No. _____

In The Supreme Court of the United States

EARL TRUVIA; GREGORY BRIGHT,

Petitioners,

v.

HARRY F. CONNICK, in his capacity as District Attorney for the Parish of Orleans; GEORGE HEATH, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; JOSEPH MICELI, Individually and in his official capacity as Officer of the City of New Orleans Police Department; THE CITY OF NEW ORLEANS; EDDIE JORDAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Earl Truvia and Gregory Bright spent 28 years in prison for murders that they did not commit. In 2002, 26 years after they were convicted and sentenced to life imprisonment without parole, a state court in Louisiana vacated their convictions, finding that the Respondents in this lawsuit had suppressed exculpatory and impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Truvia and Bright sued Respondents, pursuant to 42 U.S.C. § 1983, for money damages for the constitutional violations they suffered. The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Truvia's and Bright's civil suit, in part, based on this Court's decision in *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

This case presents two issues of national importance:

1. Whether the Fifth Circuit erred in refusing to find a triable issue as to whether there is a "policy" or "custom" when there was significant evidence of *Brady* violations by the Orleans Parish District Attorney in this and many other cases.

2. Whether proving municipal policy or custom requires proving similar unconstitutional acts that occurred before the events giving rise to the lawsuit or whether proof of a policy or custom can be based, in part, on similar unconstitutional acts that occurred following the events involving these plaintiffs.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental corporation. None of the petitioners has a parent corporation or shares held by a publicly traded company.

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OTHER MATERIALS

Earl Truvia and Gregory Bright respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 577 Fed. Appx. 317 (5th Cir. 2014) and is found at Appendix (App.) p. 1. The court of appeals' order denying Petitioners' timely petition for rehearing en banc was entered September 15, 2014, and is found at App. p. 56. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 2012 WL 3948613 (E.D. La. 2012), and is found at App. p. 21.

JURISDICTION

Petitioners seek review of the final decision of the court of appeals entered on August 8, 2014. A timely petition for rehearing *en banc* was denied on September 15, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision codifying a civil action for the deprivation of rights, 42 U.S.C. § 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

1. In 1976, a Louisiana state court wrongfully convicted Petitioners, Earl Truvia and Gregory Bright, of murder and sentenced them to life imprisonment without parole. In 2002, the Orleans Parish Criminal District Court found that Respondents suppressed exculpatory and impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The Orleans Parish Criminal District Court vacated Petitioners' convictions, and the Louisiana Supreme Court subsequently denied Respondents' application for a writ of certiorari. Twenty-eight years after being wrongfully convicted, Truvia and Bright were finally released from prison in 2004.

2. After their convictions were vacated, Petitioners filed a complaint against Respondents in the district court, asserting claims under 42 U.S.C. § 1983 for constitutional violations arising from Respondents' extensive *Brady* violations.

Petitioners submitted substantial evidence to the district court that the Orleans Parish District Attorney's office had a policy and custom of withholding exculpatory and impeachment evidence in violation of *Brady*, including that it failed to train its prosecutors of their *Brady* obligations. The evidence against the Orleans Parish District Attorney's office consisted of: (a) discovery responses from forty-four different Orleans Parish assistant district attorneys in ninety cases, in which the assistant district attorneys told the criminal defendants that they were not entitled to materials they were in fact entitled to under *Brady*; (b) the admission by Henry Julien, the prosecutor in Truvia's and Bright's case, that he withheld *Brady* evidence from them; (c) Julien's testimony that he had no duty under *Brady* to obtain critical exculpatory/impeachment materials such as witness statements; (d) testimony from Truvia's and Bright's 2002 post-conviction proceeding that the Orleans Parish District Attorney did not allow defense counsel to examine the prosecution file; (e) the affidavit of former Assistant District Attorney Bill Campbell, showing that the Orleans Parish District Attorney's office did not train Campbell on *Brady* violations, and actually instructed him to provide "not entitled" responses to *Brady* requests; (f) Respondent Connick's stipulations

in *Connick v. Thompson*, 131 S.Ct. 1350 (2011), that his Assistant District Attorneys could not recall any *Brady* training before 1985, and that the Orleans Parish District Attorney's office had no written policy regarding *Brady* violations; (g) recent admissions by the Orleans Parish DA's office in *Smith v. Cain*, 132 S.Ct. 627 (2012), that it had an unconstitutional *Brady* policy for two decades; and (h) a pattern of decisions beginning before Petitioners' convictions and continuing until recently that demonstrate an unconstitutional policy with regard to disclosure of *Brady* material in the Orleans Parish District Attorney's office.

Petitioners also submitted substantial evidence to the district court that the New Orleans Police Department had a custom of withholding exculpatory evidence, failed to train officers on *Brady* requirements, and withheld exculpatory evidence from Truvia and Bright in this case. This evidence included: (a) the withholding of arrests of three other people suspected of the murder for which Truvia and Bright were convicted, and providing false testimony that one of the three had not been arrested; (b) the withholding of evidence that a witness placed two other murder suspects at the scene of the crime with a motive to harm the victim over a bad drug deal; (c) the fact that officers provided misleading evidence that there was no information pointing to a "bad drug deal" theory for the murder; (d) the failure to perform a background check on Sheila Caston Robertson, the only eyewitness to the murder, that would have

provided crucial *Brady* evidence to impeach her; (e) the manipulation of Robertson into providing false testimony against Truvia and Bright; (f) the police department's lack of written policies or training on how to handle exculpatory evidence; and (g) testimony from police officers that they did not know what exculpatory evidence was, let alone how to handle such evidence.

3. Respondents filed two motions for summary judgment in 2007. Despite the substantial evidence of Respondents' constitutional violations and thus its liability under 42 U.S.C. § 1983 for *Brady* violations, the district court granted the motions for summary judgment on September 11, 2012. The court found that Petitioners had not demonstrated a triable issue of fact relative to the existence of a policy or custom of *Brady* violations, or a triable issue of fact relative to a failure to train that resulted in *Brady* violations by either the Orleans Parish District Attorney's office or the City of New Orleans Police Department. App. p. 21.

Petitioners filed a motion for reconsideration and/or to alter/amend the judgment, which the district court denied. App. p. 50. Petitioners then timely appealed to the Fifth Circuit.

4. The Fifth Circuit affirmed the district court's judgment. In an unpublished decision, the majority first determined that the evidence did not sufficiently establish municipal liability of the Orleans Parish District Attorney's office. App. p. 1. In doing so, it

found that the evidence, including the "not entitled" responses in ninety other cases and Julien's testimony, did not show that the District Attorney's office had a policy or custom of *Brady* violations or was deliberately indifferent to the need to train prosecutors about their *Brady* obligations. It also held that the district court properly excluded Campbell's testimony.

Furthermore, the Court of Appeals held that Truvia and Bright did not establish municipal liability under 42 U.S.C. § 1983 related to a police department policy or custom of *Brady* violations or a failure to train. The court also determined that the evidence Petitioners submitted failed to prove a failure to train because it did not demonstrate that the City of New Orleans knew that its *Brady* training was insufficient and made a deliberate choice to threaten constitutional rights.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AND A QUESTION OF NATIONAL IMPORTANCE AS TO WHAT IS SUFFICIENT EVIDENCE OF A POLICY OR CUSTOM OF VIOLATIONS OF *BRADY V. MARYLAND* TO CREATE LIABILITY UNDER 42 U.S.C. § 1983.

In *Connick v. Thompson*, 131 S.Ct. 1350 (2011) – a case that also involved the Orleans Parish District

Attorney's office – this Court held that the single incident of prosecutorial misconduct in withholding exculpatory and impeachment evidence was not sufficient to establish a policy of inadequate training or supervision to create local government liability. The Court concluded by declaring that the plaintiff "did not prove a pattern of similar violations that would establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Id*. at 1366.

The Court, however, did not indicate what would be sufficient to establish a "policy" or "custom" with regard to the failure to turn over evidence to defendants as required under *Brady v. Maryland*, 373 U.S. 83 (1963). This uncertainty in the law has created a split among the lower courts as to what is enough to create local government liability for *Brady* violations under *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658 (1978).

This is an issue of great national importance because *Brady* violations are frequent and pervasive. As Chief Judge Alex Kozinski recently declared: "*Brady* violations have reached epidemic proportions in recent years." *United States v. Olson*, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from the denial of en banc review); *see also*, Bennet L. Gershman, *Reflections on* Brady v. Maryland, 47 S. Tex. L. Rev. 685, 688 (2006) ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations."); Janet C. Hoeffel, *Prosecutorial Discretion at the Core:*

The Good Prosecutor Meets Brady, 109 Penn. St. L. Rev. 1133, 1148 (2005) ("Withholding favorable evidence . . . seems to be the norm.").

As in this case, *Brady* violations frequently lead to the conviction of innocent individuals. *See* James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, at 5 (2000) (noting that prosecutorial suppression of evidence accounted for 16% to 19% of reversible errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 23-24, 57 (1987) (asserting that thirty-five of 350 wrongful convictions resulted from prosecutorial suppression of evidence); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, Chi. Trib., Jan. 10, 1999, at 3 (reporting that convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence proving the defendant's innocence or presented evidence they knew to be false).

A. Unlike in *Connick v. Thompson*, Plaintiffs in This Case Do Not Rely on a Single Incident of Misconduct to Establish a Municipal Policy, But Rather Show Many Instances of Unconstitutional Withholding of *Brady* Material By the Orleans Parish District Attorney's Office.

The Fifth Circuit saw this case as controlled by *Connick v. Thompson*. The court declared: "Appellant's

failure to train theory fails because they have not shown that the City was deliberately indifferent to a known need for a better *Brady* training for its police officers. *Thompson*, 131 S.Ct. at 1358, 1360." App. p. 14.

But this case is quite different from *Connick v. Thompson* because Truvia and Bright do not rely on a single incident of misconduct, but rather in opposing summary judgment presented extensive evidence of *Brady* violations by the Orleans Parish District Attorney's office. They contend that the evidence is sufficient to show a policy and custom of withholding *Brady* material; it literally was the policy and custom of the Orleans Parish District Attorney's office to not disclose exculpatory and impeachment material as required by the Constitution. They also maintain that the evidence is sufficient to demonstrate deliberate indifference with regard to training and supervision and thus to establish a municipal policy under *City of Canton v. Harris*, 489 U.S. 378 (1989). This evidence included:

Discovery Responses from Other Criminal Cases. The plaintiffs presented other criminal discovery responses by Connick's office showing that 44 of Connick's prosecutors committed over ninety *Brady* violations in just a two-year period from 1974 to 1976 by refusing to produce exculpatory written or oral statements and/or material impeachment evidence of state's witnesses. (DE1160-1175, 100-10; R.2345-47, R.5807-5909, R.5911-6012, R.5807). The actual writing on these criminal discovery responses – "not

entitled" – to direct requests for *Brady*, exculpatory or material impeachment evidence shows that Connick's Office had an unconstitutional policy and custom of withholding *Brady* material.

