APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHELLE DAWN MURPHY, Plaintiff - Appellant, v. THE CITY OF TULSA, Defendant - Appellee.	No. 18-5097

Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 15-CV-528-GKF-FHM)

John J. Carwile (Tara D. Zickefoose with him on the briefs), Baum Glass Jayne & Carwile PLLC, Tulsa, Oklahoma, on behalf of the Plaintiff-Appellant.

T. Michelle McGrew (Kristina L. Gray with her on the briefs), Tulsa, Oklahoma, on behalf of the Defendant-Appellee.

Before **BACHARACH, McHUGH,** and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of the Tulsa Police Department's investigation into the murder of an infant. The police suspected the infant's mother, Ms.

Michelle Murphy. Ms. Murphy ultimately confessed, but she later recanted and sued the City of Tulsa under 42 U.S.C. § 1983. The district court granted summary judgment to the City, concluding that Ms. Murphy had not presented evidence that would trigger municipal liability. We affirm.

I. Ms. Murphy is convicted of murder after confessing in an allegedly coercive interrogation.

Roughly 25 years ago, Ms. Murphy had two small children: an infant son and a little girl. The infant son was killed, and the police suspected Ms. Murphy. She ultimately confessed after allegedly being threatened that she'd never be able to see her little girl again.

Ms. Murphy's confession led to her conviction for murder. After she had served roughly 20 years in prison, her conviction was vacated and the case was dismissed with prejudice.

II. Ms. Murphy sues the City, which obtains summary judgment based on a failure to prove a basis for municipal liability.

Ms. Murphy sued the City of Tulsa under 42 U.S.C. § 1983, claiming that

- a police officer had violated the Constitution by coercing her confession and
- the City of Tulsa had incurred liability for that constitutional violation.

The district court concluded that the City could not incur liability because the constitutional violation had not resulted from an unlawful policy or

custom.[1] Given this conclusion, the district court granted summary judgment to the City.

III. Our review is de novo.

We engage in de novo review, "drawing all reasonable inferences and resolving all factual disputes in favor of [Ms. Murphy]." *Yousuf v. Cohlmia*, 741 F.3d 31, 37 (10th Cir. 2014). With these favorable inferences, we consider whether the City of Tulsa has shown the lack of a genuine dispute of material fact and the City's entitlement to judgment as a matter of law. Fed. R. Civ. P. 56(a).

IV. No municipal policy or custom authorized police officers to threaten citizens during interrogations.

Municipalities can incur liability for their employees' constitutional torts only if those torts resulted from a municipal policy or custom. *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). Five potential sources exist for a municipal policy or custom:

1. a "formal regulation or policy statement,"

2. an informal custom amounting to a "widespread practice that, although not authorized by a written law or express municipal policy, is so permanent and well-settled as to constitute a custom or usage with the force of law,"

3. the decision of a municipal employee with final policymaking authority,

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[1] The district court also concluded that a genuine issue of material fact existed on the constitutionality of the interrogation. We need not address that conclusion.

4. a policymaker's ratification of a subordinate employee's action, and

5. a failure to train or supervise employees.

Bryson v. City of Oklahoma City, 627 F.3d 784, 788 (10th Cir. 2010) (internal quotation marks omitted).

Ms. Murphy relies on each potential source of municipal liability. In our view, however, Ms. Murphy failed to present evidence supporting municipal liability under any of the five sources.[2]

A. No formal regulation or policy statement authorized police officers to make threats.

Official policies can exist through municipalities' "formal rules or understandings." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480–81 (1986). These formal rules or understandings are "often but not always committed to writing" and "establish fixed plans of action to be followed under similar circumstances consistently and over time." *Id.*

Ms. Murphy argues that a formal rule authorized officers to use threats, pointing to

- a former police chief's testimony that police officers could decide for themselves what kinds of threats to use during interrogations and

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[2] Because Ms. Murphy has not established a municipal policy or custom, we need not decide whether a "direct causal link [exists] between the policy or custom and the injury alleged." *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010) (quoting *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993)).

- the City's alleged abandonment of a prohibition against threats in interrogations.

But Ms. Murphy failed to properly support these arguments in district court.

1. Ms. Murphy did not properly present the district court with the former police chief's testimony about the permissibility of threats.

An official policy exists only if it came from a final policymaker. *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189 (10th Cir. 2010). The parties agree that the only final policymaker here is the former police chief, and Ms. Murphy relies on his testimony. But Ms. Murphy didn't properly present the district court with the pertinent part of this testimony. Ms. Murphy's error wasn't merely technical. The district court might have discovered the pertinent part of the testimony only by trudging without guidance through 1540 pages of exhibits.

Ms. Murphy relies here on this excerpt from the former police chief's testimony:

> Q. [The sergeant] further testified that the interrogator had the full authority of the Tulsa Police Department to decide what touching of the suspect would occur. Do you agree with that testimony?
>
> A. I believe there were guidelines about no sexual touching. I mean, that would be a violation of law. But touching a suspect is not specifically prohibited.
>
> Q. [The sergeant] further testified that an interrogator had the full authority of the Tulsa Police Department to decide

> what kind of threats to make. Do you agree with that testimony?
>
> A. They would have.

Appellant's App'x, vol. 10, at 2680, 2729. But this excerpt was not properly presented to the district court.[3]

Though our review of a summary-judgment grant is de novo, "we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties." *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015) (quoting *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1223 (10th Cir. 2008)). If materials were not properly presented to the district court, "we will not reverse [the] district court for failing to uncover them itself." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998). The district court would otherwise need to scour the summary-judgment record to discern whether it supported the party's arguments. *See Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1246 n.13 (10th Cir. 2003) (explaining that the district court

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[3] The City has not urged affirmance based on Ms. Murphy's failure to properly present the district court with the pertinent part of the former police chief's testimony. But even without an argument by the City, we can affirm on any ground supported by the record. *Ross v. Neff*, 905 F.2d 1349, 1353 n.5 (10th Cir. 1990). Exercising this authority is appropriate here because Ms. Murphy is relying on evidence that the district court never had a realistic opportunity to consider.

need not comb through the summary-judgment record for evidence supporting the movant's arguments).

In her amended response to the summary-judgment motion, Ms. Murphy referred twice to the former police chief's testimony.[4] The first reference came in this sentence: "[The former police chief] had two policies which authorized Constitutional violations." For this sentence, Ms. Murphy cited pages 31–32 of her brief. Appellant's App'x, vol. 9, at 2475. These pages did not refer to the two policies. The second reference came two pages later, where Ms. Murphy stated that the City had given "'full authority' to its interrogators to conduct interrogations however they wanted to, including threats." Appellant's App'x, vol. 9, at 2505.[5] For these statements, however, Ms. Murphy did not cite any evidence.

In her original response to the City's motion for summary judgment, Ms. Murphy had referred to Fact 113 from her statement of facts:

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[4] At oral argument, Ms. Murphy also argued for the first time that the district court was aware of the challenged part of the testimony, stating that she had brought the testimony to the court's attention during the hearing on the motion for summary judgment. But "arguments made for the first time at oral argument are waived." *Ross v. Univ. of Tulsa*, 859 F.3d 1280, 1294 (10th Cir. 2017).

[5] In Ms. Murphy's original response to the City's motion for summary judgment, this statement did appear on pages 31–32. *See* Appellant's App'x, vol. 5, at 1257–58. In the amended version of Ms. Murphy's response brief, Ms. Murphy again indicated that the statement would appear on pages 31–32; but this statement had been moved to page 34.

> The Final Policymaker, and the Supervisor of the Homicide Squad, Sgt. Allen, testified that when an interrogator went alone into the interrogation room, without a video or tape recorder going, that interrogator had the "full authority" of [the Tulsa Police Department] to make his own decisions on how to conduct the interrogation, including what kind of threats to make (49, 50).

Appellant's App'x, vol. 5, at 1238 (emphasis omitted).[6] In Fact 113, Ms. Murphy had referred to an exhibit (Exhibit 49) containing this excerpt from the former police chief's testimony:

> Q. [The sergeant] further testified that the interrogator had the full authority of the Tulsa Police Department to decide what touching of the suspect would occur. Do you agree with that testimony?
>
> A. I believe there were guidelines about no sexual touching. I mean, that would be a violation of law. But touching a suspect is not specifically prohibited.

