' claims.

Turning to the Thompson-related violations,

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according to his deposition testimony, he repeatedly told Detectives Dease and Breland that he couldn't identify the robbers because they were masked. Yet, according to him, they persisted in putting the plaintiffs' photos in front of him and pressured him to identify them as the people he saw in the deli and threatened to seek a warrant for his arrest and call his probation officer if he didn't cooperate.

Is this exculpatory? Sure. His repeated denials that he couldn't identify the robbers, the detectives' allegedly, you know, flagrant persistence in the face of his denials, including their suggestive use of the photos and their alleged threats, certainly could be used to impeach his testimony and at the same time further weaken his out-of-court identification, which was the subject of evidence and argument at the joint criminal trial.

The issue then becomes whether the nondisclosure of the alleged conduct during that interview was material to the outcome. The plaintiffs argue that it was material because Thompson was the only person in the deli who identified them. nd the detectives say, No, it wasn't material because, in fact, his trial testimony was so muddled as to be essentially worthless.

I may be overstating the defendants' argument

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slightly, but I don't mean to. That's the message I get. nd I have looked at his testimony carefully, and I agree that it was muddled. But his out-of-court identification as reported by the detectives was less so.

nd in his closing argument, the State's ttorney used the out-of-court identification to help buttress the eyewitness testimony of Brown, Wolfinger, and Pallet. Disclosure of Thompson's denials and the detectives' threats would have undercut that argument significantly.

In addition, and apart from that, disclosure of the methods the detectives used, allegedly, to get Thompson to make a general identification could undermine the jury's confidence in the investigation as a whole. So in viewing the record most favorably to the plaintiffs, I conclude that the materiality of this undisclosed evidence presents a jury issue. nd, again, crediting Thompson's testimony, qualified immunity would not apply.

The bottom line is I conclude that the detectives' motion on the claims of both plaintiffs based on the Thompson-related *Brady* violations must be denied as to Dease and Breland, but, again, granted as to dger.

Turning to the phone records, the plaintiffs claim that Brady required dger to disclose the phone records of Sadler, Fuller, Macklin, and the West Haven

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house. Plaintiffs allege that dger and Dease intentionally suppressed these records, that the records were exculpatory, and that they were material to the outcome.

Please note I understand the claim to be that dger was required to disclose the original records for those phone numbers as distinct from her working copy of the records that contain her marginal notations. nd I've considered the claims accordingly.

Detective dger, in her motion for summary judgment, makes the point that the records were not suppressed because there was sufficient notice of the existence of the records to provide the defense with all the information they needed to get the records. Several cases are cited for the proposition that there's no suppression if the defendants were on notice.

gain, we confront an issue that needs to be resolved at some point. You know, is this a jury issue? In other words, is it proper for a jury to determine whether the defense had sufficient notice of the existence of the records to undercut the *Brady* claims? I'm assuming that it is a jury issue.

The standard is phrased in terms of what the plaintiffs knew or should have known, and that sounds like a jury question to me. nd so I ask, would a jury have to

find that the plaintiffs knew or should have known of the existence of the records, given what was available to them?

gain, I don't think that this has been fully briefed. If I'm mistaken about that, I hope you will be tolerant. But it occurs to me that before I reach a conclusion, it might help me if I get a supplemental memo from the plaintiffs and the detectives on these two questions: Whether this is a jury issue and, if so, whether a jury would have to find that the plaintiffs knew or should have known of the existence of the records. nd I would respectfully ask that the memos exceed not more than ten pages total.

The motion by Detective dger also urges that the record doesn't permit an inference that she failed to deliver the records to the records division. Both sides present a detailed argument about the inferences that can be drawn from the evidence on this question. Similarly, Detective dger argues that the evidence does not permit an inference that she intentionally withheld the records from the records division in order to conceal them. nd, again, the parties make extensive detailed arguments about the inferences that are available from the records.

I think you have done a fine job of advancing your respective positions, and I've considered them

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carefully and, as you might suspect, I think it is a jury issue. The arguments that you're making are the very arguments that would be made to a jury in asking the jury to figure out, you know, what happened and with what state of mind. I don't think I can make these decisions as a matter of law.

Bear in mind that while Detective dger's proffered explanation, in my opinion, is certainly plausible, in ruling on a motion for summary judgment I have to disregard it unless a jury would be bound to credit it. nd I don't think a jury would have to credit her explanation, plausible though it is.

When you put aside her testimony and you look at the circumstantial evidence provided by the record, that evidence, viewed most favorably to the plaintiffs, does not preclude a finding that she failed to deliver the records to the records division, nor does it preclude a finding that she withheld them intentionally.