Statements of former Assistant District Attorney Bill Campbell. Bill Campbell was an intern with Connick's Office within a few months of Truvia's and Bright's convictions. Campbell was directed to write "not entitled" to requests for *Brady* information. (DE100-8, ¶¶ 2-4). Campbell stated that Connick's Office's *Brady* policy was "when in doubt, don't give it up." (DE100-8, ¶¶ 7-8). Campbell testified that, upon graduating from law school, this custom continued while he was an ADA in Connick's office. (DE100-8, ¶¶ 7-8).

Other instances of *Brady* violations by Connick's Office. Truvia and Bright are only two of many innocent people wrongfully imprisoned due to Connick's Office illegally withholding exculpatory evidence. Since 1990, at least 12 people have been exonerated as a result of the *Brady* violations committed by Connick's Office: Earl Truvia, Greg Bright, Dan Bright, *State v. Bright*, 875 So. 2d 37 (La. 2004); Shareef Cousin, *State v. Cousin*, 710 So. 2d 1065 (La. 1998); Roland Gibson, *Gibson v. State*, Case No. 203-904, Orleans Parish Crim. Dist. Ct.; Isaac Knapper, *State v. Knapper*, 579 So. 2d 956 (La. 1991); Curtis Lee Kyles, *Kyles v. Whitley*, 514 U.S. 419, 441 (1995); Dwight Labran, *Labran v. State*, Case No. 388-287, Orleans Parish Crim. Dist. Ct.; John Thompson, *State v. Thompson*, 825 So. 2d 552 (La. App. 4 Cir. 2002);

Hayes Williams, *Williams v. State*, Case No. 199-523, Orleans Parish Crim. Dist. Ct.; Calvin Williams, *In re Calvin Williams*, 984 So. 2d 789 (La. App. 1 Cir. 2008); and Juan Smith, *Smith v. Cain*, 132 S.Ct. 627 (2012).

During oral argument in *Smith v. Cain*, Connick's Office admitted to this Court the existence of its two-decade unconstitutional *Brady* policy. Connick's Office admitted that its policy on *Brady* is that, when the prosecution has a single eyewitness supporting its case, it does not have to turn over inconsistent statements of that single eyewitness to the defense. *Smith*, 132 S.Ct. 627 (transcript of oral argument, Dkt. No. 10-8145, November 8, 2011, at pp. 43-53, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf). In other words, the position of Connick's office has been that, in the thirty years from the time of Truvia's and Bright's prosecutions up through very recently, Connick's office acknowledges purposely withholding *Brady* evidence from the defense instead of simply turning over these materials and allowing the jury to weigh this evidence.

Connick's Office Did Not Show Files to Defendants. At the 2002 post-conviction hearing in Louisiana state court, two criminal defense lawyers in New Orleans in the 1970s, Clyde Merritt and Ron Rakosky, testified about the Orleans Parish District Attorney's office's regular practice of not allowing defense counsel to view the prosecution's files in 1975-1976, and about the practice of Connick's office in general. Specifically, Merritt testified that

Connick's office never allowed defense counsel to view the prosecution's file. (R.6763-65). Rakosky testified similarly that the policy of Connick's office in the relevant time period was to not allow defense counsel to view the prosecution's files. (R.6766-67).

Connick's Office's Failure to Train on *Brady*. Connick acknowledged his office's failure to conduct training on *Brady* issues, consistent with Bill Campbell's affidavit testimony. (DE100-8, ¶ 4). Connick stipulated in *Thompson v. Connick*, Case No. 2:03-cv-02045, U.S.D.C., E.D.La., that "none of the district attorney witnesses recalled any specific training concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." (DE100-9, ¶¶ UU). The "district attorney" witnesses included Connick as well as several other district attorneys from his office at the time of Truvia and Bright's prosecution. Connick also stipulated in *Thompson* (and conceded here) that his office did not have any written policy on *Brady* prior to 1987. (DE100-9, ¶¶ TT; R.1110). Connick acknowledged that *Brady* issues were important since they involved a defendant's constitutional rights. (R.1106). Further, because *Brady* was subject to interpretation, training was important. Connick also acknowledged that if ADAs were not properly trained on *Brady* issues, it was foreseeable that defendants' rights would be violated. (R.1107-08)

Henry Julien, the prosecutor in this case, had been an Assistant District Attorney for only about one year when he tried this murder case after doing

predominantly civil work. (R.6533). Julien conceded that he could not recall any specific training on *Brady* and was not trained on specifics of *Brady*, such as assessing whether a witness statement would be considered exculpatory evidence. (R.6538, 6541). He was not trained to obtain the most fundamental potential *Brady* information: witness statements. (R.6542, 6563). Julien believed that in about 80% of cases, police did not provide witness statements. (R.6282). He testified that he "didn't care what the police said" and that he didn't trust the police. (R.6286-87). Further, he did not have a need for witness statements. (R.6563). Rather, he simply interviewed witnesses himself. (R.6282, 6286-87). In this case, Julien does not believe all of Robertson's statements were in the file. (R.6284-85). Further, there were general issues related to police files not being complete when provided to the DA's office, and Julien believed Connick had discussed the issue with police. (R.6286). Meanwhile, Connick conceded that, in 1975, he did not even know if *Brady* required production of police reports. (R.1112-13).

Julien was trained that as long as he did not possess the statements, he did not have a duty to contact the police or produce them. (R.6302-03). In effect, he thought he was "safe" in not having to produce such statements. (R.6303-04). Similarly, for criminal histories/rap sheets of witnesses, Julien was trained that he had no affirmative duty under *Brady* to obtain these things. (R.6278). Connick agreed. (R.1117). Thus, if these documents were not in his

file, he would not have to produce them even if they revealed exculpatory/impeachment evidence. (R.6278).

New Orleans Police Department had no policies or training on *Brady*. The New Orleans Police Department (NOPD) had no written policies/training on exculpatory evidence. (DE164-7). Heath testified, "I think that's the evidence that gets left out. . . ." (R.1845-46). Miceli also had no idea what exculpatory evidence was. (R.1946-47). As for training, Heath testified, "I have no idea what [*Brady*] is about, but no, that I recall, I was never trained about anything like that." (R.1850-52). Further, no one knew of any written policies on *Brady* evidence. (DE164-6 at 46; R.1954). Nor has NOPD produced any such policy on *Brady* during the relevant time frame. (*See* generally DE164-7).

NOPD detectives would take daily reports ("dailies") to keep track of the case and pertinent information, including arrests and witness interviews. (R.1943-44, 2114). They were to include any case activity in the daily. (R.1945). Detectives would take notes on pads of paper and then type out their notes. (R.1855, 1945). Case reports would be sent to Connick's office after an arrest was made. (R.1876-77). Dailies, though, normally were not sent to Connick's office, despite the fact that dailies could include exculpatory information such as arrests or witness statements. (R.1877-78, 1943-44). Even Julien testified that in 1975-76 it was a matter of course that NOPD would *not* provide witness statements or daily reports on an investigation. (R.6282,

6286). Unquestionably, such reports and statements would include some degree of exculpatory evidence or, as in this case, vital exculpatory evidence.

B. This Court Should Grant Certiorari to Resolve a Conflict Among the Circuits and an Issue of National Importance as to What Is Sufficient Evidence to Create a Triable Issue of Fact as to Whether There is a Policy or Custom with Regard to the Unconstitutional Failure to Disclose Exculpatory and Impeachment Material to Criminal Defendants.

Since this Court's decision in *Connick v. Thompson*, there is great uncertainty in the law and a difference among the Circuits as to what is sufficient evidence to create a triable issue of fact as to whether a local government entity has a policy or custom of unconstitutionally violating *Brady v. Maryland*. Here Bright and Truvia argue that the evidence of pervasive *Brady* violations by the Orleans Parish District Attorney's office is sufficient to show a triable issue of fact as to whether there is a policy or custom. Also and independently, they maintain that the evidence is sufficient to allow a jury to decide whether there was deliberate indifference with regard to the failure to disclose exculpatory and impeachment material to criminal defendants. Either of these approaches is sufficient to establish liability under *Monell*. Indeed, if this evidence is not sufficient to create a triable

issue of fact, it is difficult to imagine what would be enough to do so and then the goals of § 1983 in deterring wrong-doing and compensating injured victims will be lost. *See Owen v. City of Independence*, 445 U.S. 622 (1980).

The Fifth Circuit, though, found that there was insufficient evidence to warrant a trial despite many different types of evidence showing that the Orleans Parish District Attorney has a pattern and practice of not turning over *Brady* material. Other Circuits, though, have allowed cases to go forward based on much less in the way of claimed evidence of a policy or custom of not disclosing *Brady* material. The Fourth Circuit, in *Owens v. Baltimore City State's Attorney's Office*, 767 F.3d 379 (4th Cir. 2014), allowed a claim of deliberate indifference with regard to compliance with *Brady v. Maryland* to go forward based on facts strikingly similar to this case. The court explained:

> In support of his claim, Owens alleges that [r]eported and unreported cases from the period of time before and during the events complained of establish that the BCPD had a custom, policy, or practice of knowingly and repeatedly suppressing exculpatory evidence in criminal prosecutions. He further alleges that a number of motions were filed and granted during this time period that demonstrate that [the BCPD] maintained a custom, policy, or practice to allow this type of behavior either directly or . . . by condoning it, and/or knowingly turning a blind eye to it.

> The assertions as to reported and unreported cases and numerous successful motions are factual allegations, the veracity of which could plausibly support a *Monell* claim. That BCPD officers withheld information on multiple occasions could establish a persistent and widespread" pattern of practice, the hallmark of an impermissible custom.

Id. at 403 (internal quotation marks omitted).

In fact, in *Haley v. City of Boston*, 657 F.3d 39 (1st Cir. 2011), the United States Court of Appeals for the First Circuit allowed a case to go forward with significantly less as a basis for showing deliberate indifference than exists in this case. The court stated: "Disclosure abuses are a recurring problem in criminal cases, and the BPD's failure to disclose the sisters' statements is wholly unexplained. Given the volume of cases involving nondisclosure of exculpatory information and the instant failure to disclose statements that clearly would have undermined the prosecution's theory of the case, we think that the municipal liability claims pleaded by Haley step past the line of possibility into the realm of plausibility." *Id.* at 43. Likewise, federal district courts have allowed claims against local governments for deliberate indifference with regard to the disclosure of exculpatory material to go forward based on evidence similar to that in this case. *See, e.g., Bertuglia v. City of New York*, 839 F.Supp.2d 703, 737-39 (S.D.N.Y. 2012).

It is likely that the First and Fourth Circuits would have found that Truvia and Bright had put

forth enough to show a triable issue concerning whether there was deliberate indifference. But other Circuits, like the Sixth Circuit, likely would have come to the same conclusion as the Fifth Circuit in this case and would have found insufficient evidence to create a trial issue for the jury as to whether there was a policy of inadequate training or supervision as to turning *Brady* material over to defendants. *See, e.g., D'Ambrosio v. Marino*, 747 F.3d 378, 386-88 (6th Cir. 2014) (dismissing claim against county for deliberate indifference with regard to disclosure of exculpatory material).