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[6] In her amended response, Fact 113 included the same text and again cited Exhibits 49 and 50. But in the amended response, Fact 113 also included citations of testimony appearing in Exhibits 49 and 50:

> The Final Policymaker, and the Supervisor of the Homicide Squad, Sgt. Allen, testified that when an interrogator went alone into the interrogation room, without a video or tape recorder going, that interrogator had the "full authority" of [the Tulsa Police Department] to make his own decisions on how to conduct the interrogation, including what kind of threats to make (*Plt. Exh. 49, Deposition of Ronald Palmer, p. 27, l. 12-p. 28, l. 25; Plt. Exh. 50, Deposition of Sgt. Allen, p. 15, l. 19-p.16, l. 10).*

Appellant's App'x, vol. 9, at 2485. But Exhibit 49 would have been nearly impossible to locate, and the testimony in Exhibit 49 was incomplete. *See* p. 10, below. So these additional citations in Fact 113 would not have alerted the district court to the pertinent part of the former police chief's testimony.

> Q. [The sergeant] further testified that an interrogator had the full authority of the Tulsa Police

Appellant's App'x, vol. 5, at 1330.

The same testimony appeared in Exhibit 49 of Ms. Murphy's amended response to the summary-judgment motion. Appellant's App'x, vol. 10, at 2680. Although Ms. Murphy kept Exhibit 49 in her amended response to the summary-judgment motion, she dropped the reference to Fact 113. Without any reference to Fact 113, the district court no longer had anything in the amended response that even mentioned Exhibit 49. So the district court had no reason to consult Exhibit 49.

But even if the district court had consulted Exhibit 49 (despite the absence of any reference to it), the court still wouldn't have found the pertinent part of the police chief's testimony. Exhibit 49 did not complete the second question and omitted the answer.[7] The cited page stated only that the sergeant "[had] further testified that an interrogator had the full authority of the Tulsa Police . . . ." Appellant's App'x, vol. 10, at 2680. This page did not include anything in the question about threats, so the district court needn't have suspected that the exhibit was missing a page.

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[7] Fact 113 also referred to Exhibit 50, which appeared in both the original and amended response and contained the sergeant's original testimony. Appellant's App'x, vol. 5, at 1335; vol. 10, at 2684. But the sergeant was not a final policymaker, so his testimony could not show an official policy.

The court could instead have simply concluded that Ms. Murphy's assertion was not supported by the summary-judgment record.

Even if the district court had correctly guessed that the pertinent part of the testimony might be on the next page, the entire deposition transcript had never been filed.[8] The district court thus could not have simply opened the deposition transcript and flipped to the next page.

Ms. Murphy points out that the missing page of the former police chief's testimony appears elsewhere in the summary-judgment exhibits. But that page would not have easily been found among the 1540 pages of exhibits. The start of the second question appears in Exhibit 49, and the remainder of the question and the answer appear in Exhibit 63. But Ms. Murphy's brief in district court did not even cite Exhibit 63. So the district court could not be expected to find the missing page in Exhibit 63. *See Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1223 (10th Cir. 2008) (observing that "[a]lthough the document . . . was in the summary judgment record, the lone reference to it [was] . . . in the facts section," not in the arguments section, so the district court could not be expected to find it).

In a later motion to alter or amend the judgment, Ms. Murphy remarked that the district court had correctly stated that the exhibits

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[8] The Northern District of Oklahoma's rules prohibit the filing of entire depositions unless they are (1) attached to a motion or response or (2) needed for use in a trial or hearing. N.D. Okla. Civ. R. 26.3.

referred only to the sergeant's authorization of threats, not to the former police chief's. Appellant's App'x, vol. 15, at 4249. Ms. Murphy admitted that her amended response brief had failed to include the former police chief's answer because of an "inadvertent omission in the citation to Exhibit 49." Appellant's App'x, vol. 15, at 4249. As we now know, the 1540 pages of exhibits did include the pertinent part of the former policy chief's testimony. But the citation was so difficult to find that even Ms. Murphy's own attorney had not realized that the pertinent page was in the record.[9]

Testimony about a policy allowing threats did appear in two of Ms. Murphy's exhibits (60 and 61). But this testimony does not affect the outcome for two reasons.

First, Ms. Murphy does not urge reliance on Exhibits 60 or 61.

Second, the testimony in Exhibits 60 and 61 came from the police sergeant, not the former police chief. The sergeant's testimony would not have alerted the district court to the former police chief's acknowledgment of the policy.

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[9] The City's exhibits included the page with the former police chief's answer to the question that had appeared in Ms. Murphy's exhibit. But the City's page with the answer omitted the question, and the text of the City's brief did not point to the testimony or its significance. So the presence of the answer in the City's exhibits would not have alerted the district court to the pertinent part of the former police chief's testimony.

* * *

In district court, Ms. Murphy referred to the former police chief's testimony that the police could make threats; but these references were unsupported by the cited parts of the record. The testimony did appear in the exhibits, but Ms. Murphy did not tell the court where to look. The court could have found the rest of the relevant question and answer only by wading directionless through 1540 pages of exhibits. We thus conclude that Ms. Murphy failed to properly alert the district court to the former police chief's testimony on the use of threats.[10]

2. The City's written policies did not imply that the police could threaten civilians.

Ms. Murphy also alleges three other facts to show a formal rule allowing the use of threats against individuals like Ms. Murphy:

1. A policy prohibited threats against police officers being questioned in administrative proceedings.[11]

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[10] The district court also relied on the City's requirement that police officers "defend, enforce, and obey" the Constitution and state and local laws. Appellant's App'x, vol. 16, at 4416. Because Ms. Murphy didn't present the district court with evidence of an unconstitutional formal policy, we need not address the relevance of this requirement.

[11] The policy states:

> POLICE OFFICER BILL OF RIGHTS
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> A. The Chief of Police shall establish and put into operation a system for the receipt, investigation, and determination of complaints against Police Officers received by such Chief of Police from any person.

2. No such policy existed for criminal investigations of non-police officers. (We refer to "non-police officers" as "civilians.").

3. A 1934 policy prohibited threats in criminal interrogations, and the City later rescinded this policy.

Ms. Murphy contends that a reasonable fact-finder could infer that the City prohibited threats only when the person being interrogated was a police officer. We reject this contention because Ms. Murphy's evidence does not suggest that the City had a formal rule authorizing threats against civilians.

A city's "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 official or officials responsible for establishing final

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> B. Whenever an Officer is under investigation and is subject to interrogation . . . such interrogation shall be conducted under the following conditions:
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> 1) Interrogation: . . . .
>
> . . . .
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> f) The Officer under interrogation shall not be subjected to offensive language or threatened with transfer, dismissal, or disciplinary action. No promise or reward shall be made as an inducement to obtain testimony or evidence.

Appellant's App'x, vol. 10, at 2735–36 (¶ 30(B)(1)(f)).

policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). So "[w]hen a § 1983 claim is based on a policy of inaction, the plaintiff must present evidence that the [municipality] made a conscious decision not to act." *Walker v. Wexford Health Sources, Inc.*, 940 F.3d 954, 966 (7th Cir. 2019). The fact-finder can sometimes infer a municipality's conscious decision not to act when inaction would render a constitutional violation "highly predictable" or "plainly obvious." *Waller v. City & County of Denver*, 932 F.3d 1277, 1284 (10th Cir. 2019) (quoting *Barney v. Pulsipher*, 143 F.3d 1299, 1307–08 (10th Cir. 1998)).

Ms. Murphy argues that the City of Tulsa consciously chose inaction, pointing to (1) the greater protections afforded to police officers when they are questioned during administrative proceedings and (2) the City's rescission of a policy prohibiting threats against civilians. These arguments are unsupported.

For her first argument, Ms. Murphy points to protections afforded to police officers in administrative proceedings, not interrogations in criminal investigations. In an administrative proceeding against a police officer, an interrogator cannot threaten a police officer with transfer, dismissal, or disciplinary action. But threats are not prohibited against civilians being interrogated in criminal investigations.

This contrast does not suggest a deliberate choice of inaction for interrogation of civilians. As Ms. Murphy points out, no official policy bans threats against civilians being questioned about possible crimes. But the same is true for police officers suspected of possible crimes. There is thus nothing to suggest that the City consciously decided to permit threats against civilians.

Ms. Murphy also argues that the City consciously chose inaction when it rescinded a policy prohibiting threats. For this argument, Ms. Murphy alleges the discontinuance of a policy that had existed in 1934. According to Ms. Murphy, this policy had prohibited threats.

Ms. Murphy is mistaken, for the policy had simply defined confessions and discussed their admissibility:

> A confession is the voluntary declaration made by a person who has committed a crime or misdemeanor to another, acknowledging his agency or participation in the same. It is restricted to an acknowledgement of guilt made by a person after the offense has been committed. A confession of guilt by the accused is admissible in evidence against him when, and only when, it was freely and voluntarily made without having been induced by the expectation of any promise to benefit nor by the fear of any threatened injury.