Turning to the materiality of the records, Detective dger argues that they were not material to the outcome because their disclosure would not put the whole case in a significantly different light, and Detective dger makes a number of related arguments.

The plaintiffs respond that the jury could reasonably find that the records were material to the

outcomes, and I agree with the plaintiffs for substantially the same reasons they present to me.

The records discredit Pearson's testimony that he made the fourth phone call by showing that the landline at the West Haven house was used to call the Bridgeport pager two minutes before the fourth call was made. Had the phone records been disclosed, there's a reasonable probability that the defense would have discovered the call to the pager, contradicting the fourth phone call theory.

Moreover, examination of the records would have shown frequent calls from Mr. Sadler to that landline in West Haven, leading to discovery of Sadler's connection to Crystal Sykes' then-boyfriend, Mr. Newkirk. t the pertinent time in 1999, Newkirk was her boyfriend and he spent time with her in West Haven. He did not get cell service at that location, so Sadler called him on the landline and, as the records show, he called Sadler from the stolen phone.

Picking up on that last point, disclosure would have bolstered a request for a third-party culpability instruction. Those phone records put the stolen cell phone in Sadler's possession 36 hours after the crime, give or take. nd I think that constitutes evidence of his involvement in the crime, evidence that is

sufficiently direct to support a third-party culpability instruction.

Beyond that, the defense could have used the records to undermine the jury's confidence in the investigation. Specifically, the records could lead a jury to reasonably find that the investigation of Mr. Sadler and his associates was woefully inadequate. So with regard to the materiality of the records, I am satisfied that they are material.

The motion for summary judgment on this claim, based on concealment of the phone records, therefore is unavailing except we need to contend with the question whether the defendants were on notice sufficient to undercut their *Brady* claims. nd so, for today, I defer on the motion for summary judgment on this claim as against Detective dger and also Detective Dease, but I grant summary judgment on this claim to Detective Breland.

I'm going to pause for a moment to give the court reporter a break, and then I'm going to turn to the fabrication claims. nd at that point, I think it would probably be more than I could have expected you to endure today, and so I won't proceed to other aspects of the motions.

I'm going to ask the court reporter to let me know when she's ready to continue.

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THE COURT REPORTER: I'm ready, Your Honor. Thank you for thinking of me.

THE COURT: Okay. Turning, then, to the fabrication claims against the detectives.

I have not had a fabricated evidence claim in the course of my work as a judge, and so it has been a steep learning curve for me. But it certainly is a significant area of the law, and I'm glad to have learned a bit about it.

It's not entirely clear to me whether the source of the protection against fabricated evidence lies in procedural or substantive due process, but the Second Circuit has indicated that a fabricated evidence claim invokes the protection provided by substantive due process, and so I'll proceed on that assumption.

Based on my research, I have come to understand that there are several types of fabricated evidence claims. Such a claim can involve a false report of a witness's statement. In this category would be an officer's report of an interview in which the officer states that a witness said X, X is likely to influence the jury's decision, and, in fact, the witness did not say X, and the officer knows the witness did not say X. That's exemplified by a series of cases in the Second Circuit.

nother type of claim involves a false report of

the officer's own observations. In a Second Circuit case, an officer prepared a report stating that he saw the plaintiff smoking marijuana in a car, and then searched the car and found narcotics. nd the plaintiff said that he was never in the car. nd the Court of ppeals found the plaintiff's statement sufficient to support a fabrication claim.

nd then another category, and one that is not irrelevant to our situation, involves cases where an officer coerces a witness to make a statement that the officer knows is false. s disturbing as that scenario truly is, there are more than a few cases that present claims of that nature, both in and outside the Second Circuit.

In the briefing here, the plaintiffs seem to have taken on the burden of proving that the detectives created false evidence knowing it was false. nd so, you might wonder, why did I spend considerable time looking at the question whether knowledge of falsity is, in fact, an element of a fabricated evidence claim in the Second Circuit? I mean, the more I looked, the more I needed to look.

When the Second Circuit lists the elements of such a claim, you won't see knowledge of falsity among the elements. Recently, the Court of ppeals listed the

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elements in a case that you might or might not have seen. That's a case called *Barnes v. City of New York*, and it's at 68 F.4th 123 128, 2023.

Though the list does not explicitly mention knowledge of falsity as an element, the Second Circuit has repeatedly stated that fabrication means knowingly making a false statement or omission. That's been the Circuit's position ever since its first opinion in the area. nd it's an opinion that runs throughout all the cases.