The unfortunate and often tragic reality is that *Brady* violations are widespread and there are a large number of civil suits against local governments by those who are injured, including by those who have been wrongly convicted because of the unconstitutional actions of prosecutors and police. This Court should grant certiorari to clarify the law in this area and what is sufficient to allege and to create a triable issue of fact as to whether there is a policy or custom of *Brady* violations or of deliberate indifference with regard to training and supervision as to the requirements of disclosing exculpatory and impeachment material under *Brady*.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE CIRCUITS AND A QUESTION OF NATIONAL IMPORTANCE AS TO WHETHER PROOF OF MUNICIPAL POLICY OR CUSTOM REQUIRES ACTUAL PROOF OF PRIOR VIOLATIONS OR WHETHER PROOF OF DELIBERATE INDIFFERENCE AS TO TRAINING WHICH CAUSED A CONSTITUTIONAL VIOLATION IS SUFFICIENT.

The United States Court of Appeals for the Fifth Circuit stressed that the evidence presented by Bright and Truvia was insufficient to establish a policy of inadequate training or supervision because the other instances of unconstitutional conduct occurred after the illegal withholding of evidence in this case. The Fifth Circuit declared that Bright and Truvia "have not, however, pointed to case law preceding their convictions that held that the DA's office responsible for committing *Brady* violations or that upheld other defendant's claims of *Brady* violations." App. pp. 8-9. Similarly, the court stated that "Appellants' citations to over a dozen state and federal cases to show a 'continuum' of *Brady* violations are not probative because the vast majority of them occurred after Appellant's were convicted in July 1976." App. pp. 12-13.

Other Circuits have come to the similar conclusion that there must be proof of *prior* violations to show a policy or custom of deliberate indifference as to *Brady* obligations. For example, in *D'Ambrosio v.*

Marino, 747 F.3d 378, 388 (6th Cir. 2014), the court stressed that there was insufficient evidence of a policy of deliberate indifference because "only three [prior cases] had been ruled as improper by the courts prior to D'Ambrosio's conviction in 1989."

But other courts have been willing to consider both prior and subsequent instances of misconduct as part of determining whether there is a policy of deliberate indifference. *See, e.g., Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1144-45 (9th Cir. 2012); *Ligon v. City of New York*, 925 F.Supp.2d 478, 532-33 (S.D.N.Y. 2013).

Of course, subsequent acts of misconduct are not sufficient to show that a policy or custom existed at the time of the constitutional violations suffered by Truvia and Bright. But that does not say, as the Fifth Circuit concluded, that the subsequent acts are irrelevant in assessing whether there was a policy or custom. In deciding whether there was a policy or custom of constitutional violations, all relevant evidence should be considered, including proof of others who were injured by the same practices of the local government.

This Court should grant certiorari to resolve an issue that frequently arises in litigation against local governments under § 1983 as to what types of evidence may be considered in determining whether there is a policy or custom of deliberate indifference with regard to training and supervision.

CONCLUSION

For all of these reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-30589

EARL TRUVIA,

Plaintiff-Appellant

v.

HARRY F CONNICK, in his capacity as District Attorney for the Parish of Orleans; GEORGE HEATH, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; JOSEPH MICELI, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; CITY OF NEW ORLEANS; EDDIE JORDAN,

Defendants-Appellees.

GREGORY BRIGHT,

Plaintiff-Appellant

v.

HARRY F CONNICK, in his capacity as District Attorney for the Parish of Orleans; GEORGE HEATH, Detective; JOSEPH MICELI, Detective; CITY OF NEW ORLEANS; EDDIE JORDAN,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC Nos. 2:04-CV-680, 2:04-CV-682

(Filed Aug. 8, 2014)

Before REAVLEY, JONES and GRAVES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Gregory Bright and Earl Truvia, previously convicted in Louisiana state court for the 1975 murder of Elliot Porter, appeal the district court's denial of various civil rights and constitutional claims against the City of New Orleans, the New Orleans Police Department, former officers and detectives, and former Orleans Parish district attorneys. After due consideration, we AFFIRM the district court's dismissal of their claims.

I. FACTS AND PROCEEDINGS

Gregory Bright and Earl Truvia ("Appellants") were convicted in Louisiana state court for the October 31, 1975 murder of Elliot Porter. Each was sentenced to life imprisonment without parole. Nearly

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

three decades later, in 2002, a state court vacated Appellants' convictions upon finding that the State of Louisiana had suppressed exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), during Appellants' criminal trial. Specifically, the court found that the State had suppressed (1) a police report and "attached statements" showing that before arresting Appellants for Porter's murder, the police were pursuing two other suspects based on a "drug deal gone bad" murder theory; and (2) evidence concerning the mental history and reputation for truthfulness of the State's sole eyewitness, Sheila Caston Robertson. In March 2003, the Louisiana Supreme Court denied the State's application for a writ of certiorari. *See State v. Truvia,* 839 So. 2d 35 (La. 2003). The State dismissed the criminal charges filed against Appellants, who were subsequently released from custody.

In 2004, Appellants filed suit against the City of New Orleans ("the City"); the New Orleans Police Department ("NOPD"); five former NOPD officers and detectives, including detectives Joseph Miceli and George Heath; former Orleans Parish district attorneys Harry Connick and Eddie Jordan; and two former assistant district attorneys.[1] Appellants

[1] Claims against the two assistant district attorneys and against Connick in his individual capacity were dismissed by the district court in 2004. Connick remains subject to the present suit only in his official capacity as the former district attorney for Orleans Parish. Similarly, Jordan was subject to suit only in his official capacity as former district attorney and was named

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asserted claims under 42 U.S.C. §§ 1983, 1985, and 1988, and alleged violations of the Fourth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. In 2007, Connick and Jordan, the City, Miceli, and Heath (collectively "Appellees") filed two separate motions for summary judgment. Eventually, the district court granted both motions and entered judgment in Appellees' favor on September 11, 2012. Appellants filed a Motion for Reconsideration and/or to Alter/Amend Judgment, which the district court denied, and Appellants timely appealed.

II. DISCUSSION

Appellants raise three issues on appeal. Appellants assert that they suffered a constitutional violation caused by either the DA's policy of withholding exculpatory evidence from criminal defendants in violation of *Brady v. Maryland,* or the office's deliberate indifference to *Brady* violations, or the DA's failure to train its prosecutors to enforce *Brady.* Similarly, Appellants contend that the City maintained a police department policy of withholding exculpatory evidence from criminal defendants and failed to train NOPD officers on *Brady* requirements, thereby violating Appellants' constitutional rights. In addition to

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as a defendant for the sole reason that he was successor to Connick as Orleans Parish district attorney. Appellants voluntarily dismissed their claims against three of the five former NOPD officers and detectives, leaving Heath and Miceli as the only detective defendants.

pursuing relief under Section 1983 based on municipal liability, Appellants assert that NOPD detectives Heath and Miceli violated Appellants' constitutional rights by withholding exculpatory evidence material to their criminal trial.

A. Standard of Review

We review the district court's grant of summary judgment *de novo. DePree v. Saunders,* 588 F.3d 282, 286 (5th Cir. 2009). This court applies the same standards as the district court, granting summary judgment where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*; *see* Fed. R. Civ. P. 56(c). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Crawford v. Formosa Plastics Corp., La.,* 234 F.3d 899, 902 (5th Cir. 2000) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505 (1986)). The evidence in the record is reviewed in the light most favorable to and with all reasonable inferences drawn in favor of the non-moving party. *Thorson v. Epps,* 701 F.3d 444, 445 (5th Cir. 2012). However, the non-movant must go beyond the pleadings and present specific facts indicating a genuine issue for trial in order to avoid summary judgment. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S. Ct. 2548, 2553 (1986). Summary judgment is appropriate if the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex,* 477 U.S. at

322, 106 S. Ct. at 2552. This court may affirm summary judgment on any ground supported by the record and raised in the district court, "even if it is different from that relied on by the district court." *Holtzclaw v. DSC Commc'ns Corp.,* 255 F.3d 254, 258 (5th Cir. 2001).

B. Section 1983 Claim Against the DA's Office

Appellants challenge the district court's ruling that rejected their claim under 42 U.S.C. § 1983 against the Orleans Parish district attorney's office under Connick. "To state a section 1983 claim, a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law." *Whitley v. Hanna,* 726 F.3d 631, 638 (5th Cir. 2013) (quotation marks omitted). Appellants assert here, as they did before the district court, that they suffered a constitutional violation within the meaning of Section 1983 due to Connick's policy of withholding exculpatory evidence from criminal defendants in violation of *Brady v. Maryland.*

Under *Brady,* a local government entity, including a district attorney's office ("DA office"), deprives a criminal defendant of his right to due process when it suppresses or withholds evidence that is both favorable to the defendant and material to his defense. *See, e.g., Smith v. Cain,* 132 S. Ct. 627, 630 (2012). In order to establish that a DA's office is liable under

Section 1983, plaintiffs "must prove that action pursuant to official municipal policy caused their injury." *Connick v. Thompson,* 131 S. Ct. 1350, 1359 (2011) (quotations and citation omitted). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, [or] practices so persistent and widespread as to practically have the force of law." *Id.* at 1359.

1. Policy or Practice

Appellants offer several pieces of evidence as proof that Connick's DA office had a policy or a persistent and widespread practice of violating criminal defendants' *Brady* rights in the 1970s. First, they allege the DA office failed to turn over material exculpatory or impeachment evidence in their case about the State's only eyewitness, Sheila Caston Robertson. They further allege that in response to their pre-trial request for *Brady* material, the State replied that it had none or that the defendants were not entitled to such material. Second, they allege that the State gave similar "no possession or no entitlement" responses to pretrial *Brady* requests in other unrelated cases between 1974 and 1976. Third, they contend that in *Smith v. Cain* – a case unrelated to the one at hand – counsel for the Orleans Parish DA office admitted during oral argument that its policy was to refuse to turn over *Brady* evidence when the prosecutor determined that the evidence was not material. Fourth, they allege that Connick's DA office had a "policy" of not obtaining witness statements, police reports, and

witness rap sheets from police files. Finally, they offered the affidavit of former Orleans Parish Assistant District Attorney Bill Campbell as evidence that the DA office had a policy in 1975 and 1976 of withholding exculpatory evidence.

Like the district court, we assume, *arguendo,* that the evidence Appellants claim was suppressed in their case was material and a *Brady* violation occurred. (The existence of a violation, we note, is disputed by the DA office.)[2] Nevertheless, appellants must go beyond their specific case and demonstrate that a pattern or policy of purposefully withholding exculpatory evidence from criminal defendants existed within the DA office during the relevant time period. The existence of a single *Brady* violation is insufficient to support a government entity's liability under Section 1983 for an unconstitutional policy or practice. *Thompson,* 131 S. Ct. at 1356.

Appellants thus direct our attention to discovery requests made by various counsel in other, unrelated cases around the time of their criminal trial and to the State's similar "no possession or no entitlement" responses. They have not, however, pointed to case law preceding their convictions that held the DA's office responsible for committing *Brady* violations or that upheld other criminal defendants' claims of

[2] The issues Appellants raise to cast doubt upon Robertson's credibility did not manifest, according to their own evidence, until several years after their trial.