Appellant's App'x, vol. 10, at 2732. This language parroted Oklahoma law in 1934 on the definition and admissibility of confessions. *See Dumas v. State*, 24 P.2d 359, 361 (Okla. Crim. App. 1933) ("A confession to be admissible must be voluntary; and if made under a promise of benefit or threat of harm by one having him in custody or one having authority over

him, it is deemed involuntary."); *Lucas v. State*, 221 P. 798, 800 (Okla. Crim. App. 1924) ("[C]onfessions induced by a promise of benefit or a threat of harm made to a defendant by a prosecuting attorney or an officer having him in custody will be deemed involuntary and will be inadmissible as evidence."). Explaining Oklahoma law on the definition and admissibility of confessions does not amount to an official policy banning threats in interrogations.

Because the 1934 policy didn't prohibit threats, rescission of the policy would not suggest a conscious decision to permit threats. Indeed, over 50 years after the enactment of this policy, Tulsa police stated in a training bulletin: "Any coercion, physical or mental, which causes the suspect to waive his rights will invalidate his statement. Threats are strictly forbidden . . . ." Appellant's App'x, vol. 9, at 2436; *see* Part IV(E), below. Given this training bulletin's clarity, no reasonable fact-finder could infer that the City had consciously decided to rescind a policy banning threats.

B. The City of Tulsa had no informal custom authorizing threats in criminal interrogations.

Ms. Murphy also argues that the police department had an informal custom of violating the Constitution through coercive interrogations. We reject this argument.

Cities may incur liability when they adopt unconstitutional "longstanding practice[s] or custom[s]" that become "standard operating procedure[s]." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 485–87 (1986) (White, J., concurring)). A single unconstitutional incident is ordinarily insufficient for municipal liability. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985). But a single incident may suffice when caused by an existing policy that "can be attributed to a municipal policymaker." *Id.*

According to Ms. Murphy, threats and coercion constituted "standard operating procedure" for the Tulsa Police Department. Appellant's Reply Br. at 17. Though Ms. Murphy has not pointed to any evidence of other interrogations involving threats or coercion, she argues that a single incident suffices here because (1) "interrogations were recurring situations" and (2) the former police chief testified that police officers were permitted to make threats. Appellant's Reply Br. at 17.

But the recurrence of interrogations, in itself, does not show the inevitability of threats. And as discussed above, Ms. Murphy failed to properly present the district court with the former police chief's testimony. *See* Part IV(A)(1), above.[12] Without that testimony, the recurrence of

[12] In her reply brief, Ms. Murphy also relies on the sergeant's testimony about the permissibility of threats. In her opening brief, however, Ms. Murphy did not develop an argument involving the sergeant's testimony on

interrogations alone does not suggest a custom involving threats or coercion.

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this issue. In that brief, Ms. Murphy simply included one oblique reference (with no citation) to the sergeant's testimony:

> [The former police chief's] testimony and the other evidence submitted to the trial court, support existence of both a formal policy or of an informal policy. Where a longstanding practice or custom can be said to constitute "standard operating procedure" of the local government entity, municipal liability may be imposed. There can be no greater evidence that an unconstitutional practice is "standard operating procedure" than where the final policymaker [agreed to be the former police chief] says that his interrogators had his full authority to make threats, *and when his sergeant likewise testifies that his interrogators had [the Tulsa Police Department's] full authority to make threats*. Murphy's single incident of unconstitutional activity, along with accompanying proof that it was caused by an unconstitutional policy which can be attributed to [the former police chief] as the municipal policymaker, satisfies the single incident test recognized in [*City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985)].

Appellant's Opening Br. at 32 (emphasis added) (citations omitted). The italicized language does not constitute adequate development of an argument basing a custom on the sergeant's testimony. *See Thompson R2-J Sch. Dist. v. Luke P., ex rel. Jeff P.*, 540 F.3d 1143, 1148 n.3 (10th Cir. 2008) (stating that an argument is waived when it consists of a single sentence in an appeal brief). Ms. Murphy did elaborate (slightly) in her reply brief, but by this time it was too late to inject a new issue of a custom based on the sergeant's testimony. *WildEarth Guardians v. EPA*, 770 F.3d 919, 933 (10th Cir. 2014).

C. No formal policymaker authorized police officers to threaten suspects.

Ms. Murphy contends that the former police chief admitted that he had established a policy allowing threats. This contention is also rooted in the former police chief's testimony, which was not properly presented in district court. *See* Part IV(A)(1), above. We thus conclude that no genuine issue of material fact existed on this contention.

D. No final policymaker ratified a practice of threatening suspects.

Ms. Murphy also argues that the former police chief's testimony shows ratification of the allegedly unconstitutional interrogation of Ms. Murphy. This argument again hinges on the former police chief's testimony, which Ms. Murphy failed to properly present in district court. *See* Part IV(A)(1), above. We thus reject this argument as unsupported.

E. The City of Tulsa is not liable on a failure-to-train theory.

Municipal liability can also be based on a failure to train officers. But "[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). The municipality can incur liability for a failure to train only upon proof of "deliberate indifference," *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998), which is a "stringent standard of fault," *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 410 (1997). To satisfy this stringent standard, Ms. Murphy needed to show that

the City had "actual or constructive notice that its action or failure to act [was] substantially certain to result in a constitutional violation" and "consciously or deliberately [chose] to disregard the risk of harm." *Barney*, 143 F.3d at 1307.

No fact-finder could reasonably infer deliberate indifference in training for two reasons:

1. The City lacked notice of the risk of constitutional violations.
2. The City trained officers not to make threats during interrogations.

To prove notice to the City, Ms. Murphy points to the former police chief's testimony that (1) threats were permissible and (2) the interrogating officer would not have been disciplined for using threats in citizen interrogations. We again decline to consider the former police chief's testimony. *See* Part IV(A)(1), above. And even if we were to consider the former police chief's testimony, it does not suggest notice that inaction would lead to constitutional violations.

Ms. Murphy also argues that the City recognized that its toleration of threats in interrogations would cause constitutional violations. For this argument, Ms. Murphy starts with the City's knowledge that threats would violate the Constitution. But Ms. Murphy does not explain how this knowledge would lead to constitutional violations. Indeed, even with the

City's knowledge, Ms. Murphy does not identify a single threat to anyone else.[13]

Even without notice to the City, Ms. Murphy could show deliberate indifference by proving that a constitutional violation would be highly predictable or plainly obvious in certain recurring situations. *Barney v. Pulsipher*, 143 F.3d 1299, 1307–08 (10th Cir. 1998). Ms. Murphy tries to satisfy this requirement by showing that the City of Tulsa

- failed to train its officers to address recurring situations and
- was substantially certain that these recurring situations would lead to constitutional violations.[14]

In evaluating the City of Tulsa's training, we focus on "purported deficiencies on the part of the City." *Carr v. Castle*, 337 F.3d 1221, 1229

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[13] In district court, Ms. Murphy argued that the interrogating detective had also coerced the confession of a second person—LaRoye Hunter. But Ms. Murphy does not reassert this argument on appeal.

[14] A plaintiff can also show municipal liability based on a failure to provide adequate supervision. *Bryson v. City of Oklahoma City*, 627 F.3d 784, 788 (10th Cir. 2010). Ms. Murphy thus titles part of her opening appellate brief "Deliberately Indifferent Failure to Train or Supervise." But her opening brief does not discuss the adequacy of the City's supervision. Appellant's Opening Br. at 35. We decline to consider "arguments that are . . . inadequately presented[] in an appellant's opening brief." *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007).

Ms. Murphy does add this argument in her reply brief, pointing there to her expert witness's report. Appellant's Reply Br. at 15–16. But the reply brief was too late for Ms. Murphy to inject the issue of inadequate supervision. *WildEarth Guardians v. EPA*, 770 F.3d 919, 933 (10th Cir. 2014).

(10th Cir. 2003). Given this focus, inadequacies in a particular officer's training would not trigger municipal liability because that "officer's shortcomings may have resulted from factors other than a faulty training program." *City of Canton v. Harris*, 489 U.S. 378, 390–91 (1989). Nor is it enough to show that an incident "could have been avoided if an officer had had better or more training." *Id.* at 391.

The bulk of Ms. Murphy's evidence focuses on the training of individual officers. For example, Ms. Murphy points to

- the interrogating police officer's lack of memory about training in interrogations or the frequency of confessions among suspects who are innocent,
- the lack of evidence that training in interrogations had been made available to the police officer conducting the interrogation,
- the sergeant's lack of recollection about training,
- the sergeant's failure to ask his subordinates about the methods that they had used to obtain confessions, and
- the failure to discipline the interrogators for threatening civilians during interrogations.

All of this evidence addresses shortcomings in individual officers' training and supervision, not the City's overall training. These pieces of evidence thus do not suggest deliberate indifference on the City's part.