The closest case to the one we have here is a case called *Norales v. cevedo*, 2022 Westlaw 17958540, decided December 27, 2022. Because I think this case is important, I'm going to ask you to bear with me as I tell you a little bit about it.

In that case, an acquittee in a shooting case brought a fabricated evidence claim alleging that the defendant officers undermined the fairness of his trial by coercing his identification as a suspect from an unreliable witness. The District Court dismissed the complaint for failure to state a claim on which relief could be granted, and the Court of ppeals affirmed the dismissal. The complaint alleged that the witness who identified the plaintiff as the shooter had been offered leniency if she testified, and threatened with an arrest if she did not. In addition, it alleged that one of the

officers told this witness incorrectly that a surveillance video showed the plaintiff shooting the victim. The Second Circuit concluded that these alleged facts failed to plead a plausible claim.

The Court said that to adequately plead a fabricated evidence claim, a plaintiff must plausibly allege facts showing that the defendants, quote, "knowingly fabricated evidence," end quote. The complaint was insufficient because the plaintiff failed to allege facts to establish that the defendants coerced the witness to testify falsely rather than give testimony she believed to be truthful, or that the witness herself ever said her identification was false. In that case, the witness testified that she had truthfully identified the plaintiff, and the Court concluded that in that context the claims failed. So allegations that a defendant coerced a witness to make an unreliable identification through a promise of leniency and a threat of prosecution does not plausibly allege that a defendant knowingly fabricated evidence.

In *Norales*, the Court distinguished another case involving an identification, *Frost v. New York City Police Department*. That's at 980 F.3d 231, 2020.

In that case, an acquittee previously prosecuted for gang-related murder brought a 1983 action alleging

various claims, including a substantive due process violation. Summary judgment was granted on the due process claim and the Court reversed. The Court said that fact issues barred summary judgment on the due process claim based on fabrication of evidence.

The claim was supported by a declaration of a witness named Vega, V-E-G- , who was interviewed twice on the day of the murder and said he didn't know who shot the victim or where the shots came from, and then later said, actually, the shots came from the doorway leading to a stairwell in the plaintiff's apartment complex. Six months later, he was arrested on an unrelated matter and offered to enter into a cooperation agreement in exchange for information about the murder. During an interview with his counsel present and in the presence of the prosecutor, he identified the plaintiff from a photo array as the shooter.

In opposing summary judgment in that case on the fabricated evidence claim, the plaintiff submitted Vega's affidavit, stating that he falsely identified the plaintiff because he was facing a felony charge and, importantly, the detective made clear to him that he would need to identify the plaintiff as the shooter in order to get a deal. Vega stated that, in truth, he did not see the plaintiff shoot the victim. nd this is the case in

which the trial court found his declaration incredible as a matter of law, leaving the Court of ppeals to say that was error.

The Court in *Frost* did not explicitly discuss whether knowledge of falsity is an element that was adequately supported there, but the cases it cited require knowledge of falsity. nd so I think that a reasonable interpretation of the case must lead one to conclude that knowledge of falsity is required.

I recognize that these two cases are important, and I want to give you an opportunity to consider them. But for now, I'm satisfied that coercing statements that prove to be false and knowingly fabricating evidence are legally distinct.

The Seventh Circuit explained this distinction in a case called *Petty v. City of Chicago*, 754 F.3d 416, at 423 to 25, and that was a Seventh Circuit decision in 2014. Citing previous Seventh Circuit law, the Court said that coerced testimony is testimony that a witness is forced by improper means to give. The testimony may be true or false. Fabricated testimony, on the other hand, 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.

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prosecutor or investigator fabricating evidence that she knows to be false is different than getting a reluctant witness to say what may be true.

Now, you might ask, well, if knowledge of falsity doesn't appear on the Second Circuit's list of elements, how can it be that it's actually a requirement? nd that's a good question. But having thought about it, I think that the term "fabricated" necessarily carries the implication of knowledge of falsity. I think this is the case for a number of reasons.

First, the plain meaning of the terms "fabricated" and "fabricated evidence." The term "fabricated" is defined to include an element of deceit. Merriam-Webster defines the term as: To invent, create, or make up for the purpose of deception.

The Oxford Dictionary defines it as follows: "To invent or concoct something, typically with deceitful intent. For example, officer fabricated evidence."

Similarly, Black's Law Dictionary defines "fabricated evidence" as: "Evidence that is false or altered so much that it is deceitful."

Second and relatedly, the term "deceit" implies intent to deceive, and the term "deception" implies intentionally causing someone to have a false belief.