Brady violations. In addition, as noted by the district court, facsimiles of requests for production and DA office responses thereto, without something more, do not show that *Brady* violations actually occurred in those cases, let alone that the DA's office had an unconstitutional policy or practice. This evidence does not create a triable fact issue as to whether the DA office had a policy of withholding *Brady* evidence from criminal defendants.

Appellants' focus on the oral argument before the Supreme Court in *Smith* likewise fails, because there was no "admission" that the DA office had a policy of refusing to turn over *Brady* evidence. To the contrary, counsel's statements concerned whether the State believed that a *Brady* violation had occurred when the State failed to turn over a particular prior inconsistent statement that was favorable to a single criminal defendant's defense. *See* Transcript of Nov. 8, 2011, oral argument for *Smith v. Cain,* No. 10-8145, at 43-53, http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf (last visited July 31, 2014). Accordingly, the oral argument in *Smith* does not advance the position that a policy of withholding exculpatory evidence was in force around the time of Appellants' criminal trial.

With respect to the claim that the DA office had a "policy" against prosecutors' reviewing certain police files in search of *Brady* material, the only evidence advanced by Appellants is a reference to testimony of the prosecutor in their case, Henry Julien. On its face, the testimony concerns Julien's views, relates to

their sole case, and cannot create a fact issue concerning the office's policy.

Finally, the district court correctly excluded Campbell's affidavit from evidence based on his lack of personal knowledge and hearsay. Campbell's affidavit purported to address the status of the DA office's *Brady* policy *before* Campbell began serving as an intern there in 1977. "[Federal Rule of Civil Procedure] 56(e) requires statements in affidavits to be based on personal knowledge and not based on information and belief." *Bolen v. Dengel,* 340 F.3d 300, 313 (5th Cir. 2003). Because the district court did not abuse its discretion by excluding Campbell's affidavit as inadmissible, we do not consider it here.

Because the only probative evidence Bright and Truvia present relates exclusively to their case, the district court correctly held that Bright and Truvia have failed to establish the existence of a policy, custom, or practice in Connick's office in 1975 and 1976 of violating criminal defendants' *Brady* rights. However, in limited circumstances, a failure to train prosecutors regarding their *Brady* duties may rise to the level of official municipal policy. *Thompson,* 131 S. Ct. at 1359.

2. Failure to Train

Under a failure-to-train theory, Appellants must prove "both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady*

disclosure obligation . . . and (2) that the lack of training actually caused the *Brady* violation in this case." *Thompson,* 131 S. Ct. at 1358. "For an official to act with deliberate indifference, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Estate of Davis ex rel. McCully v. City of N. Richland Hills,* 406 F.3d 375, 381 (5th Cir. 2005) (quotation marks omitted). "Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Thompson,* 131 S. Ct. at 1360. In failure-to-train cases "culpability . . . is at its most tenuous," for the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.* (quotation and citation omitted).

In *Connick v. Thompson,* the Supreme Court most recently rejected a municipal liability claim that arose from a *Brady* violation perpetrated by an assistant Orleans Parish DA in the 1980's. *Thompson* held that a district attorney's office may not be held liable under Section 1983 for failure to train based on a single *Brady* violation. Moreover, as the Court noted, "[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Id.* at 1361. "A district attorney is entitled to rely on prosecutors' professional training and

ethical obligations in the absence of specific reason, such as a pattern of violations, to believe those tools are insufficient to prevent future constitutional violations in the usual and recurring situations with which the prosecutors must deal." *Id.* at 1363 (quotation and citation omitted). It is not enough to show that "because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts . . . to a decision by the city itself to violate the Constitution." *Id.* at 1365 (quotation and citation omitted). It is in this light that we review Appellants' Section 1983 claim for failure to train.

To prove that Connick's office was deliberately indifferent to the need to train prosecutors on *Brady* requirements, Appellants contend that various Orleans Parish prosecutors committed multiple *Brady* violations in other cases, and the DA office did not have a policy to ensure assistant district attorneys immediately obtained witness statements from police in every case. None of this evidence shows that Connick's office was deliberately indifferent to a need for *Brady* training before Appellants' criminal trial in 1976. First, the *Brady* "violations" Appellants refer to are not proven *Brady* violations; instead, they are the same discovery requests made by counsel in other, unrelated cases to which the prosecutors responded by denying possession of *Brady* material. This evidence, as previously discussed, fails to show actual *Brady* violations, much less an unconstitutional pattern or policy. Second, Appellants' citations to over a

dozen federal and state cases to show a "continuum" of *Brady* violations are not probative because the vast majority of them occurred after Appellants were convicted in July 1976. The two cases that predated July 1976, *Davis v. Heyd,* 479 F.2d 446 (5th Cir. 1973), *overruled by Garrison v. Maggio,* 540 F.2d 1271 (5th Cir. 1976), and *State v. Carney,* 334 So. 2d 415 (La. 1976), surely did not convey the requisite notice under a failure-to-train theory. *See Thompson,* 131 S. Ct. at 1360 (holding that not even "*four* reversals could . . . have put Connick on notice that the office's *Brady* training was inadequate") (emphasis added). Third, Appellants have not provided any authority to support their assertion that the DA office was required, above and beyond *Brady,* to have a policy for obtaining all witness statements from police files.

Because Appellants have not shown that Connick was on actual or constructive notice of the necessity of *Brady* training for the office's attorneys prior to their convictions, the district court correctly held that that Connick is entitled to judgment as a matter of law.

C. Section 1983 Claim Against the City

Appellants contend that the City had a custom or policy of withholding exculpatory evidence from criminal defendants and failed to train NOPD officers on *Brady* requirements. Because Appellants' terse argument pertaining to the City is dedicated entirely to the City's alleged failure to train NOPD officers, their

argument as to a general City policy is waived. *See Jason D.W. by Douglas W. v. Hous. Indep. Sch. Dist.,* 158 F.3d 205, 210 n.4 (5th Cir. 1998) (even when the appellant listed a legal question in his statement of issues, his "failure to provide any legal or factual analysis of [the] issue on appeal waive[d] that issue").

Appellants' failure-to-train theory fails because they have not shown that the City was deliberately indifferent to a known need for better *Brady* training for its police officers. *Thompson,* 131 S. Ct. at 1358, 1360. As evidence that the City failed to train its officers, Appellants rely on admissions by Detectives Heath and Miceli during their depositions that they were unsure as to the meaning of "exculpatory" and "*Brady* material." Further, NOPD department regulations between 1972 and 1974 did not include a specific "policy on the handling and production of exculpatory evidence," and the daily reports of NOPD detectives were generally not forwarded to the DA office. According to Appellants, the detectives' daily reports might have included exculpatory information such as arrests or witness statements. However, even when viewing this evidence in the light most favorable to Appellants, they have not demonstrated that, as of 1976, the City knew its *Brady* training for police officers was insufficient yet still made a "deliberate or conscious" choice in the face of such information "to endanger constitutional rights." *Estate of Davis,* 406 F.3d at 383; *see Thompson,* 131 S. Ct. at 1365 (explaining that "deliberate indifference" requires proof of the defendant's being on notice that, absent

additional specified training, it was "highly predictable" that the defendant's employees would make incorrect *Brady* decisions). Absent a showing that the City was deliberately indifferent, there is no issue of fact with respect to the City's failure to train NOPD officers on *Brady* rights.

The district court correctly rejected Appellants' claims against the City.

D. Brady *Claims Against Detectives Heath and Miceli*

Appellants also alleged that NOPD detectives Heath and Miceli violated their constitutional rights by withholding exculpatory evidence during their criminal trial. The district court found no triable issues of fact that any evidence was suppressed and alternatively held the officers shielded by qualified immunity.

Qualified immunity shields a government official from Section 1983 liability if the official's acts were objectively reasonable in light of clearly established law at the time of the official's conduct. *Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 253 (5th Cir. 2005) (quotation and citation omitted). "When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *Id.* (citation omitted). We evaluate qualified immunity under a two-part test: (1) "whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right," and (2) "whether the

right at issue was clearly established at the time of defendant's alleged misconduct." *Pearson v. Callahan,* 555 U.S. 223, 232, 129 S. Ct. 808, 816 (2009) (quotation marks omitted). "A right is clearly established when 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Hernandez v. United States,* ___ F.3d ___, 2014 WL 2932598 at *5 (5th Cir. 2014). By the time Appellants' criminal trial was underway in 1976, the law in this circuit was clearly established that a public official's concealment of material exculpatory evidence was a constitutional violation. *See Brown v. Miller,* 519 F.3d 231, 238 (5th Cir. 2008).

Appellants allege that Heath and Miceli suppressed such evidence in their case when the detectives: (1) withheld evidence of the arrests of three other people for the murder and then provided false testimony that one of these people had not been arrested; (2) withheld evidence that an eyewitness placed two other murder suspects at the scene of the crime, threatening to harm the victim over a "drug deal gone bad"; (3) provided misleading evidence/ testimony that there was no credible information about the "drug deal gone bad" theory by claiming this was merely an unsubstantiated "rumor" with no supporting eyewitnesses; (4) withheld a background check on eyewitness Robertson which would have provided impeachment evidence; and (5) manipulated Robertson, who stated she did not know where the suspects lived, but then took Heath and Miceli to the

suspects' apartments, and pointed out the incorrect address to Truvia.

The district court analyzed all of the proffered evidence and concluded as to each cited piece that there was no *Brady* violation by these officers or they were entitled to qualified immunity. We agree, largely based on the district court's careful exposition of the record.

We add a few comments responsive to Appellants reliance on post-summary judgment evidence offered in their Federal Rule of Civil Procedure 59 motion. As the district court noted in its opinion denying the motion, the newly proffered evidence would not have changed its conclusion. First, according to their depositions, the brief arrest and detention of three other suspects, including Smith and Navarre, ceased shortly after a phone call to the victim's mother, who identified one of them as a relative of the victim. No material defense value attached to this incident. Second, Alfred Marshall talked to some policeman (not identified by name) two weeks after the murder about his encounter with Symms and Johnston the night of the murder. As Marshall's deposition developed, it became clear that the local community was well aware of these individuals' potential involvement, and defense counsel actually questioned witnesses about them during the Appellants' trial. Thus, this information was not suppressed under *Brady* because it was ascertainable by the defense using reasonable diligence. *Brown v. Cain,* 104 F.3d 744, 750 (5th Cir. 1997) (citation omitted). Finally, the federal court is

not bound by the findings in state habeas court in Appellants' favor, because that case involved different issues than municipal entity Section 1983 liability, and the state court made no finding about Miceli's or Heath's alleged suppression of evidence.

Accordingly, there was no genuine issue of material fact as to whether detectives Heath and Miceli violated Appellants' constitutional rights under *Brady.*

E. Appellants' Motion for Reconsideration and to Alter/Amend Judgment

Following the district court's grant of summary judgment for Appellees, Appellants filed a motion pursuant to Rule 59(e) for "Reconsideration and/or to Alter/Amend Judgment," attaching "newly-discovered evidence" they had not previously submitted to the court. The district court denied the motion. We review the district court's order denying Appellants' motion for abuse of discretion. *Ross v. Marshall,* 426 F.3d 745, 763 (5th Cir. 2005). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Id.* (quotation marks omitted).

Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 473 (5th Cir. 1989) (quotation marks omitted). Appellants asserted both grounds. On appeal, Appellants do not dispute that the allegedly "newly-discovered evidence" was in fact

not "new," and they offer no reason why this evidence could not have been presented earlier in opposition to Appellees' motions for summary judgment. Ordinarily, an "unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a . . . motion for reconsideration," *Templet v. HydroChem Inc.,* 367 F.3d 473, 479 (5th Cir. 2004). As we and the district court noted, however, the newly offered evidence does not alter the outcome here.

Further, Appellants have failed to demonstrate a sufficient error of law or fact that warranted the district court's reconsideration of its summary judgment order. Appellants claim that the "manifest error" upon which their motion was based was the district court's refusal to afford "full faith and credit" to Judge Elloie's decision and by using the testimony of former assistant district attorney Henry Julien in reaching its conclusion on the summary judgment motions. However, neither of these points amount to "manifest error" worthy of Rule 59 reconsideration. The district court expressly indicated in its summary judgment order that for purposes of ruling on the Appellees' summary judgment motions concerning the DA office and NOPD, the court assumed, without deciding, that a *Brady* violation occurred in connection with Appellants' 1976 criminal trial. Even if the district court did improperly credit Julien's deposition testimony when ruling on Appellees' motions, the district court's grant of summary judgment was still proper for the reasons stated above. Appellants have

not shown that the district court abused its discretion in denying their Rule 59(e) motion.

CONCLUSION

For these reasons, the judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

EARL TRUVIA, ET AL	CIVIL ACTION
VERSUS	NO. 04-0680 c/w 04-0682
HENRY P. JULIEN, JR., ET AL	SECTION "N" (2)

ORDER AND REASONS

(Filed Sep. 10, 2012)

Presently before the Court are motions for summary judgment filed by Defendants Harry Connick, in his official capacity as the (former) District Attorney for the Parish of Orleans, the City of New Orleans, and former New Orleans Police Detectives Micelli and Heath (Rec. Docs. 88 and 150). Having carefully considered the parties' supporting and opposing submissions, and applicable law, **IT IS ORDERED**, for the reasons stated herein, that the motions are **GRANTED**, and that Plaintiffs' claims are **DISMISSED WITH PREJUDICE**. Additionally, because Defendant Eddie Jordan, in his official capacity as the (former) District Attorney for the Parish of Orleans, is named solely as the successor to Defendant Harry Connick, in his official capacity as the (former) District Attorney for the Parish of Orleans, **IT IS FURTHER ORDERED** that Plaintiffs' claims against Defendant Jordan are likewise **DISMISSED WITH PREJUDICE**.

BACKGROUND

In 1976, Plaintiffs, Earl Truvia and Gregory Bright, were found guilty, in Louisiana state court, of the October 31, 1975 murder of Elliot Porter. They were sentenced to life imprisonment without parole. Thereafter, in 2002, finding violations of *Brady v. Maryland,* 373 U.S. 83 (1963), had occurred in connection with Plaintiffs' trial, Judge Charles L. Elloie, of the Criminal District Court for the Parish of Orleans, State of Louisiana, vacated the convictions. In March 2003, the Louisiana Supreme Court denied the State of Louisiana's application for a writ of certiorari. *See State v. Truvia,* 839 So.2d 35 (La.2003). Following the State of Louisiana's eventual dismissal of the criminal charges filed against Plaintiffs, they were released from custody.

Based on these events, Plaintiffs filed suit, in 2004, against (1) Harry Connick, individually and in his official capacity as the (former) District Attorney for the Parish of Orleans ("DA"); (2) Eddie Jordan, in his official capacity as the District Attorney for the Parish of Orleans; (3) the City of New Orleans; (4) the New Orleans Police Department (NOPD); (5) former Assistant District Attorneys Henry Julien and Kurt Sins; and (5) NOPD Detectives Joseph Micelli and George Heath.[1] Plaintiffs assert claims under state

[1] The claims against Defendant Connick, in his individual capacity, along with the claims against Henry Julien and Kurt Sins were dismissed by Judge Porteous in 2004. *See* Rec. Docs. 32-33, and 70. Plaintiffs also previously voluntarily dismissed

(Continued on following page)

and federal law, including 42 U.S.C. §§ 1983, 1985, 1988. They allege violations of the Fourth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, constituting malicious investigation, false arrest, malicious prosecution, and false imprisonment.

LAW AND ARGUMENT

I. Summary Judgment Standard

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The materiality of facts is determined by the substantive law's identification of which facts are critical and which facts are irrelevant. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed.2d 202 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.*

If the dispositive issue is one on which the non-moving party will bear the burden of proof at trial, the moving party may satisfy its summary judgment burden by merely pointing out that the evidence in the record contains insufficient proof concerning an

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their claims against former New Orleans Police Department Officers/Detectives Lawrence Elsensohn, Pascal Saladino and Robert Laviolette. *See* Rec. Docs. 260 and 267.

essential element of the nonmoving party's claim. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed.2d 265 (1986); *see also Lavespere v. Liberty Mut. Ins. Co.,* 910 F.2d 167, 178 (5th Cir. 1990). Once the moving party carries its burden pursuant to Rule 56(a), the nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324, 106 S. Ct. 2553; *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986); *Auguster v. Vermillion Parish School Bd.,* 249 F.3d 400, 402 (5th Cir. 2001).

When considering a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party, *Gillis v. Louisiana,* 294 F.3d 755, 758 (5th Cir. 2002), and draws all reasonable inferences in favor of that party. *Hunt v. Rapides Healthcare System, L.L.C.,* 277 F.3d 757, 764 (2001). Factual controversies are to be resolved in favor of the nonmoving party, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (citations omitted). The Court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *See id.* (emphasis in original) (citing *Lujan v. Nat'l Wildlife*

Fed'n, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188, 111 L. Ed.2d 695 (1990)).

Although the Court is to consider the full record in ruling on a motion for summary judgment, Rule 56 does not obligate it to search for evidence to support a party's opposition to summary judgment. *See* Fed. R. Civ. P. 56(c)(3) ("court need consider only the cited materials"); *Malacara v. Garber,* 353 F.3d 393, 405 (5th Cir. 2003) ("When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court."). Thus, the nonmoving party should "identify specific evidence in the record, and articulate" precisely how that evidence supports his claims. *Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.), *cert. denied,* 513 U.S. 871, 115 S. Ct. 195 (1994).

The nonmovant's burden of demonstrating a genuine issue is not satisfied merely by creating "some metaphysical doubt as to the material facts," "by conclusory allegations," by "unsubstantiated assertions," or "by only a scintilla of evidence." *Little,* 37 F.3d at 1075. Rather, a factual dispute precludes a grant of summary judgment only if the evidence is sufficient to permit a reasonable trier of fact to find for the nonmoving party. *Smith v. Amedisys,* 298 F.3d 434, 440 (5th Cir. 2002).

II. Substantive Law and Application of Legal Principles

A. Motion filed by (former) District Attorney Connick

Plaintiffs' actions arise under 42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Recognizing that the initial inquiry in such actions is whether the plaintiff has suffered a constitutional violation as a result of the defendant's actions, Plaintiffs contend that their state post-conviction proceedings conclusively establish that they did indeed suffer such a violation. Defendants vehemently disagree. Plaintiffs further contend that Defendant Connick, as DA, had a policy, custom, or practice of violating criminal defendants' constitutional rights, under *Brady,* by purposefully withholding exculpatory evidence. According to Plaintiffs, Connick also failed to train and supervise his prosecutors on the requirements of *Brady* such that his failure constitutes deliberate indifference actionable under § 1983. Finally, Plaintiffs

contend that Connick's alleged deficiencies actually caused violations of their *Brady* rights.

Legal principles governing Plaintiffs' claims under §1983 were recently discussed in *Connick v. Thompson,* 131 S. Ct. 1350, 1359 (2011):

> A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. *See Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978). But, under §1983, local governments are responsible only for "their own illegal acts." *Pembaur v. Cincinnati,* 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed.2d 452 (1986) (citing *Monell,* 436 U.S., at 665-683, 98 S. Ct. 2018). They are not vicariously liable under § 1983 for their employees' actions. *See id.,* at 691, 98 S. Ct. 2018; *Canton,* 489 U.S. at 392, 109 S. Ct. 1197; *Board of Comm'rs of Bryan Cty. v. Brown,* 520 U.S. 397, 403, 117 S. Ct. 1382, 137 L. Ed.2d 626 (1997) (collecting cases).
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> Plaintiffs who seek to impose liability on local governments under § 1983 must prove that "action pursuant to official municipal policy" caused their injury. *Monell,* 436 U.S., at 691, 98 S. Ct. 2018; *see id.,* at 694, 98 S. Ct. 2018. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *See*

> *ibid.*; *Pembaur,* supra, at 480-481, 106 S. Ct. 1292; *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 167-168, 90 S. Ct. 1598, 26 L. Ed.2d 142 (1970). These are "action[s] for which the municipality is actually responsible." *Pembaur, supra,* at 479-480, 106 S. Ct. 1292.

Addressing a governmental entity's alleged failure to properly train employees regarding their constitutional duties, the Supreme Court additionally explained:

> In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. *See Oklahoma City v. Tuttle,* 471 U.S. 808, 822-823, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training' " is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton,* 489 U.S. at 388, 109 S. Ct. 1197. Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.,* at 389, 109 S. Ct. 1197.

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.,* 520 U.S. at 410, 117 S. Ct. 1382. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.,* at 407, 117 S. Ct. 1382. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." *Canton,* 489 U.S., at 395, 109 S. Ct. 1197 (O'Connor, J., concurring in part and dissenting in part). A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities. . . ." *Id.,* at 392, 109 S. Ct. 1197; *see also Pembaur,* supra, at 483, 106 S. Ct. 1292 (opinion of Brennan, J.) ("[M]unicipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . . ").

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. *Bryan Cty.,* 520 U.S., at 409, 117 S. Ct. 1382. Policymakers' "continued adherence to an approach that they know or should know has failed to

> prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the 'deliberate indifference' – necessary to trigger municipal liability." *Id.,* at 407, 117 S. Ct. 1382. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.
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> [C]ontemporaneous or subsequent conduct[, however,] cannot establish a pattern of violations that would provide "notice to the cit[y] and the opportunity to conform to constitutional dictates. . . ." Canton, 489 U.S., at 395, 109 S. Ct. 1197 (O'Connor, J., concurring in part and dissenting in part).

Connick v. Thompson, 131 S. Ct. at 1359-60 and n.7. To prevail on a failure to train claim under § 1983, the plaintiff also must prove that the lack of training actually caused the *Brady* violation at issue. *Id.* at 1358 and n.5.

For purposes of the instant motion, the Court assumes, without deciding, that a *Brady* violation did occur in connection with Plaintiffs' 1976 criminal trial. Nevertheless, the Court finds that no triable issue has been demonstrated relative to the existence of a policy, custom, or practice in Connick's office, in 1975 and 1976, of violating criminal defendants' constitutional rights, under *Brady* and its progeny, by purposefully withholding exculpatory evidence. The

Court likewise rejects Plaintiffs' contention that, in 1975 and 1976, Connick also failed to train and supervise his prosecutors regarding the requirements of *Brady* such that his failure constitutes deliberate indifference actionable under § 1983.