But Ms. Murphy also challenges the overall adequacy of the training, arguing that the police department failed to teach the constitutional limits of interrogations. Failing to teach police officers about certain

constitutional limits can demonstrate a municipality's "'deliberate indifference' to constitutional rights." *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). Given the potential for coercion in interrogations, failing to teach police officers how to lawfully interrogate civilians might trigger municipal liability. But this possibility is belied by the summary-judgment record.

The City of Tulsa contends that it did teach officers the constitutional limits of interrogation, pointing to a 1987 legal bulletin that tells officers

- how to apply *Miranda v. Arizona*, 384 U.S. 436 (1966), and
- how to interrogate suspects.

In the bulletin, the police department instructs officers not to coerce, threaten, or make promises to suspects:

> CAN THE SUSPECT BE THREATENED OR PROMISED LENIENCY? Any coercion, physical or mental, which causes the suspect to waive his rights will invalidate his statement. Threats are strictly forbidden, but often there is little or no difference between a promise or a threat. Generally, promises of leniency should be avoided. Any promise by the officer that results in an incriminating statement from the suspect will be carefully examined by the courts to see if it amounts to coercion.

Appellant's App'x, vol. 9, at 2436. These instructions make clear that "[t]hreats are strictly forbidden." Appellant's App'x, vol. 9, at 2436; *see* Part IV(A)(2), above.

Despite this express prohibition against threats, Ms. Murphy argues that this bulletin serves only to tell officers how to give *Miranda* warnings, not how to ensure that a confession is voluntary. These are two distinct constitutional inquiries: *Miranda* requires a warning before a custodial interrogation, and the right to due process extends beyond *Miranda* to ensure that the confession is voluntary. *United States v. Pettigrew*, 468 F.3d 626, 634 (10th Cir. 2006).

We conclude that the training bulletin unambiguously extends beyond *Miranda*. The bulletin does extensively discuss *Miranda*, but it also addresses the right to due process.[15] At the outset, the bulletin explains that

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[15] In district court, Ms. Murphy used brackets to imply that the sentence involving threats pertained only to threats designed to obtain an arrestee's waiver of rights under *Miranda*:

> The sentence on p. 5 of ***City Ex. 3*** thereto which begins, "Threats are strictly forbidden...." Is preceded by this sentence: "Any coercion, physical or mental, which causes the suspect to **waive his [Miranda] rights** will invalidate the statement" (emphasis added), thus allowing the jury to infer that this applies only to pre-*Miranda* interrogation.

Appellant's App'x , vol. 16, at 4362 (emphasis in original). But the word "*Miranda*" does not appear in this section of the training bulletin, which states in its entirety:

> **Can the Suspect be Threatened or Promised Leniency?**
>
> Any coercion, physical or mental, which causes the suspect to waive his rights will invalidate his statement. Threats are strictly forbidden, but often there is little or no difference between a promise and a threat. Generally, promises of leniency

it is "a concise statement of the issues involved in confessions." Appellant's App'x, vol. 9, at 2432. And three other topics show that the bulletin extends beyond *Miranda*.

First, the bulletin addresses the voluntariness of confessions by suspects who are intoxicated or suffer a mental disability. Appellant's App'x, vol. 9, at 2437.

Second, the bulletin contrasts the admissibility of (1) coerced confessions and (2) confessions obtained in violation of *Miranda*. For this contrast, the bulletin notes that

- confessions obtained in violation of *Miranda* can be used to impeach defendants and
- "[c]oerced confessions cannot be used for any purpose."

> should be avoided. Any promise by the officer that results in an incriminating statement from the suspect will be carefully examined by the courts to see if it amounts to coercion. A promise not to file the death penalty or a promise not to file on a relative in return for a confession is likely to render the statement inadmissible. However, it is permissible to tell a suspect that if he cooperates the prosecutor will be informed of his cooperation.
>
> It is important to note that whether or not the suspect believed he would receive leniency is not the issue. The focus is not upon the suspect's beliefs but on the actions of the officer.
>
> Finally, regardless of whether the statement is later admissible, the officer should not make decisions concerning leniency without consulting with the prosecutor's office.

Appellant's App'x, vol. 9, at 2436.

Appellant's App'x, vol. 9, at 2437.

Third, the bulletin discusses interrogation of suspects who are expected to lie and describes Oklahoma law's requirements for using a juvenile's statements in court, Appellant's App'x, vol. 9, at 2437—two issues that extend beyond *Miranda* to interrogation in general.

Given the breadth of the bulletin's discussion of confessions, its prohibition against threats unambiguously extends beyond *Miranda* to address other constitutional limits on interrogations.

Ms. Murphy also contends that

- the City never showed that it was still using the 1987 bulletin at the time of her questioning (in 1994) and
- the City failed to show that it had ever distributed the 1987 training bulletin to anyone.[16]

Though the City didn't present the 1987 bulletin in district court until the reply brief, Ms. Murphy could have raised these contentions in her surreply brief or at oral argument on the City's motion. But Ms. Murphy failed to present these contentions at either opportunity. Ms. Murphy thus forfeited

[16] Ms. Murphy also argues in her reply brief that the former police chief testified that he hadn't known of a policy in 1994 that banned threats. Raising this argument in the reply brief was too late. *WildEarth Guardians v. EPA*, 770 F.3d 919, 933 (10th Cir. 2014).

these arguments involving the 1987 bulletin. *See Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.*, 890 F.3d 1195, 1199 (10th Cir. 2018).[17]

Beyond the bulletin, the City of Tulsa contends that it trained its officers on constitutional interrogations in four ways:

1. Training was provided to all police officers involved in investigating Ms. Murphy, and this training included instruction on constitutional rights, statutes, ordinances, instruction on *Miranda* warnings, interviews, interrogations, and juvenile law.

2. To maintain the police officers' certification from the Council on Law Enforcement Education and Training, all police officers attended at least 40 hours of in-service training every year. This training included legal procedures.

3. All new police officers for the City's detective unit had to complete another 40 hours of training in interrogations, arrest warrants, search warrants, and affidavits.

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[17] We ordinarily may consider forfeited arguments under the plain-error standard. *See Law Office of Michael P. Medved, P.C.*, 890 F.3d at 1199. But Ms. Murphy has not urged plain error, and considering the argument (despite the forfeiture) would be problematic:

> [T]he district court did not address this argument, so we would potentially be reversing on an alternative ground not raised or ruled on in district court. The rule that an issue not raised to the district court is forfeited "is particularly apt when dealing with an appeal from a grant of summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories." If this court were to consider new arguments on appeal to reverse the district court, we would "undermine[] important judicial values."

Wright v. Experian Info. Sols., Inc., 805 F.3d 1232, 1244 n.6 (10th Cir. 2015) (citation omitted).

4. Police officers received monthly legal bulletins on new ordinances, statutes, appellate court decisions, and opinions by the United States Supreme Court.

The City of Tulsa has provided no additional evidence on the content of these trainings and bulletins. Given the lack of detail about much of the content, Ms. Murphy asserts that the City's evidence was too general to avoid municipal liability, arguing that "it is the content of the training, catered to specific re-occurring situations an officer in a specific area might face, that controls the analysis." Appellant's Opening Br. at 37 (emphasis omitted).

Although the City's evidence of training lacks detail, it is specific enough to prevent municipal liability. In *Barney v. Pulsipher*, for example, we affirmed summary judgment to a municipality on a claim involving failure to train correctional officers about the sexual assault of inmates. 143 F.3d 1299, 1308 (10th Cir. 1998). The county presented evidence of a state-certified basic officer training program and a single correctional officer course. *Id.* Because the plaintiff failed to present evidence "pertaining to the adequacy of the instruction [the correctional officer] received in these courses," we concluded as a matter of law that the training was constitutionally adequate. *Id.*

That conclusion is equally fitting here. The City presented evidence that it had taught officers how to interrogate suspects and updated those police officers on relevant legal decisions. And at least one part of that

training—the 1987 bulletin—told police officers that they could not make threats during interrogations. Considering the entirety of the training, a fact-finder could not reasonably infer that future constitutional violations would be highly predictable or plainly obvious. *Id.* at 1307; *see* Part IV(A)(2), above.[18]

Ms. Murphy also relies on her expert's report to argue that this training fell short of professional standards on interrogations. For this argument, Ms. Murphy points to *Allen v. City of Muskogee*, 119 F.3d 837 (10th Cir. 1997). There we held that municipal liability could reasonably be inferred from a police department's deviation from training provided elsewhere. 119 F.3d at 843. The issue involved the training's substance because the municipality had trained its officers contrary to the national standard. *Id.*

In our case, the City trained its police officers to follow standard interrogation procedures. Even if the extent of the City of Tulsa's training

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[18] In her reply brief, Ms. Murphy argues that the district court found a disputed fact involving the availability of training on interrogation tactics in 1994. We reject this argument for two reasons.