Third, a fabricated evidence claim as described

by the Second Circuit addresses, quote, "corruption," end quote, of the criminal process. The term "corruption" implies intentional or willful misconduct.

Fourth, a violation of substantive due process, which is what we're dealing with now, requires conduct that shocks the conscience.

nd, finally, case law from outside the Second Circuit holds that a fabricated evidence claim requires proof of knowledge of falsity. nd I'm directing you to *nderson v. City of Rockford*, Seventh Circuit, 932 F.3d 494, 510-11 in 2019.

For all these reasons, I conclude that the plaintiffs' fabricated evidence claim against an individual defendant cannot withstand the individual's motion for summary judgment on that claim unless a jury could reasonably find that the defendant created and forwarded to the prosecutor specified evidence likely to influence the jury's verdict, knowing the evidence was false. That's the standard I'm applying as I analyze each of the alleged fabrications.

I begin with Brown's identification of the plaintiffs as his co-perpetrators, his statements implicating them in the crimes, and his statement that he gave the stolen cell phone to Mr. Horn. The plaintiffs say that the detectives -- by which I believe they mean

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Dease and dger only -- fed Brown a fabricated, nonsense story to implicate Mr. Horn. They say that during the preinterview, these detectives, Dease and dger, fed him a false story to enable them to close the investigation. nd they say that they offered favorable treatment to Brown as an inducement.

The plaintiffs submit that, and I'm quoting, "There's only one way Brown could have identified the plaintiffs. Dease and dger told Brown to say that Vernon Horn and Marcus Jackson robbed the Dixwell Deli with him, even though this was not true and they knew it was not true," end quote. Have the plaintiffs sustained their burden at summary judgment of producing evidence creating a genuine dispute as to whether Dease and dger knew Brown's identification was false?

Viewing the record fully and most favorably to the plaintiffs, I believe a jury could find that Brown never met Horn or Jackson, as the plaintiffs have testified, and they could infer from this and other evidence that his false identification of them as his co-perpetrators was the product of coaching by Dease and possibly dger, but especially Dease, who was the lead detective and who has himself testified that he didn't want Brown to back off his identification of the plaintiffs once it was made.

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But could the jury reasonably go further and find that Dease and dger knew Brown's identification and his statements implicating them were false? Unless the evidence is sufficient to permit a reasonable inference that they knew Brown's identification was false, they are entitled to summary judgment on this claim under the Second Circuit law as I understand it.

I've given this a great deal of thought, and I conclude that the evidence is not sufficient to support reasonable findings that Dease and dger knew the identification was false.

This case is unlike *Norales*. Brown has not recanted. The plaintiffs point to no evidence known to Dease and dger at the time of the interview that contradicted Brown's identification. nd, viewing the record fully and most favorably to the plaintiffs, Brown's identification of the plaintiff as his co-perpetrators could be true. This point bears some elaboration to avoid misunderstanding.

s I review this record, it bothers me greatly that such a markedly inadequate investigation could result in the conviction and incarceration of people who might well be innocent. But you don't need to prove that you're innocent in order to bring a fabricated evidence claim. For a detective to knowingly fabricate evidence he knows

to be false and provide it to the prosecutor to aid in the conviction of anybody, whether that person is guilty or innocent, is a violation of substantive due process.

So I don't need to decide, and I'm not deciding, whether Mr. Horn or Mr. Jackson is actually innocent. But I will say that if you look at the record fully and most favorably to them, the evidence against them falls well short of guilt beyond a reasonable doubt. It's, in my opinion, surprisingly insufficient.

In the habeas petition prepared by Federal Defender Terry Ward, the statement is made that Mr. Horn was wrongfully convicted as a result of a confluence of several factors, one of which was a woefully inadequate investigation. nd I think that's a fair characterization of this investigation.

Yet I cannot exclude the possibility that Mr. Horn and Mr. Jackson actually were involved, as farfetched as that may seem. Their alibis are not what one would need to be able to say yes, they could not possibly have been involved. nd I won't continue with the elaboration, but I hope the point is clear.

I think this case is distinguishable from *Frost*, just as the Second Circuit found the *Norales* case distinguishable from *Frost*, where Mr. Vega said that the police specifically told him he had no choice but to

identify the plaintiff. We don't have that evidence here.

Going back to a point that I made at the beginning, though I believe that the fabrication claim fails for lack of sufficient evidence permitting an inference of knowledge of falsity, I have come to the conclusion that a jury could find that Detective Dease in the presence of Detective dger did lead Brown to identify the plaintiffs using methods that should have been disclosed under *Brady*. I believe that disclosure of those methods would have likely changed the outcome, given Brown's importance to the case.