1. DA Connick's Official Policy

Connick's evidentiary submissions support the existence of an official policy, during the pendency of the criminal proceedings at issue here, directed toward compliance with applicable law, including *Brady* and its progeny. As discussed in Connick's memoranda, the Code of Professional Responsibility required disclosure of exculpatory evidence in 1976.[2] Additionally, Connick's own affidavit and deposition testimony, as well as the affidavits of a number of persons working as Assistant District Attorneys during the time period at issue here, including then Assistant District Attorney ("ADA") Henry Julien, prosecutor in Plaintiffs' criminal case, maintain that, prior to and after the indictment of Truvia and Bright, Connick's official policy recognized prosecutors' legal and ethical obligations to comply with applicable law concerning evidence disclosure, including *Brady* and *Giglio,* and the Louisiana Code of Professional Responsibility.[3] The affidavits further

[2] See DR 7-103(B) of the Louisiana Code of Professional Responsibility.

[3] See Affidavit Exhibits to Connick's Memorandum in Support of Motion for Summary Judgment ("Connick's Orig. Mem."),

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aver that none of the affiants were ever aware of any custom or practice on the part of Connick or any ADA to purposefully or intentionally withhold *Brady* material; and that Connick never "encouraged, directed, or even hinted, that anyone should cover up, destroy, or hide *Brady* material."[4]

The Court finds Plaintiffs' arguments to the contrary to be unavailing. Specifically, Plaintiffs point to discovery responses given by Julien in this matter,[5] and other discovery requests and responses provided by various counsel in other, unrelated cases during 1975 and 1976.[6] Julien's response to Bright's requests for exculpatory evidence, however, does not refuse to provide such evidence. Rather, it simply provides: "State is not in possession of any."[7] In his deposition, Julien related that he answered in this fashion because he had no responsive documents in his possession, and did not think any exculpatory evidence existed about which he should ask the police

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Rec. Doc. 88-2, including Affidavit of Harry Connick (Rec. Doc. 88-2, pp. 28-30), ¶¶ 7-9 and 15-17; Transcript of Harry Connick Deposition ("Connick Depo.") (Rec. Doc. 100-17), at 59-61; Transcript of Henry Julien Deposition ("Julien Depo.") (Rec. Doc. 267-3), at 19-30, 50, 73 and 112.

[4] *Id.*

[5] See Prayer for Oyer (Rec. Doc. 100-4); Answer to Prayer for Oyer (Rec. Doc. 100-6).

[6] See Plaintiffs's [sic] Exhibits J, K, and Q (Rec. Docs. 100-10, 135 (manual attachment), and 238).

[7] See Answer to Prayer for Oyer (Rec. Doc. 100-6).

department.[8] With respect to the request for a "FBI rap sheet" for any intended witnesses, Julien responded that the defense "is not entitled to this information," because he did not see how that could be *Brady* information.[9] But, in any event, Julien also explained that, regardless of his written discovery responses in a given case, he and Pat Quinlan, the senior prosecutor with whom he was assigned to work, routinely allowed defense counsel to review the prosecution's case file prior to trial, and did so in Plaintiffs' criminal case.[10] Significantly, Plaintiffs have put forth no evidence, including deposition or affidavit testimony of Plaintiffs' criminal defense counsel, to the contrary. Julien also indicated that if he had had a FBI rap sheet in his possession, he probably would have provided it to defense counsel.[11]

As presented, the Court additionally finds the numerous discovery requests and responses provided by Plaintiffs from other, unrelated matters to be problematic and of little value. Although Plaintiffs maintain that these documents reveal numerous *Brady* violations from ADA's in Connick's office, that conclusion cannot be drawn based solely on the documents themselves. The Court is provided with no explanation of the facts of those cases, no indication of any

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[8] See Julien Depo. (Rec. Doc. 267-3), at 125-132.

[9] *Id.* at 125.

[10] *Id.* at 96-100, 117, 120-23, and 140-45; Affidavit of Henry Julien ("Julien Affid.") (Rec. Doc. 88-2, pp. 31-33) at ¶¶ 15-20.

[11] *Id.* at 113.

court resolution of the discovery requests,[12] no proof that *Brady* material existed and was actually withheld, and no proof that a *Brady* violation occurred. Indeed, certain of the responses indicate that the State either had no such material, or had none in addition to that which had already been provided.[13] Nor do Plaintiffs provide the affidavit or deposition testimony of *any* of the numerous ADA's and defense attorneys who submitted the discovery requests and responses in an effort to shed light on the actual meaning of these documents, the resolution of the requests, the apparently restricted nature and procedures for pre-trial criminal discovery and other evidentiary disclosures during the relative time period, and whether or not responsive information actually was disclosed notwithstanding the contents of the written responses. This omission is particularly significant given that a number of the discovery responses apparently were submitted by the same former ADA's who have submitted affidavits, in support of Connick's motion, addressing Connick's *Brady*

[12] Most of the discovery requests are presented in the form of prayer and/or motion and are accompanied by a proposed "show cause" order for the court. See, *e.g.,* Plaintiffs' Exhibit K (Rec. Doc. 135).

[13] See, *e.g.,* Plaintiffs' Exhibits 4 and 6 (Rec. Doc. 135) (Manual Attachment). Further, many of the documents are largely illegible. See, *e.g.,* Plaintiffs' Supp. Exhibit Q (Rec. Doc. 238).

policies and the training provided during their tenure in his office.[14]

2. Prosecutorial Training

Turning to the issue of *Brady* training, the Court likewise is not convinced, on the showing made, that attorney training in Connick's office was legally deficient relative to prosecutorial obligations regarding exculpatory evidence. And, even if it were, there is no indication that Connick, as policymaker for the DA's office in 1975 and 1976, was deliberately indifferent at that time to such inadequacies and the likelihood of resulting constitutional violations.

As previously discussed, the Code of Professional Responsibility, to which all ADA's were subject, required disclosure of exculpatory evidence in 1976. Further, the testimony offered by former ADA Julien, and the affidavits submitted by a number of other former ADA's, indicate that they regularly received interoffice updates regarding pertinent jurisprudence, and participated in periodic "in house" group training sessions, in addition to attending, or reviewing materials obtained from, outside seminars and district attorney meetings.[15] Additionally, junior ADA's, including

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[14] See Affidavit Exhibits to Connick's Orig. Mem. (Rec. Doc. 88-2).

[15] See Julien Affid. (Rec. Doc. 88-2, pp. 31-33) at ¶¶5-6; Affidavit Exhibits to Connick's Orig. Mem. (Rec. Doc. 88-2); Julien Depo. (Rec. Doc. 267-3) at 14-19, 43-44; Connick Depo. (Rec. Doc. 100-16, 100-17, and 100-18) at 27-31, 35-36, and 53-58.

Julien, were paired with more experienced attorneys for supervision and on-the job training, including training regarding *Brady* material.[16] Indeed, as previously stated, Julien testified that he and Pat Quinlan, the senior prosecutor with whom he worked for Plaintiffs' criminal case, routinely allowed defense counsel, including those who represented Plaintiffs to review their case file prior to trial.[17] Junior ADA's also would consult with more experienced prosecutors regarding any evidentiary questions they might have.[18] Finally, Plaintiffs point to no reported instance of similar *Brady* violations, occurring *prior* to 1976, that arguably may have alerted Connick to a need at that time for additional training of his ADA's regarding disclosure of exculpatory evidence. Under these circumstances, and also for the reasons discussed at length by the Supreme Court in *Connick v. Thompson,* 131 S. Ct. at 1360-67,[19] the Court finds no triable

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[16] See Julien Depo. (Rec. Doc. 267-3), at 38-41, 69-70; Affidavit Exhibits to Connick's Orig. Mem. (Rec. Doc. 88-2).

[17] See Julien Depo. (Rec. Doc. 267-3), at 96-100, 117, 120-23, and 140-45; Julien Affid. (Rec. Doc. 88-2, pp. 31-33), at ¶¶ 15-20.

[18] See Julien Depo. (Rec. Doc. 267-3), at 40-43, 49-54, 69-70, and 117; Affidavit Exhibits to Connick's Orig. Mem. (Rec. Doc. 88-2), including Affidavit of John S. Baker, Jr. (Rec. Doc. 88-2, p. 2), ¶ 10.

[19] In *Connick v. Thompson,* the Supreme Court explained why the "single incident" liability hypothesized in *Canton v. Harris,* 489 U.S. 378, 109 S. Ct. 1197 (1989), concerning the obvious need to train novice armed police officers regarding constitutional constraints on the use of deadly force, did not similarly apply to prosecutors with respect to *Brady* obligations. 131 S. Ct. at 1360-67. The Court emphasized that "[a]ttorneys are

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claim as to attorney training exists here. The Court additionally finds support for this conclusion in *Cousin v. Small,* 325 F.3d 627 (5th Cir. 2003), wherein the Fifth Circuit entered summary judgment in Connick's favor, concluding no genuine issue of material fact existed as to the Plaintiffs' failure to train claim.

B. Motion filed by City of New Orleans, and (former) Detectives Micelli and Heath

Plaintiffs' claims against the City of New Orleans and former NOPD Detectives Micelli and Heath also are asserted under §1983 and likewise concern alleged violations of the constitutional obligations recognized in *Brady* and its progeny. The Court also finds these claims to be legally ineffectual.

1. Defendants Micelli and Heath

Focusing first on the remaining individual defendants, former Detectives Micelli and Heath, Plaintiffs contend that they: (1) withheld evidence of the arrests of three other people (Ricky Truvia, Ricky

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trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Id.* at 1361. The Court also referenced the on-the-job training received by junior prosecutors in the Orleans Parish DA's office, and prosecutors' ethical obligation to " 'seek justice, not merely to convict,' " and to produce *Brady* evidence to the defense. *Id.* at 1362.