First, "factual findings" are inappropriate in summary-judgment proceedings. *Fowler v. United States*, 647 F.3d 1232, 1239 (10th Cir. 2011). We thus apply de novo review, deciding for ourselves whether the evidence created a genuine dispute of material fact. *Id.*; *see* Part III, above.

Second, it is too late to make new arguments in the reply brief. *WildEarth Guardians v. EPA*, 770 F.3d 919, 933 (10th Cir. 2014).

might have been inadequate, "showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Connick v. Thompson*, 563 U.S. 51, 68 (2011).

* * *

Because Ms. Murphy cannot show deliberate indifference, the City cannot incur liability for failing to train police officers.

V. Conclusion

Ms. Murphy failed to raise a genuine dispute of material fact on the existence of a municipal policy or custom authorizing unconstitutional interrogations. We thus affirm the award of summary judgment to the City.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE DAWN MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-CV-528-GKF-FHM
	)	
THE CITY OF TULSA,	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter comes before the court on the defendant City of Tulsa's Motion for Summary Judgment [Doc. #175]. For the reasons discussed below, the motion is granted.

I. Background

On September 12, 1994, Travis Wood, the three-month-old son of Michelle Murphy, was found dead as a result of a stab wound to the chest and incised wound to the neck. The Tulsa Police Department, headed by then Chief Ron Palmer, oversaw the investigation of infant Wood's murder. That same day, Murphy made a statement to TPD detective Michael Cook.

On September 15, 1994, Murphy was charged with murder in the first degree in the District Court in and for Tulsa County. Murphy was convicted of the charge in November of 1995 and served twenty (20) years of a sentence of life without parole. On May 30, 2014, Tulsa County District Court Judge William Kellough vacated and set aside Murphy's conviction and, on September 12, 2014, the charge against Murphy was dismissed with prejudice.

Murphy now brings this case against the City of Tulsa pursuant to 42 U.S.C. § 1983, the federal civil rights statute.[1] Murphy seeks section 1983 relief on the basis of two constitutional violations: (1) violation of Murphy's Fifth Amendment right against self-incrimination, and (2) violation of the Fourteenth Amendment due process clause's right to a fair trial.[2] The City moves for summary judgment in its favor.

II. Procedural History and Evidentiary Issues

Before considering the City's motion for summary judgment, however, the court must first address four evidentiary issues associated with Murphy's response.

In support of its motion, the City offers eighty-three (83) material facts to which it asserts there is no dispute. These facts are divided into six categories: (1) "The Tulsa Police Department's Murder Investigation," fact nos. 1-28; (2) "Murphy's Confession And Probable Cause," fact nos. 29-36; (3) "Murphy's Confession was Given Knowingly and Voluntarily," fact nos. 37-46; (4) "Causation and Waiver," fact nos. 47-54; (5) "TPD Policies, Practices, Training, and Supervision," fact nos. 55-71; and (6) "The 'Earlier' Case – LaRoye Hunter," fact nos. 72-83.

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[1] Murphy's original Complaint also named the following defendants: TPD officers Cook, Wayne Allen, Doug Noordyke, B.K. Smith, and Gary Otterstrom; TPD forensic laboratory criminalists Ann Morris, Ann Reed, Tara Valouch, and David Sugiyama; Tulsa County prosecutor Timothy Harris; Department of Human Services employees Jeri Poplin and Doris Unap; and Oklahoma Bureau of Investigation agents Tom Gibson and Mary Long. [Doc. #2]. However, Murphy voluntarily dismissed these individual defendants prior to the filing of Murphy's First Amended Complaint. The original Complaint also identified "other unknown supervisors" as a defendant, but "other unknown supervisors" were not included in the First Amended Complaint.

[2] The City's motion for summary judgment also includes argument regarding a § 1983 malicious prosecution claim. However, during the dispositive motion hearing in this matter, held on February 9, 2018, Murphy's attorney informed the court that Murphy is not pursuing a separate § 1983 malicious prosecution claim. Thus, the court need not consider the City's argument regarding any potential § 1983 malicious prosecution claim.

Murphy's response to the motion includes over 1,000 pages of exhibits. The City subsequently moved to strike the exhibits attached to Murphy's response, arguing that the exhibits did not comply with Local Civil Rule 56.1. In an order dated August 29, 2017, the court concluded that Murphy's response failed to comply with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1) for five separate reasons. First, the court concluded that Murphy "frequently fail[ed] to 'refer with particularity' to those portions of the record upon which she relies," offering as an example Murphy's collective response to the City's first twenty-eight (28) statements of undisputed material facts. In response to the City's first 28 facts, Murphy responded with the statement "[t]he investigation was woefully inadequate, not 'thorough' or 'constitutionally sound' as asserted . . ." and cited to 140 of her own additional statements of undisputed fact, seventeen pages of an expert report prepared on her behalf by Dr. Michael D. Lyman, and twelve pages of deposition testimony from the unnamed "scene investigator." Second, Murphy did not use a consistent format for her references. Third, Murphy referenced missing exhibits. Fourth, Murphy occasionally referred to multi-page exhibits as a whole, without reference to page and line numbers. Finally, for some of the exhibits containing excerpts of testimony, Murphy did not identify the individual whose testimony was presented. In order to correct these identified deficiencies, the court granted Murphy additional time to file an amended response that complied with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1). *See* [Doc. #279].

Pursuant to Local Civil Rule 56.1(c):

> The response brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. **Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's facts that is disputed.** All material facts set forth in the statement of the material facts of the movant shall be deemed admitted

> for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party.

LCvR 56.1(c) (emphasis added). The local rule is consistent with statements of the Tenth Circuit interpreting Fed. R. Civ. P. 56, and meant to further the purposes of Rule 56. The Tenth Circuit has stated that "on a motion for summary judgment, 'it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without . . . depending on the trial court to conduct its own search of the record.'" *Cross v. Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) (quoting *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978)). This court "is not required to comb through Plaintiffs' evidence to determine the bases for a claim that a factual dispute exists." *Bootenhoff v. Hormel Foods Corp*., No. CIV-11-1368-D, 2014 WL 3810329, at *2 n.3 (W.D. Okla. Aug. 1, 2014) (citing *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1199 (10th Cir. 2000))[3]; *see also Espinoza v. Coca-Cola Enters., Inc.*, 167 F. App'x 743, 746 (10th Cir. 2006) ("[W]here the nonmovant failed to support his case with adequate specificity, we will not fault the court for not searching the record on its own to make his case for him (nor will we take on that role of advocacy.")); *Boldridge v. Tyson Foods, Inc.*, No. 05-4055-SAC, 2007 WL 1299197, at *2 (D. Kan. May 2, 2007) ("It is not this court's task to comb through Plaintiff's submissions in an effort to link alleged facts to his arguments or to construct Plaintiff's arguments for him.") (quoting *Barcikowski v. Sun Microsystems, Inc*., 420 F. Supp. 2d 1163, 1179 (D. Colo. 2006)); *Lucas v. Office of Colo. State Pub. Def.*, No. 15-CV-00713-CBS, 2016 WL 9632933, at *5 (D. Colo. Aug. 25, 2016) ("The Court has no obligation to scour the record in search of evidence to support any

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[3] In *Mitchell*, the Tenth Circuit discussed the necessity of such a rule, reasoning, "[t]he district court has discretion to go beyond the referenced portions of these materials, but is not required to do so. If the rule were otherwise, the workload of the district courts would be insurmountable and summary judgment would rarely be granted." *Mitchell*, 218 F.3d at 1199 (alteration in original) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998)).

factual assertions, and where inadequate record citations have been made, the court has ignored them.").

Due to a change in Murphy's counsel, the court granted Murphy an additional extension to file her amended response. *See* [Doc. #335]. The amended response lists 197 additional material facts and again appends over 1,000 pages of exhibits which Murphy asserts preclude summary judgment. However, the amended response fails to correct several of the deficiencies previously identified by this court and, for the four following reasons, the court is persuaded that portions of Murphy's amended response do not comply with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1).

First, Murphy again fails to "refer with particularity" to those portions of the record on which she relies. By way of example, Murphy did not correct all of the insufficiencies specifically identified by this court in its August 29, 2017 order regarding Murphy's opposition to the City's first twenty-eight undisputed material facts.