How did I come to this conclusion? jury viewing the record most favorably to the plaintiff could, as I said before, credit the plaintiffs' testimony that Brown never met them, did not know them, never spoke to them. Crediting that testimony, how could Brown pick their photos out of the array and how could he implicate them as his co-perpetrators?

I agree with plaintiffs' counsel that if the plaintiffs, in fact, didn't know Brown, there had to be some very significant coaching in order for him to identify them, or at least a jury could reasonably so find.

nd I make it a point to tell you this because I imagine that dismissal of the fabrication claim in so far

as Brown's testimony is concerned might feel like a heavy blow. The plaintiffs' papers are replete with allegations that these detectives framed them, that they're corrupt cops, that they're innocent people. nd I trust that the plaintiffs believe these things. But the plaintiffs have made no secret of alleging that -- their belief that Brown was, in fact, manipulated, coached into falsely identifying them. nd if the jury could draw that inference, then I think a *Brady* claim would still be a potential remedy.

I'm going to move along here and consider Brown's statement about the fourth call, meaning his statement that he gave the phone to Mr. Horn. The same analysis applies. I don't think the record viewed fully and most favorably to the plaintiffs permits a reasonable inference that the detectives knew that he did not, in fact, give the phone to Horn. nd so the knowledge-of-falsity element is -- is once again dispositive with regard to that part of the claim.

I'm going to turn now to Pearson's statements about the fourth call. The plaintiffs allege that after extracting a vague statement from Sykes, Dease and Breland tried to coerce Pearson to confirm her statement in their interview on February 3rd. Plaintiffs say they told Pearson falsely that phone records showed he had called

Sykes from the stolen phone on January 25th. Pearson had already told them that he was with Horn at his house -- that is, Pearson's house -- that morning, the morning of the 25th. He said the detectives told him, "Either you got the phone from Horn or you took it from the deli. Which is it?" Under pressure, Pearson ultimately relented and falsely said he got the phone from Mr. Horn.

s the plaintiffs put it, the story that the -- I'm quoting -- "The story that the state and its witnesses would tell to tie Vernon to the fourth phone call was a fabrication conjured up by the NHPD detectives," end quote. So here again, have the plaintiffs sustained their burden of producing evidence creating a genuine dispute as to whether the detectives knew Pearson's statement that he got the phone from Horn was false?

pplying the same analysis, I've come to the same ruling. The jury could credit Pearson's testimony and find that the detectives falsely told him that Sykes said he called her, that the phone records proved it, and that if he didn't get the phone from Horn, he must have stolen it himself. Crediting Pearson's testimony, a jury could further find that he did ultimately cave under pressure and falsely told the detectives what they wanted to hear. But I do not believe that the evidence permits a reasonable finding that the detectives knew his statement

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was false.

Turning to Sykes' statement about the fourth call, again, I reach the same ruling. If you read the record and construe it in a manner most favorable to the plaintiffs, the detectives showed Sykes the record of the stolen cell phone, the so-called "call detail record," and falsely told her that it showed that Pearson had called her on the 25th. s the plaintiffs suggest, this is what she meant when she said, quote, "The paper said that he called," end quote. nd when asked in her written statement why she was at the station, she responded, quote, "I was told I had a phone call, right, a phone call stating that I was talking to -- say his name -- Marcus Pearson."

I agree with plaintiffs' counsel that a jury could interpret that evidence most favorably to the plaintiffs as proof that she was, indeed, told what to say. But I don't see how a jury could find that the detectives knew her statement was untrue.

I don't want to belabor this, but in fairness, the detectives had the idea that Mr. Horn, Mr. Jackson, and even Mr. Pearson may have been involved in this. nd when they go to see Ms. Sykes, they show her Pearson's photo and she says, Yeah, I know him. We talk. In fact, he was her marijuana dealer, and they talked from time to

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time. Now, you know, the detectives have her saying she knows him. nd they want to know if he's the one who called her. However it happened, she winds up saying, "Yeah, there's a good possibility." She's led to say it -- let's assume she was -- I think the jury could so find -- but she did say it, "Yeah, I think there's a good possibility." Were the detectives supposed to ignore that? I mean, this stolen cell phone was now the key, as the plaintiffs themselves argue. So, naturally, they go to Pearson and they want to know, did he call Sykes? Is that, in fact, what occurred?