Navarro, and Kevin Smith) for Elliot Porter's murder; (2) withheld evidence that an eyewitness, Alfred Marshall, placed two other murder suspects (Ed Johnson and Deatrice Symms) at the scene of the crime, on the night of the murder, looking for the victim, threatening to harm the victim, and having a motive to harm the victim over a bad drug deal; (3) affirmatively provided misleading evidence that there was no credible information as related to the bad drug deal theory by claiming this was merely an unsubstantiated "rumor" and that there were no eyewitnesses to support this rumor; (4) withheld a background check on the lone prosecution witness (Sheila Caston Robertson), which would have provided overwhelming impeachment evidence that she had given a false name, had mental health issues, had abused her children, and/or had a drug problem; and (5) manipulated the key witness, Sheila Caston Robertson, who stated that she did not know where the suspects lived, but then suddenly took these defendants to the suspects' apartments – and actually pointed out the incorrect address for plaintiff Truvia.[20]

The Court finds that Plaintiffs' claims against these defendants are without merit and/or are precluded by qualified immunity principles. Police officers "are entitled to qualified immunity on summary judgment unless a plaintiff (1) has 'adduced sufficient evidence to raise a genuine [dispute] of material fact

[20] See Plaintiffs' Supplemental Opposition Memorandum (Rec. Doc. 260) at 2.

suggesting [the officers'] conduct violated an actual constitutional right,' and (2) the officers' 'actions were objectively unreasonable in light of clearly established law at the time of the conduct in question.'" *Poole v. City of Shreveport,* No. 11-30158, 2012 WL 3517357, *3 (5th Cir. 2012) (quoting *Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir. 2008)." "'Although nominally an affirmative defense, the plaintiff has the burden to negate the defense once properly raised.'" *Id.* "This standard, even on summary judgment, 'gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (internal quotation marks omitted). As explained by the Supreme Court in *Pearson v. Callahan,* 555 U.S. 223, 231, 244-45, 129 S. Ct. 808, 815, 823 (2009):

> The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed.2d 396 (1982). Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly, and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on

> mixed questions of law and fact." *Groh v. Ramirez,* 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed.2d 1068 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou,* 438 U.S. 478, 507, 98 S.Ct. 2894, 57 L. Ed.2d 895 (1978)), for the proposition that qualified immunity covers "mere mistakes in judgment, whether the mistake is one of fact or one of law").
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> This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne,* 526 U.S. 603, 614, 119 S. Ct. 1692, 143 L. Ed.2d 818 (1999) (internal quotation marks omitted); see *Hope v. Pelzer,* 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L. Ed.2d 666 (2002) ("[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" (internal quotation marks omitted)).
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> The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.

Having carefully reviewed the parties' voluminous submissions, including the deposition testimony of Henry Julien, George Heath, Joseph Micelli, Pascal Saladino, and Robert Laviolette, Jr., it is not clear that former ADA Henry Julien received each and

every document completed by the detectives investigating the Elliot Porter murder during the course of their investigation. What has not been contradicted by Plaintiffs' evidentiary submissions, however, are Julien's assertions that he allowed defense counsel to review his case file pre-trial, that all of the detectives investigating the Porter murder testified that it was their practice to document all pertinent information gathered during the course of an investigation, whether favorable or not to an identified suspect, and that none of the detectives purposefully withheld from the prosecution material evidence known to be favorable to the underlying criminal case against Plaintiffs. Further, the case cited by Plaintiffs as "clearly established law" regarding police officers, *Luna v. Beto,* 395 F.2d 35 (5th Cir. 1968) (en banc), *cert. denied,* 394 U.S. 966, 89 S.Ct. 1310 (1969),[21] at most established that a *Brady* violation may occur, justifying federal habeas relief, if a police officer deliberately conceals exculpatory evidence. Thus, because the Court finds

[21] In their opposition memoranda, Plaintiffs actually cite to the panel opinion, which ordered reversal of the district court's denial of federal habeas relief. See Rec. Doc. 164 at 6; Rec. Doc. 260 at 4 and 8 (citing *Luna v. Beto,* 391 F.2d 329 (5th Cir. 1967). On rehearing, en banc, however, the Fifth Circuit found the authority cited by the panel majority to be inapposite and, thus, affirmed the district court. See *Luna v. Beto,* 395 F.2d 35 (5th Cir. 1968) (en banc), *cert. denied,* 394 U.S. 966, 89 S.Ct. 1310 (1969). Moreover, though arguing the law to be "clearly established" for purposes of their claims against the individual officers, another part of Plaintiffs' submission describes *Brady* as being "the subject of constantly evolving" Supreme Court jurisprudence during that time. See Rec. Doc. 164 at 19.

no triable issue exists in Plaintiffs' favor, relative to a purposeful concealment by the individual defendants of evidence favorable to Plaintiffs, qualified immunity principles protect the individual defendants from liability in this matter.

Furthermore, focusing on Plaintiffs' first specific allegation, even if Ricky Truvia, Ricky Navarro, and Kevin Smith were arrested by police in the sense that they were taken to the police station for questioning, and were not "free to go" during that interview, no evidence supports the notion that they were ever formally booked, or charged with Elliot Porter's murder, or were considered serious suspects following their alleged temporary detention. In any event, Plaintiffs have put forth no evidence suggesting that any of these three individuals had anything to do with the crime at issue. Thus, the claims lack merit. *See Crawford v. Cain,* No. 04-0748, 2006 WL 1968872, *18-19, (E.D. La. 7/11/06) (Vance, J.) (requiring plausible nexus to the crime), *aff'd,* 248 Fed.Appx. 500 (5th Cir. 2007), *cert. denied,* 552 U.S. 1183 (2008).

Turning to Plaintiffs' second contention, it is undisputed that Alfred Marshall was not an "eyewitness" to the actual murder of Elliot Porter. Rather, his affidavit indicates only that he saw and talked with Ed Johnson and Deatrice Symms while "at the Project" on the night before the (early morning) murder.[22] Significantly, Plaintiffs provide no citation to

[22] See Alfred Marshall Affidavit (Rec. Doc. 164-2), at ¶ 3.

deposition testimony reflecting questioning of the individual defendants by them regarding the veracity of Mr. Marshall's affidavit, or why no reference to him is made in the case report. In any event, Defendants are correct that the alternative suspects and conduct referenced by Mr. Marshall already had been communicated by other persons to the detectives, and, moreover, questioning by counsel during the underlying criminal trial reflects that Plaintiffs' criminal defense counsel were aware of these two suspects and the allegations that had been made relative to them.[23] Additionally, other accounts to police regarding these two suspects were reflected in the detectives' case report that was provided to former ADA Julien, and, as indicated above, Plaintiffs point to no testimony – by affidavit or otherwise – by defense counsel for their criminal trial, or other contrary evidence, refuting Julien's assertion that he allowed Plaintiffs' criminal defense counsel to review that report prior to the trial. Thus, even if Mr. Marshall's comments to detectives arguably should have been noted in the police case report, the Court, on the showing made, does not find their omission to deprive the individual defendants of qualified immunity.

Regarding Plaintiffs' next assertion, *i.e.,* that the individual defendants "affirmatively provid[ed] misleading evidence that there was no credible information

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[23] See Trial Transcript, *State of Louisiana v. Truvia and Bright* ("Trial Transcript") (Rec. Doc. 267-4), at 24-26, 30-31, 33-39, 54-55; see also Julien Depo. (Rec. Doc. 267-3), at 118-120.

as related to the bad drug deal theory by claiming this was merely an unsubstantiated 'rumor' and there were no eyewitnesses to support this rumor," the individual defendants are immune from liability regarding any testimony offered by them. To the extent that this allegation concerns statements made in the police case report, the Court, for reasons previously stated, and on the showing made, likewise finds such statements protected by qualified immunity.

Plaintiffs' fourth contention concerns an allegedly withheld background check of prosecution witness Sheila Caston Robertson, which they contend would have provided overwhelming impeachment evidence demonstrating that she had given a false name, had mental health issues, had abused her children, and/or had a drug problem. It is unclear from the parties' submissions whether the police detectives here actually obtained a report of Sheila Caston Robertson's criminal record, though it is undisputed that such checks frequently were done by them with material witnesses. Even if one were done, however, there is no indication that the detectives' inquiry would have gone beyond a criminal background check.

Significantly, the only documentation provided to the Court regarding criminal conduct by Sheila Caston Robertson, occurring *prior* to the 1976 trial, concerns a 1966 juvenile conviction, when she was approximately 12 years old, for aggravated battery (striking two persons with a stick) and subsequent

parole matters in 1969 and (possibly) 1973.[24] All other criminal conduct reflected in these documents occurred years after the 1976 trial.[25] It is unclear to the Court whether these juvenile records would have been available to the detectives in 1976, or even appropriately recorded in the case report. Further, there is no indication that the individual defendants in fact obtained the referenced Division of Family Services records for 1975 and 1976,[26] that accessing such records was standard procedure for them, or that any of the detectives or ADA Julien had notice of any facts suggesting that such a query regarding Sheila Caston Robertson's children or mental health was appropriate in this instance. Accordingly, this contention offers Plaintiffs no legal relief.

Finally, the Court does not find sufficient evidentiary support for Plaintiffs' last assertion regarding the individual defendants' alleged manipulation of Sheila Caston Robertson relative to the identification of plaintiff Truvia's home. Mere speculation about the explanation provided by individual defendants regarding the matter is insufficient.

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[24] See Plaintiffs' Exhibit C (Rec. Doc. 164-4).

[25] *Id.*

[26] See Plaintiffs' Exhibit D (Rec. Doc. 164-5).

2. City of New Orleans (NOPD)

The Court likewise finds Plaintiffs' claims against the City of New Orleans lack merit. Although in hindsight the practices of the NOPD, in 1975 and 1976, arguably could have been better, in terms of ensuring that the DA's office had *all* police department documentation relative to a particular case, and those practices likely are different from those employed today, Plaintiffs have not demonstrated a triable issue as to the existence of an official NOPD policy, custom, or practice, during that time, of violating constitutional rights by purposefully withholding exculpatory evidence from the prosecutor and defendant. This is particularly true when the state of the law, in late 1975 and early 1976, regarding police obligations relative to *Brady* and its progeny, as discussed above, is considered.[27]

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[27] Indeed, the parties' submissions suggest that if police investigators did not provide certain documents to the DA, the selection seemingly turned on the type of document, *e.g.*, detectives' field notes or daily reports, rather than a case report or field arrest report, or how comprehensive other documents were, rather than its contents. See, *e.g.*, Julien Depo. (Rec. Doc. 267-3), at 45-48, and 53-68; Transcript of Joseph Micelli Deposition ("Micelli Depo.") (Rec. Doc. 267-1), at 37-40 and 50-51; Transcript of George Heath Deposition ("Heath Depo.") (Rec. Doc. 115), at 26-29, 42-44, 68-83; Transcript of Pascal Saladino Deposition ("Saladino Depo.") (Rec. Doc. 150, Exhibit 4) (Manual Attachment), at 17-20, 59-64; Transcript of Robert Laviolette, Jr. Deposition ("Laviolette Depo.") (Rec. Doc. 150, Exhibit 5) (Manual Attachment), at 6-14. Additionally, although certainly not an excuse for any constitutional violations found to have occurred in the past, the reality of the disparity in technology available

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On the showing made, the Court additionally finds no triable issue to exist with respect to whether the NOPD's training of its officers relative to *Brady* obligations, during the time period at issue, reflects a policy of deliberate indifference. As set forth above, the law in late 1975 and 1976 regarding police obligations was far from being well developed or settled.[28] Nor is it determinative that the detectives who investigated the Elliot Porter murder in 1975, when deposed more than thirty years later, in 2007, could not provide a legal definition of "exculpatory evidence" or "*Brady* information." The investigating detectives' deposition testimony demonstrates an overall understanding that pertinent information, whether supportive of a particular person's innocence or not, was to be reported, and that investigative information was not purposefully withheld from the DA's office. Plaintiffs have not produced evidence to the contrary.[29]

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for use by police departments and prosecutors in 1975-76, as compared to that in existence today, or even twenty years ago, cannot be ignored. Present-day parties, counsel, and courts must remain mindful of this.

[28] See also note 27.