As previously mentioned, City fact nos. 1-28 relate to TPD's investigation of the murder of infant Wood. Murphy purports to specifically dispute only eight (8) of these facts. Rather, at the outset of Murphy's section stating the material facts to which she asserts a genuine issue of fact exists, Murphy again includes the following:

> 1-28. The investigation was woefully inadequate, not "thorough" or "constitutionally sound" as asserted on p. 31 citing these facts. See Plaintiff Facts ## 15, 21, 22, 24-103 and 142-195. *See also*, ***Plt. Ex. 178, Expert Report of Michael Lyman, pp. 107-124; Plt. Exh. 148, Transcript of Noordyke, p. 16, ll. 22-24, p. 23, ll. 1-3, p. 25, ll. 2-12, l. [sic] 26, ll. 2-6, p. 27, ll. 7-12, p. 31, ll. 3-16, p. 40, ll. 2-7, p. 46, ll. 4-15, p. 52, ll. 4-8, p. 65, ll. 1-24, p. 69, ll. 3-8, p. 29, ll. 7-12.***[4]

[4] With the court's permission, Murphy supplemented her amended response to include a reference to page 29, lines 7-12 on February 9, 2018. *See* [Doc. # 365].

[Doc. #338, p. 1 (internal footnote omitted)]. Murphy explains that "Fact ##" refers to Murphy's additional material facts to which she asserts there is no dispute. [Doc. #338, p. 1 n.1].

Although, unlike in her original response, Murphy identifies the scene investigator as TPD officer Noordyke and includes specific page and line references, Murphy again broadly refers to 135 of her own statements of additional undisputed material facts—each of which references one or more exhibits—as well as 17 pages of Dr. Lyman's expert report, and 13 pages of Noordyke's testimony. Similarly, Murphy cites only her own statements of additional undisputed material facts to dispute the following undisputed material facts offered by the City: 20, 23, 25, 27, 37, 38[5], and 67. As previously discussed by this court, this practice requires the court to first find the referenced statements of undisputed material fact in a separate section of Murphy's response, look to the exhibits referenced in that later section, and comb through the record to find the relevant material in support of Murphy's proposition. The court is not persuaded that this burdensome procedure satisfies the particularity requirement of LCvR 56.1(c).

Second, Murphy fails to properly address many of the City's assertions of undisputed material fact. Murphy purports to dispute City fact nos. 22, 46, 52, 53[6], 56, 57, 63, 72, 73, and 80, but includes only argument and no reference to any portion of the evidentiary record upon which Murphy relies. It is well established that "argument of counsel is not evidence, and cannot provide a proper basis to deny summary judgment." *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052,

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[5] In addition to her own statement of additional undisputed material facts, Murphy also refers the court to "pp. 28-29, below, items A-L" with regard to fact nos. 37 and 38 offered by the City. However, looking to pages 28-29 (both as denominated by Murphy and as identified by the ECF header), the court does not see any items designated "A-L."

[6] The court specifically excluded Murphy's argument regarding the City's undisputed material fact nos. 52 and 53 by order of September 20, 2017. *See* [Doc. #331].

1061 (10th Cir. 2009). *See also Bones v. Honeywell Int'l, Inc*., 366 F.3d 869, 875 (10th Cir. 2004) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.").

Third, although Murphy has remedied most of the deficiencies from her prior brief with regard to missing exhibits, one deficiency remains. In opposition to the City's undisputed material fact no. 13, Murphy refers to Exhibit 15, which was not provided to the court.

Finally, Murphy does not purport to specifically dispute fact nos. 1-10, 12, 14, 16-19, 21, 24, 26, 28, 31, 33-36, 40-45, 48-51, 54, 64-66, 69, 74-79, and 81-83.[7]

To the extent that Murphy identifies a numbered material fact of the City relative to which she cites with particularity to the evidentiary record to demonstrate a dispute as required by LCvR 56.1(c), the court will consider the issue for purposes of the City's motion for summary judgment. The court will not "seach[] through the record on plaintiff's behalf, however, to compile the relevant facts." *Stallings v. Werner Enters.*, 598 F. Supp. 2d 1203, 1210 (D. Kan. 2009). To do so would require the court to comb through the record, essentially charting Murphy's arguments for her, in a manner not required by the Tenth Circuit. Thus, the court concludes that Murphy fails to properly address the following facts, and the court will consider them undisputed for purposes

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[7] The City offers admissible evidence in support of these facts. The City offers certified transcripts of Murphy's preliminary hearing, *Jackson v. Denno* hearing, and criminal trial, *Fisher v. Shamburg*, 624 F.2d 156, 162 n.7 (10th Cir. 1980) ("[W]e note that it is proper to consider a certified transcript on a motion for summary judgment."); investigation records of the Tulsa Police Department, Fed. R. Evid. 803(8) (hearsay exception for public records); *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2016 WL 4036187, at *2 (N.D. Okla. July 20, 2016); and certified depositions, affidavits, admissions, and interrogatory answers, Fed. R. Civ. P. 56(c)(1). To the extent that the City offers uncertified interview transcripts as exhibits, the court finds that Fed. R. Evid. 801, the rule against hearsay, is inapplicable, as the statements are not offered for the truth of the matter asserted. *See, e.g.*, [Doc. #175, p. 2, ¶ 5 ("TPD officers and detectives obtained written and recorded statements from Christina Carter, Christona Lowther, and William Green) (citing Lowther taped statement, Carter taped statement, and supplementary offense report)].

of the City's motion for summary judgment: 1-10, 12-14, 16-28, 31, 33-38, 40-46, 48-54, 56-57, 63-67, 69, and 72-83.

III. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Further, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In considering a motion for summary judgment, "[t]he evidence and reasonable inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party." *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249). Summary judgment is appropriate only "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Stover*, 382 F.3d at 1070 (quoting Fed. R. Civ. P. 56(c)).

IV. Undisputed Material Facts

The court finds the following facts regarding the investigation, trial, conviction, and release of Murphy:

At approximately 6:15 a.m., on Monday, September 12, 1994, EMSA and officers from the Tulsa Police Department ("TPD") arrived on scene at Michelle Murphy's apartment in response to a 911 call regarding the stabbing death of a baby. Officer BK Smith and Officer Gary Neece were among the first to arrive. They were directed to the back door of the apartment, where Smith observed Murphy's three-month old son, Travis Wood, dead, lying in a pool of blood. [CSOMF at ¶ 1]. Smith and Neece entered Murphy's apartment through the back door to search for additional victims. They exited the apartment and set up a perimeter to protect the crime scene. Smith then guarded the back door of Murphy's apartment until he was relieved by a day shift officer. [CSOMF at ¶ 2]. Ultimately, nine uniformed TPD officers and four detectives, including Det. Doug Noordyke, Scene Investigator, assisted in investigating the homicide of Travis Wood. [CSOMF at ¶ 3].

TPD officers immediately separated the witnesses. Murphy and her neighbors, Christina Carter and Christona Lowther, were each placed in separate patrol cars. [CSOMF at ¶ 4]. TPD officers and detectives obtained written and recorded statements from Carter, Lowther, and William Green. [CSOMF at ¶ 5]. TPD officers and detectives also interviewed Murphy's other neighbors, James Fields, Kathy Evans, Steve Mann, LaDonna Summer, William Lee, Kevin Washington, Mike Jarnagan, Pat Jarnagan, and the security guard for the apartment complex. They also interviewed the probation officer of one of Murphy's acquaintances. [CSOMF at ¶ 6]. 911 calls had been made by Lee and Lowther. As part of the investigation, TPD officers obtained copies of these calls. [CSOMF at ¶ 8].

Allen assigned the homicide investigation to Det. Corporal Mike Cook, a 20-year TPD veteran and a 13-year homicide detective. At the time, Cook had investigated hundreds of homicide cases. [CSOMF at ¶ 7]. Allen also assigned Noordyke, a 13-year TPD veteran, as the crime scene investigator. Noordyke's training included police academy training in crime scene processing, evidence recovery, and fingerprinting. He also attended specialized schools in blood stain pattern analysis and latent print examinations and had received training with senior SIU officers regarding crime scene processing. At the time of the Murphy investigation, Noordyke had processed hundreds of crime scenes. [CSOMF at ¶ 9].

When Noordyke arrived at the scene, it had been taped off and preserved. His first duties were to document the scene with video, photographs, sketches, and narrative report. He also recovered physical evidence and processed the scene for prints. [CSOMF at ¶ 10].[8] There were no signs of forced entry into the apartment.[9] [CSOMF at ¶ 11]. Noordyke collected the sheet/drape that separated the kitchen from the living room because it was stained with what appeared to be blood. He also obtained samples from what appeared to be blood on the outside of the front screen door and near the body of the baby. [CSOMF at ¶ 12]. Noordyke recovered seven knives from Murphy's apartment, including a 9-inch dagger in the closet and a large knife with a 7 ¼-inch blade found between the couch cushions. [CSOMF at ¶ 13]. The agent from the Medical

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[8] The City references both the deposition transcript of Noordyke and the Amended Complaint to support its factual position. A complaint is not competent evidence for summary judgment. *See Wheeler v. Perry*, No. CIV-15-198-F, 2015 WL 5672607 (W.D. Okla. Aug. 21, 2015). However, Noordyke's deposition testimony sufficiently supports the City's assertion.