During the course of my adjudication of these motions, I have learned about the Reid technique about which I knew nothing before. But I've done my best to learn about that technique, how it's been used, the role it's played in cases like this. My understanding, as of 1999, using the Reid technique was almost universal in police departments across the country. People were trained to use it and did use it.

nd part of that technique included, you know, not taking "no" for an answer, dismissing the denial by a witness. nd, also, they made use of deception. I know that some courts drew the line at literally fabricating or forging a document and showing it to a witness and telling the witness, you know, " s recorded in this lab report, we

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found your DN at the scene." But some courts said even that was okay.

In any case, in 1999, this -- if these detectives go to Pearson and ask him, you know, "Is it true you called Crystal Sykes?" nd he says, "No, I didn't call her," they didn't have to take that as a final answer, I don't think. nd if he ultimately winds up saying, "You know what, I did -- I did call her," there's no due process violation under a fabricated evidence theory unless they knew that, in fact, he hadn't called her.

nd I just don't see how on this record, even viewing it in the most plaintiff-friendly manner, a jury could reasonably say that, yes, those detectives knew he was lying.

It's not like the cases that one can find in which, in fact, that happened -- the detectives forced the person to lie, knowing he was lying. That's not -- that's not our case.

I'm going to turn now to the next item, the statement Pallet gave on March 23rd to Detective Dease in the presence of State's ttorney Gary Nicholson.

He told them he got out of a taxi, saw three men on the side of the deli smoking wet, he went into the deli, got some cigarettes from Hardy, walked out and saw

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the men smoking wet putting masks over their faces and entering the deli.

Pallet testified that the plaintiffs were -- were those people that he passed as he made his getaway, so to speak. I think that a jury looking at the record most favorably to the plaintiffs could find that, indeed, Pallet did not get out of the taxi, that he did not enter the deli, and that he did not see anybody outside the deli, that he did not pass anybody smoking wet.

gain, the issue is: Could a reasonable jury find that he knew -- that Dease knew Pallet's account was false? The plaintiffs point to Hardy's unopened pack of cigarettes on the counter of the deli and the taxi driver's testimony that Pallet didn't get out of the car. nd they point to evidence that in May 1999, Pallet told his robbery codefendant that his story was a lie, designed to get favorable treatment in his robbery cases, which, indeed, he did. s a result of his cooperation, he got a two-year sentence with a possibility of parole.

On the basis of that evidence, I -- I do believe that a jury could find that Pallet's statement that he saw the plaintiffs is false, but I don't think a jury could infer that Dease knew that Pallet was lying when he interviewed him on March 23rd.

Moreover -- and this is a point that bears

mentioning -- since the prosecutor was present at the interview and decided to use Pallet as a witness, the question is: Can Dease be held liable in any event?

In the *Norales* case, the Court of ppeals seems to have said no. The Court pointed out that in that case, the prosecutor had interviewed the witness who identified the plaintiff several times, and then independently decided to go forward. nd the prosecutor's independent decision meant that the detectives' conduct did not cause the plaintiff to be subject to trial.

So even if a jury could reasonably find that Dease knew Pallet was lying -- and, again, I don't believe that's true -- we would run up against that principle that was applied in *Norales*, given the prosecutor's presence at the interview.

ccordingly, I think that the fabrication claims fail on the element of knowing falsity, and I believe that summary judgment needs to be granted on these claims as a result.

I trust that I have worn out my audience today and I thank you for your patience, but I hope you can tell I haven't been ignoring this case. Quite the contrary. I have been living this case for at least ten weeks, and giving it my full time and attention when I'm not on the bench.

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nd, you know, understanding that you have very significant investments in this case, I am keenly aware of the delay and I didn't want to prolong the delay. I wanted to give you whatever answers I could give you today. nd so, I've done that and I thank you for your patience.

I -- I don't think there's any need for anybody to comment. If somebody wants to comment, it's okay with me, but I will say that I realize we're quite a distance from whatever disposition might await, and I don't want to drag it out any longer. I think that the other motions are in a position for me to rule on them more or less right away. nd at that point, it'll be up to you to decide how you wish to proceed. But for now, I'm going to leave it there.

Does anybody want to put anything on the record?

MR. GER RDE: Judge, it's Tom Gerarde. If I could just add a clarification point?

First of all, thank you very much for doing this. We weren't expecting it and it's been super-helpful, but are we going to await a formal decision by you before any of this is an actual decision?

nd the reason I'm asking that, if there is an intention to deny summary judgment as to the individual defendants, is there an appeal clock ticking in the event

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they wanted to consider an appeal to the Second Circuit in an interlocutory basis, or is that something we would await a final decision by you that's posted?

THE COURT: Well, you know, I appreciate the question. I realize that people appreciate the fact that an appeal has happened on the claims against Mr. Stephenson, so I appreciate the question.