[29] Specifically, once the legal meaning of "exculpatory evidence" or "*Brady* information" was clarified, former Detective Micelli essentially testified that he likely would have noted such evidence in case reports, which were intended to be as accurate as possible, with no intentional material omissions, and that he never purposefully withheld any investigative information from the DA. See Micelli Depo. (Rec. Doc. 267-1), at 26-41, 46-50, 73-74, 125-132, 137-140, 161 and 173. With respect to persons with

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III. Conclusion

For the foregoing reasons, the Court finds that no genuine issue of material fact exists for trial and that the remaining defendants are entitled to judgment as a matter of law. Accordingly, Plaintiffs' claims against the remaining defendants are dismissed with prejudice.

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whom he talked during the course of the investigation, he would not list every person but would record anything "worth reporting." *Id.* at 161. See also Trial Transcript (Rec. Doc. 267-4) at 44, and 53-54. He also indicated that he was never specifically asked by the DA's office to provide information that "would show or suggest that the criminal defendant is actually innocent." See Micelli Depo. (Rec. Doc. 267-1), at 40 and 50.

Former Detective Heath testified that the detective's duty was to collect evidence and report anything pertinent to the case, regardless of whether it supported the guilt of one person versus the other, and that he was never told by a supervisor to "throw out" evidence that might be relevant to a case. See Heath Depo. (Rec. Doc. 115), at 24, 30-34, 79 and 83-85. Throughout his deposition testimony, he also emphasized that much of a detective's training was on-the-job training gained by working with other experienced detectives. Former Detective and co-defendant Saladino testified that all leads pertinent to the case would be investigated and documented, regardless of whether they ultimately supported the guilt of a particular person or not, that any changes in witness testimony would be documented and provided to the DA, and that he would not throw away any evidence favorable to a defendant. See Saladino Depo. (Rec. Doc. 150, Exhibit 4) (Manual Attachment), at 28-33, 35, 45-48, and 57. Former Detective and co-defendant Laviolette similarly testified that all leads followed, and any evidence gathered, tending to support the innocence of a defendant, would be documented in the detective's daily report. See Laviolette Depo. (Rec. Doc.150, Exhibit 5) (Manual Attachment), at 8-13.

New Orleans, Louisiana, this 10th day of September 2012.

/s/ Kurt D. Engelhardt
KURT D. ENGELHARDT
United States District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

EARL TRUVIA, ET AL	CIVIL ACTION
VERSUS	NO. 04-0680 c/w 04-0682
HENRY P. JULIEN, JR., ET AL	SECTION "N" (2)

ORDER AND REASONS

(Filed May 9, 2013)

Presently before the Court is Plaintiffs' "Motion for Reconsideration and/or to Alter/Amend Judgment" (Rec. Doc. 282). Having carefully considered the parties' submissions and applicable law, **IT IS ORDERED**, for the reasons stated herein, that the motion is **DENIED**. Accordingly, as stated in the Court's prior Order and Reasons (Rec. Doc. 280), **IT IS ORDERED** that Plaintiffs' claims against Defendant Harry Connick, in his official capacity as the (former) District Attorney for the Parish of Orleans, Defendant Eddie Jordan, in his official capacity as the (former) District Attorney for the Parish of Orleans, Defendant City of New Orleans, and Defendants Joseph Micelli and George Heath, in their individual capacities as former New Orleans Police Department detectives, are **DISMISSED WITH PREJUDICE**.[1]

[1] Plaintiffs' claims against Defendant Connick, in his individual capacity, along with their claims against Defendants

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As reflected in the Court's prior Order and Reasons (Rec. Doc. 280), Plaintiffs' official capacity claims against Defendants Connick and Jordan rest on assertions that, during the pendency of the criminal proceedings at issue here, Connick, as the District Attorney for the Parish of Orleans: (1) had a policy of withholding exculpatory evidence in violation *Brady v. Maryland,* 373 U.S. 83 (1963), and its progeny;[2] and (2) failed to train and supervise his prosecutors regarding the requirements of *Brady* such that his failure constituted deliberate indifference to criminal defendants' constitutional rights. Plaintiffs' claims against the City of New Orleans and former New Orleans Police Department Detectives Micelli and Heath likewise concern alleged violations of the

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Henry Julien, Jr., and Kurt Sins, were dismissed, by the Court, in 2004, on grounds of absolute prosecutorial liability. *See* Rec. Docs. 32-33, and 70. Plaintiffs also previously voluntarily dismissed their claims against former New Orleans Police Department Officers/Detectives Lawrence Elsensohn, Pascal Saladino and Robert Laviolette. *See* Rec. Docs. 260 and 267.

[2] For purposes of establishing municipal liability under 42 U.S.C. § 1983, "[t]he official policy itself must be unconstitutional or, if not, must have been adopted 'with deliberate indifference to the known or obvious fact that such constitutional violations would result.'" *James v. Harris Cty.,* 577 F.3d 612, 617 (5th Cir. 2009), *cert. denied,* 130 S.Ct. 1078 (2010) (quoting *Johnson v. Deep East Tex. Reg'l Narcotics Trafficking Task Force,* 379 F.3d 293, 309 (5th Cir. 2004)). "Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it 'must amount to an intentional choice, not merely an unintentionally negligent oversight." *Id.* at 17-18 (quoting *Rhyne v. Henderson County,* 973 F.2d 386, 392 (5th Cir. 1992).

constitutional obligations recognized in *Brady* and its progeny. On the showing made, the Court finds that the aforementioned defendants are entitled to summary judgment in their favor relative to these claims.

The primary focus of Plaintiffs' motion for reconsideration is the contention that, given the state court's 2002 ruling,[3] this Court is required, as a matter of law, to find that (former) Assistant District Attorney Henry Julien did not allow Plaintiffs' defense counsel to review the prosecution's case file prior to or during the course of their 1976 criminal trial. Even if Plaintiffs are correct, which the Court does not decide, the Court's prior conclusion – that no genuine issue of material fact has been demonstrated to exist in Plaintiffs' favor relative to their claims for damages against the aforementioned defendants – is unchanged for the other reasons stated in the Court's prior Order and Reasons.

Thus, with respect to the official capacity claims asserted against Defendants Connick and Jordan, the Court finds, on the showing made, that no triable issue has been demonstrated relative to the existence of an unlawful policy, custom, or practice in Connick's office, in 1975 and 1976, of violating criminal defendants' constitutional rights, under *Brady* and its

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[3] *See* October 1, 2001 Judgment (Rec. Doc. 164-3) issued by Judge Charles Elloie in *State v. Bright and Truvia,* No. 252-514, Sect. A, Criminal District Court, Parish of Orleans, State of Louisiana.

progeny, by purposefully withholding exculpatory evidence, or, in any event, reflecting deliberate indifference to defendants' rights to such evidence. The same is true relative to Plaintiffs' contention that, in 1975 and 1976, Connick failed to train and supervise his prosecutors regarding the requirements of *Brady* such that his failure constitutes deliberate indifference for purposes of 42 U.S.C. §1983. Regarding Plaintiffs' claims against the City of New Orleans, Plaintiffs' motion similarly fails. As the Court previously concluded, in hindsight the documentary policies and procedures employed by the New Orleans Police Department ("NOPD") in 1975 and 1976 arguably could have [sic] better. Nevertheless, on the showing made, Plaintiffs likewise have not demonstrated a triable issue, relative to the existence of an NOPD policy, custom, or practice during that time, of violating constitutional rights by purposefully withholding exculpatory evidence from the prosecutor and defendant, or reflecting deliberate indifference to whether that evidence should be turned over to the prosecutor for disclosure to criminal defendants. The Court additionally finds no triable issue to exist with respect to whether the NOPD's training of its officers relative to *Brady* obligations, during the time period at issue, reflects a policy of deliberate indifference. This is particularly true when the still evolving state of the law, in late 1975 and early 1976, is considered.[4]

[4] For example, though obviously subject to federal constitutional requirements, prior to a 1984 amendment to La. R.S. 44:3,

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Lastly, with respect to the claims asserted against Defendants Micelli and Heath, Plaintiffs' motion additionally contends that the Court's prior Order and Reasons imposed "a willfulness state of mind requirement on the withholding of exculpatory evidence," which "improperly increases what actually must be shown to prove a constitutional *Brady* violation." *See* Rec. Doc. 282-1, p. 20. Plaintiffs are incorrect. The referenced portion of the Court's language is directed to determining whether qualified immunity principles protect Defendants Micelli and Heath from liability, not, significantly, whether any *Brady* violation occurred. As previously stated, the Court finds no triable fact issue to exist such that these defendants

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police reports, under Louisiana law, generally were considered confidential and not subject to disclosure. *See, e.g., State v. Ward,* 483 So. 2d 578, 583, *cert. denied,* 479 U.S. 871 (1986) (discussing amendment); *State v. Shropshire,* 471 So. 2d 707, 708-09 (1985) (same). Additionally, as discussed in the prior Order and Reasons (Rec. Doc. 280, p. 19, n. 27), the parties' submissions suggest that if the police department did not provide certain documents to the District Attorney's office, the selection seemingly turned on the type of document, *e.g.,* detectives' field notes or daily reports, rather than a case report or field arrest report, or how comprehensive other documents were, rather than its contents. *See, e.g.,* Julien Depo. (Rec. Doc. 267-3), at 45-48, and 53-68; Transcript of Joseph Micelli Deposition ("Micelli Depo.") (Rec. Doc. 267-1), at 37-40 and 50-51; Transcript of George Heath Deposition ("Heath Depo.") (Rec. Doc. 115), at 26-29, 42-44, 68-83; Transcript of Pascal Saladino Deposition ("Saladino Depo.") (Rec. Doc.150, Exhibit 4) (Manual Attachment), at 17-20, 59-64; Transcript of Robert Laviolette, Jr. Deposition ("Laviolette Depo.") (Rec. Doc.150, Exhibit 5) (Manual Attachment), at 6-14.

are deprived of the protection of qualified immunity. This Court again reaches this conclusion whether or not it considers the recently obtained deposition testimony of Kevin Smith, Ricky Navarre, and Alfred Marshall also referenced by Plaintiffs in support of their motion for reconsideration. *See* Rec. Doc. 282-1, pp. 21-24.

New Orleans, Louisiana, this 8th day of May 2013.

/s/ Kurt D. Engelhardt
KURT D. ENGELHARDT
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-30589

EARL TRUVIA,

Plaintiff-Appellant

v.

HARRY F CONNICK, in his capacity as District Attorney for the Parish of Orleans; GEORGE HEATH, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; JOSEPH MICELI, Detective, Individually and in his official capacity as Officer of the City of New Orleans Police Department; CITY OF NEW ORLEANS; EDDIE JORDAN,

Defendants-Appellees.

GREGORY BRIGHT,

Plaintiff-Appellant

v.

HARRY F CONNICK, in his capacity as District Attorney for the Parish of Orleans; GEORGE HEATH, Detective; JOSEPH MICELI, Detective; CITY OF NEW ORLEANS; EDDIE JORDAN,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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(Filed Sep. 15, 2014)

ON PETITION FOR REHEARING EN BANC

(Opinion 08/08/2014, 5 Cir., ___, ___, F.3d ___)

Before REAVLEY, JONES and GRAVES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
UNITED STATES CIRCUIT JUDGE