[9] Murphy purports to dispute the City's assertion with the following: "There was glaring evidence of unforced entry. *See Plt. Exh. 148, Transcript of Noordyke, p. 46, ll. 4-15*." However, evidence of *unforced* entry is not competent evidence to dispute the City's assertion that there was no evidence of *forced* entry. Accordingly, the court will treat the City's statement of material fact no. 11 as undisputed for purposes of the motion for summary judgment.

Examiner's office arrived at the scene, examined the victim and found a "stab wound just below the neck and a deep large laceration across the throat that was close to being a full decapitation of the infant." [CSOMF at ¶ 14]. In addition to obtaining latent prints, video, and crime scene photographs, Noordyke collected 25 separate pieces of evidence on September 12, 1994. [CSOMF at ¶ 15]. Throughout the course of its investigation, TPD generated 232 pages of TRACIS documents. The investigation included: securing the crime scene; canvassing the area for potential witnesses; separating the witnesses at the scene; obtaining witness statements; documenting the crime scene with video, photographs and diagrams; obtaining and processing evidence; obtaining DNA evidence and evidence from the Medical Examiner's office; having detectives re-visit the scene; and interviewing Murphy and obtaining her tape-recorded confession. [CSOMF at ¶ 25].

Officer Gary Otterstrom was assigned to sit with Murphy in his patrol car until the detectives arrived. While Murphy was seated in the passenger seat of the patrol car, she stepped out of the vehicle several times to speak with neighbors and smoke cigarettes. [CSOMF at ¶ 23]. Allen, the on-scene supervisor, instructed Otterstrom to obtain a written search waiver from Murphy so that she could give permission for the officers to search her residence for evidence. At 7:17 a.m., September 12, 1994, Allen witnessed Otterstrom read Murphy her *Miranda* warnings from a card and then observed Murphy willingly sign a Consent to Search form for her apartment. [CSOMF at ¶ 24].

Cook arrived at the crime scene between 7:30 and 8:00 a.m. As the detective assigned to the case, he was responsible for interviewing the witnesses and putting together the reports. [CSOMF at ¶ 16]. At approximately 8:40-8:45 a.m., Cook went to the detective division to talk to Murphy. [CSOMF at ¶ 17]. Cook interviewed Harold Eugene Wood (Murphy's common-law husband and infant Wood's father) and took a tape-recorded statement of Murphy. [CSOMF at ¶

18]. Cook subsequently arrested Murphy. [CSOMF at ¶ 31]. After obtaining Murphy's recorded statement, Cook interviewed Murphy's neighbors, William Lee and LaDonna Summer. [CSOMF at ¶ 19]. Cook also took a recorded statement of Scottie Dale Ritchie, a close friend of Harold Eugene Wood, and obtained copies of recorded conversations between Murphy and Earl Peck while she was in jail after her arrest. [CSOMF at ¶¶ 26 and 28]. Cook prepared a prosecution report for the Tulsa County District Attorney's Office, which identified each witness and summarized their testimony. [CSOMF at ¶ 27].

Cook and Noordyke returned to the scene two additional times. First, they went back to Murphy's apartment at night, on September 19, 1994, to see the field of view from the front door and front window as well as from the back door and the back window. They checked the view during the daylight hours and returned after dark. They specifically wanted to see if they could view where the body was on the floor, from outside the back window, looking through the mini blinds as fourteen-year old William Lee had described to police. This line of sight was confirmed. [CSOMF at ¶ 20]. In March of 1995, Cook and Noordyke were called back out to Murphy's apartment because the maintenance supervisor reported a possible break-in. The detectives discovered a box from Murphy's closet had been overturned onto her bed and a maroon-handled knife was next to overturned boxes on Murphy's bed. [CSOMF at ¶ 21].

Pursuant to 22 O.S. § 285, Murphy's preliminary hearing was held on November 14 and 15, 1994 before the Honorable J. Peter Messler. Private counsel represented Murphy. [CSOMF at ¶ 33]. At the preliminary hearing, the State presented nine witnesses including William Lee and officers Smith and Otterstrom. Cook did not testify and Murphy's taped confession was not offered into evidence. [CSOMF at ¶ 34]. At the end of the two-day preliminary hearing, Judge Messler denied Murphy's demurrer; found probable cause existed that first-degree murder had

been committed; and found probable cause existed that Murphy committed the crime. He bound Murphy over for trial for first-degree murder. [CSOMF at ¶ 35].

At a separate proceeding before the trial, on November 9, 1995, Judge E.R. (Ned) Turnbull conducted a *Jackson v. Denno* hearing to determine whether Murphy's statement was voluntary. Murphy was represented by counsel at this hearing. [CSOMF at ¶ 37]. At the *Jackson v. Denno* hearing, Cook testified regarding Murphy's statement. The notification of rights waiver was admitted without objection as State's exhibit 1. [CSOMF at ¶ 38]. Cook testified that he did not coerce Murphy in any way with any kind of punishment or promise; he did not threaten her in any way, with either physical force or mental intimidation; and he did not promise anything to get her to talk. Cook also described the manner in which he read Murphy her *Miranda* rights and obtained the rights waiver.[10] [CSOMF at ¶ 39]. Murphy testified that Cook never hit her and never used any kind of physical force against her; she never told Cook she needed to see a physician; and that she understood her rights and waived them by signing and initialing the waiver of rights. [CSOMF at ¶ 40]. At the conclusion of the *Jackson v. Denno* hearing, Judge Turnbull found that the State had shown by a preponderance of the evidence that Murphy's statement to Cook was voluntary and that Murphy was properly read her rights. Thus, Judge Turnbull overruled Murphy's motion to suppress her statements. [Doc. #175-32, p. 63:1-6].

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[10] Murphy objects on the basis that "Cook now disavows his trial testimony. (Plt. Exh. 125, Deposition of Det. Cook, p. 282, l. 9- p. 283, l. 14)." [Doc. #338, p. 2, ¶ 39]. In support thereof, Murphy cites to deposition testimony of Cook taken in this matter. However, the court has reviewed the entirety of the exchange between Cook and Murphy's then-attorney during Cook's deposition, and the court is not persuaded by Murphy's characterization of Cook's deposition testimony. At the outset, Cook testified that, although he did not recall his testimony during Murphy's criminal trial, he assumed that the official transcript was accurate. [Doc. #349, p. 5]. Further, Cook refused to agree that the transcript was untrustworthy. [*Id.*]. Nothing in Cook's testimony proves, or is even indicative, that Cook has "disavowed his trial testimony."

During Murphy's criminal trial, which began on November 16, 1995, Murphy's taped statement to Cook was played for the jury, copies of the transcript of the statement were given to the jurors, and the statement was admitted into evidence. [CSOMF at ¶ 41]. Jury Instruction No. 16 given by the trial court defined "voluntary confession" and instructed that:

> A "voluntary confession" is a statement, freely and knowingly made by a person who is not under arrest or in custody, to a police officer or any other person which admits facts that tend to establish the commission of an offense. Such confession is freely and knowingly made when the person voluntarily states his involvement with the alleged crime or reveals details of it, without threats, pressure, coercion, or duress from any police officer or police agent.
>
> The state has offered evidence that a confession was made by the defendant to Michael Cook on September 12, 1994 [*sic*] if you find that the defendant made the alleged confession, and made it freely and voluntarily, you may take it into consideration with all the other facts in evidence and give it whatever weight and credit you find it deserves. However, if you find that the confession was induced by coercion or by a promise of immunity or a lesser punishment than might otherwise be inflicted, or that the confession was made under threat of violence or force, you should disregard the confession in arriving at your verdict.

[Doc. #175-34, p. 2].

In November of 1995, the jury convicted Murphy of first-degree murder and sentenced her to life without parole. With separate appellate counsel, Murphy appealed her conviction to the Oklahoma Court of Criminal Appeals, and the court found no error in Murphy's conviction. [CSOMF at ¶¶ 45-46; Doc. #175-35]. On September 5, 2013, Murphy filed an Application for Post-Conviction Relief. [CSOMF at ¶ 47; Doc. #97-21]. On May 29, 2014, then-Tulsa County District Attorney Tim Harris filed a motion to confess the application for post-conviction relief. [CSOMF at ¶ 49; Doc. #175-1]. On May 30, 2014, Tulsa County District Judge William C. Kellough vacated Murphy's judgment and sentence. [CSOMF at ¶ 50; Doc. #175-36]. After vacating Murphy's conviction, Judge Kellough retained jurisdiction to re-try Murphy. Judge Kellough set an appearance bond and ordered her to reappear on June 24, 2014 at 9:00 a.m. for a

status conference. [CSOMF at ¶ 51; Doc. #175-36]. Rather than retry Murphy, the State of Oklahoma filed a Motion to Dismiss the case with prejudice. [CSOMF at ¶ 51; Doc. #175-53].