You know, for the reasons I've explained, I think an appeal would be out of order because I think if we credit the testimony of Mr. Pearson and Mr. Thompson, qualified immunity does not apply. But I may be missing something.

nd so I can do one of two things. I can either enter a text order on the docket consistent with the oral rulings I have given you, establishing on the docket that the motions have been the subject of the rulings that I have made today. nd that could start the clock. It is not my intention to delay my rulings on the motions while I, you know, write an opinion for publication in the federal supplement, sometimes referred to as the vanity press.

I don't -- I don't propose to do that. I'd rather give you oral rulings so you know where we stand and you can move this along.

MR. GER RDE: Judge, would it be acceptable if

the way this all shook out today is we waited until the entire motion was decided before any clock started ticking? Because there is something that's still open on the phone records as to the individuals, and people won't know what to do. nd I know we would prefer to do that. I'm not sure how plaintiffs feel about that, but it would be better if we could see the entire decision, evaluate it, then make decisions about if there's a basis for interlocutory appeal.

THE COURT: That's okay with me. Sure. I mean, if you want to submit those memos, and then I can very rapidly close that out. t that point, the -- I believe the individual detectives' motion for summary judgment on the Section 1983 claims would be complete; right?

MR. GER RDE: Yes, on the 1983. I think there are other issues, but that wouldn't really bear on appeal, on immediate appeal.

THE COURT: Exactly, exactly. Yeah. So I'm -- I'll -- I'm happy to do that.

MR. KR USE: Yes, your Honor. nd this is Brad Krause for the individual detectives. nd I agree with that proposal that Mr. Gerarde just submitted.

If Your Honor seems to be inclined in terms of concluding the rulings on those additional constitutional issues to then allow the clock to start ticking with

regards to any potential appeal, and we can also deal with the issues concerning the briefing on those memo issues that you have raised.

THE COURT: Okay, that's fine with me.

Is there any objection on the plaintiffs' side?

MR. M ZEL: I think, Your Honor -- this is Ilann Maazel for Mr. Horn. Our inclination since we, you know, we are very eager to move this forward, would be that your rulings today are your rulings, and if someone needs to appeal they should do so.

I don't think there's really any -- I agree with the Court, there's no basis for the defendants to appeal from anything Your Honor has ruled upon today. nd I don't think, frankly, there's any jurisdiction to appeal, given the facts as alleged on the plaintiffs' side.

But leaving that aside, I do think that, you know, Your Honor has spent a lot of time with us today issuing various rulings, and those should be final as to those issues. I do have -- you know, I very much appreciate the Court working so diligently -- you know, hundreds and hundreds of pages of briefing.

I am wondering approximately when the Court anticipates issuing rulings on all the remaining issues -- against the City, against, you know, the state defendant, you know, the plaintiffs' motions for partial summary

judgment against the detectives. Can we have some sense of a timetable for that, Your Honor?

THE COURT: I -- I think that's a very fair question, and the best I can do is estimate for you that I will have the rest of the rulings in the next couple or three weeks. I have other things to do, which is not to imply that this isn't the top priority. It is. It has been the top priority for a long time. But, you know, I wanted to give rulings that were fully thought out, from my point of view, and rulings that do justice to the case.

nd so I can't tell you I'm going to have them for you tomorrow, but I think you should expect to hear from my chambers about another call like this, and we'll make it clear to Mr. Jackson's counsel that they're welcome to join. nd I'll wrap it up then in so far as the claims against the detectives are concerned, the claims against the City -- which at this point boil down to another liability for *Brady* violations, I believe -- the *Brady* claim against Mr. Stephenson which has already been to the Court of ppeals, and whether I can fully dispose of the other causes of action, the negligence claim, the indemnification claim, the direct action against the City claim. I'll try. I'll try. But my focus has been on the federal claims.

MR. GER RDE: Judge, it's Tom Gerarde. One more

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thing.

Given that we are only a couple weeks from having the 1983 portion of this against the individuals wrapped up, I think it really would make sense to go with what ttorney Krause and I suggested versus what ttorney Maazel just suggested because there would be an interlocutory appeal clock ticking on the Pearson and the Kendall Johnson [sic] claims right now. nd then a new clock of 30 days would tick once we have the dger phone records claim.

So couldn't we just keep all of that together? The Court of ppeals might wonder what we're up to if I file one appeal and then another.

THE COURT: No, I appreciate your comments and I appreciate the comments of plaintiffs' counsel. Your, you know, respective positions are perfectly understandable.

What I would suggest is that we set a schedule for the submission of these memos in the very near future, and I can promise you that as soon as I get them I will make a ruling on that last aspect of the *Brady* claim based on the phone records. I expect I would be able to do that with your help.

So, you know, I'm not going to impose dates on you. I don't know what your schedules are. I don't know if plaintiffs -- I don't know if the people on the

plaintiffs' side are in a position to submit a memo on those two questions this week or whether they would need more time. But I would expect, you know, they're going to be motivated to do that as soon as can be.

nd at that point I would think that for the defense, having had the time to undertake further research of your own, further review of the records, you would be prepared to file your response very promptly.

nd so I would -- on those assumptions, I would ask you to stay on the line and talk about when you'll be able to get those done. nd, again, I will endeavor to give you a ruling very promptly after your memos are filed.

MR. M ZEL: Your Honor, this is Ilann Maazel for the plaintiff. I have a proposal, which is -- it seems to me that the Court has given us a couple of discreet issues to brief, and it would make sense for both sides to just submit concurrent briefs at the same time, maybe two weeks from today. nd there's no reason for an opening brief and an opposition and a reply. These are just discreet legal issues as to which Your Honor wants the views of both sides.

nd so it seems to me concurrent briefing would dramatically speed up the process without sacrificing, you know, any clarity for the Court.

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THE COURT: Okay. I think that makes good sense. I like that suggestion. I think that's a fair and efficient way to go. So why don't we say that you'll file your memos concurrently, not later than a week from Friday?

MR. M ZEL: That's Thanksgiving Friday. Is there any way we could roll it to Monday?

THE COURT: Monday it is.

MR. FINUC NE: nd, Your Honor, this is Stephen Finucane from the G's office. I just want to clarify: You're not looking for anything from us on behalf of Mr. Stephenson; right? This is more about the New Haven detectives?

THE COURT: That's right, yeah.

MR. FINUC NE: Thank you, Your Honor.

THE COURT: Okay. ll right, thank you again.

MR. GER RDE: Judge, I'm sorry. We're not leaving with any clarity on whether or not a clock is ticking to go to the Court of ppeals. I don't want an, Oh, you blew your 30 days argument.

Can we agree to wait until everything is decided before we go to the --

THE COURT: Yes, yes. Exactly. What will happen is after you submit your memos, I will add an order on the docket that sets up the rulings, and in there that

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will trigger the running of that clock.

Until that happens, you don't have to worry about the clock ticking; okay?

MR. GER RDE: Yes, thank you very much.

THE COURT: Okay. Thank you all.

(Proceedings concluded, 3:42 p.m.)

EXHIBIT B

CERTIFIC TE

RE: *HORN v. NEW H VEN, ET L.*

Case No. 3:18-cv-01502-RNC

I, Cassie Zayas, RPR, Official Court Reporter for the United States District Court, District of Connecticut, do hereby certify that the foregoing 50 pages are a true and accurate transcription of my stenographic notes taken in the aforementioned matter to the best of my skill and ability.

_ /s/ C SSIE Z Y S_____

Official Court Reporter
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EXHIBIT B

Leona Delcore

From: CMECF@ctd.uscourts.gov
Sent: Thursday, August 8, 2024 5:20 PM
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Subject: Activity in Case 3:18-cv-01502-RNC Horn v. New Haven et al Order on Motion for Reconsideration

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U.S. District Court

District of Connecticut

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Case Name: Horn v. New Haven et al
Case Number: 3:18-cv-01502-RNC
Filer:
Document Number: 364(No document attached)

Docket Text:
ORDER granting [349] Motion for Reconsideration filed by Vernon Horn. The motion for reconsideration is granted in light of the evidence presented in the plaintiffs' Table of Overlooked Data, ECF 284-1. As the plaintiffs argue, this evidence, viewed fully and most favorably to them, raises triable issues of fact with regard to the Detectives' alleged knowledge of the falsity of at least the following: (1) Pearson's statement that he made the fourth call using the stolen cell phone; (2) Brown's statement that he handed the phone to Horn after the third call; (3) statements by the Detectives that Pearson's account of the fourth call was volunteered by him without threats or promises; and (4) statements by the Detectives that Brown and Thompson identified the plaintiffs in the course of nonsuggestive photo arrays. Because the evidence is sufficient in this regard, the order granting summary judgment on this count is hereby vacated and the defendants' motion for summary judgment on this count is hereby denied. So ordered. Signed by Judge Robert N. Chatigny on 8/8/2024. (Rickevicius, L.)

3:18-cv-01502-RNC Notice has been electronically mailed to:

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