The court finds the following facts regarding the Tulsa Police Department's policies, procedures, and training in 1994:

In 1994, the basic training for TPD officers, detectives and supervisors involved in the Murphy murder investigation was approximately 14 weeks at the TPD police academy which included a legal block on constitutional rights, statutes and ordinances, as well as instruction on *Miranda* warnings, interviewing, interrogations and juvenile law. [CSOMF at ¶ 56; Doc. #175-40, ¶ 3; Doc. #175-44, ¶¶ 9 and 11].[11] From at least 1978 to 2003, in order to maintain CLEET (Council of Law Enforcement Education and Training) certification, all TPD officers were required to attend forty hours of in-service training yearly that included current legal procedures and, every officer also received monthly legal bulletins regarding new ordinances, statutes, and

[11] The court denied Murphy's motion to strike the City's exhibit 40, the affidavit of former homicide detective Kenneth Mackinson, who averred that the TPD police academy's legal block included constitutional rights and interrogations. *See* [Doc. #355]. Murphy objects to the City's factual assertions regarding training as to constitutional rights and interrogations, citing deposition testimony in this case of Palmer and Cook. However, the court is not persuaded by Murphy's characterization of the deposition testimony. Palmer did not testify that homicide detectives were not required to be trained in interrogations, but rather that "[t]here was no requirement specifically that [he was] aware of" and that he "d[idn't] know exactly what the curriculum was for them to come into the Detective Division." [Doc. #339, Exh. 52, p. 37:6-8]. Further, Cook did not testify that he had no training in interrogations but, rather, that he could not recall his knowledge of whether there were constitutional limitations on interrogations, either in 1994 or 2017. [Doc. #339, Exh. 162, p. 55:5-8]. Even viewed in the light most favorable to Murphy, Cook's recollection of constitutional limitations on interrogations is not dispositive as to whether or not he actually received training. Because Murphy has presented no evidence to dispute the City's undisputed material facts regarding training as to constitutional rights and interrogations, the court will treat the facts as undisputed for purposes of the City's motion. *See* Fed. R. Civ. P. 56(e)(2).

court decisions.[12] [CSOMF at ¶ 57; Doc. #175-41, p. 13:18 to 14:7]. By 1988, all officers assigned to the Detective Division were required to complete forty hours of training in interrogations, arrest warrants, search warrants and affidavits. Officers assigned to the Homicide Unit also completed this additional forty hours of training.[13] [CSOMF at ¶ 58].

In 1994, one of the written policies of the Tulsa Police Department was to protect the constitutional rights of all persons. [CSOMF at ¶ 65; Doc. #106-6, COT 4]. In 1994, TPD officers were required to take an oath of office which stated, in part, "I, _____, having been duly appointed a Police Officer of the City of Tulsa, and a Peace Officer of the State of Oklahoma, do solemnly swear, that I will defend, enforce, and obey, the Constitution and Laws of the United States, the State of Oklahoma and the Charter and Ordinances of the City of Tulsa." [CSOMF at ¶ 71; Doc. #106-6, COT 3]. Therefore, the City's general guidelines required TPD officers to be stewards of the Constitution of the United States, the laws of Oklahoma, and the laws of the City of Tulsa. [Doc. #339, Exh. 56, p. 32:15-24]. Although TPD's policy required officers to follow the Constitution, it was not possible to write a policy for every facet or intricacy of the Constitution. [CSOMF at ¶ 68; Doc. #175-41, p. 17:9-18].

V. Discussion

"A plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a

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[12] Murphy objects to the City's reliance on the Mackinson affidavit to support its assertion that "every officer also received monthly legal bulletins regarding new ordinances, statutes, and court decisions" as hearsay, and argues that Mackinson cannot testify regarding all TPD's officers' receipt of the materials. However, the court finds sufficient evidence in the record to support the City's factual statement. *See* [Doc. #231-2 to Doc. #231-6; Doc. #175-41, p. 13:18 to p. 14:7].

[13] *See supra* n. 16.

municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998) (citing *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978)); *see also Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015) ("[A] plaintiff asserting a § 1983 claim must show '1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged.' Through 'its *deliberate* conduct,' the municipality must have been the 'moving force' behind the injury.") (emphasis in original) (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)). A municipality cannot be liable under § 1983 solely because its employee caused injury or damage. *See Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006). Nor may a municipality be liable "if a jury finds that the municipal employee committed no constitutional violation." *Myers*, 151 F.3d at 1316.

A. Constitutional Violation

As previously stated, Murphy asserts two constitutional violations: (1) violation of her Fifth Amendment right against self-incrimination through the use of Murphy's allegedly coerced statement at her criminal trial, and (2) violation of the Fourteenth Amendment due process clause's right to a fair trial. The court will consider each alleged violation separately.

1. Fifth Amendment

The City argues that Murphy is collaterally estopped from claiming that her statement was coerced by virtue of Judge Turnbull's ruling in the *Jackson v. Denno* hearing and, therefore, Murphy cannot establish a Fifth Amendment violation. The court is not persuaded.

"In accordance with the doctrine of issue preclusion (previously known as collateral estoppel), once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim." *Okla.*

Dep't of Pub. Safety v. McCrady, 176 P.3d 1194, 1199 (Okla. 2007) (internal footnote omitted). However, for issue preclusion to apply, there must exist "**a final determination of a material issue common to both cases**." *Id.* (emphasis in original) (footnote omitted). A criminal conviction may have preclusive effect in a subsequent civil action arising from the same events. *Lee v. Knight*, 771 P.2d 1003, 1006 (Okla. 1989).

Under Oklahoma law, a judgment reversed, set aside, or vacated is of no preclusive effect. *See Wininger v. Day*, 376 P.2d 211, 213 (Okla. 1962) (in considering assertion that collateral estoppel should apply, stating "[t]he validity, if any, of such contention must necessarily be based on the fact or assumption that the verdict in the [first] case does validly exist"); *Brumark Corp. v. Corp. Comm'n of the State of Okla.*, 924 P.2d 296, 301 (Okla. Civ. App. 1996) ("A judgment that is reversed on appeal—and the cause remanded—loses its conclusive character and cannot stand as a bar to further suit on the same cause of action.") (quoting *Mobbs v. City of Lehigh*, 655 P.2d 547, 549 n.5 (Okla. 1982)); *Williams Prod. Mid-Continent Co. v. Patton Prod. Corp.*, 277 P.3d 499, 501 (Okla. Civ. App. 2012) ("In what appears to be a case of first impression before an Oklahoma court, we hold a second judgment predicated on a prior judgment later reversed cannot stand."); *see also Woodrow v. Ewing*, 263 P.2d 167, 172 (Okla. 1953) ("The judgment, *until properly set aside* is conclusive not only as to all questions actually decided but also as to all germane issues that might have been litigated or availed of.") (emphasis added); *Franklin Savs. Ass'n v. Office of Thrift Supervision*, 35 F.3d 1466, 1469 (10th Cir. 1994) ("'A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.'") (quoting *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir. 1988)); *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1266 (10th Cir. 2002) (same); *Eastom v. City of Tulsa*, No. 11-CV-0581-HE, 2012 WL 12540242, at *2 (N.D. Okla. Mar.

2, 2012) ("However, because plaintiff's conviction was vacated, there is no ruling that can be given preclusive effect.") (citing *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992)).

Here, Judge Kellough vacated Murphy's judgment and sentence. [CSOMF at ¶ 50; Doc. #175-36]. Rather than retry Murphy, the State of Oklahoma dismissed the charge. [CSOMF at ¶ 51; Doc. #175-53]. As a result, based on the foregoing cases, the court is persuaded that no "final order" exists which would have any preclusive effect in this matter.

The City urges the court to consider two Oklahoma Court of Criminal Appeals decisions and give conclusive effect to Judge Turnbull's *Jackson v. Denno* ruling. *See* [Doc. #175, pp. 19-23 (citing *Jackson v. State*, 41 P.3d 395 (Okla. Crim. App. 2001) ("*Jackson I*") and *Jackson v. State*, 146 P.3d 1149 (Okla. Crim. App. 2006) ("*Jackson II*")]. However, this court is not satisfied that these cases require the court to ignore what appears to be well-established Oklahoma case law holding that vacated judgments are of no preclusive effect. In *Jackson I*, the court concluded that Shelton Jackson's confession was not coerced, but reversed Jackson's conviction for first-degree murder and remanded the matter for a new trial on the basis of ineffective assistance of counsel. *Jackson I*, 41 P.3d at 401. A jury again convicted Jackson, and Jackson appealed his second conviction and sentence to the Oklahoma Court of Criminal Appeals. *Jackson II*, 146 P.3d at 1154. During his second appeal, Jackson again sought to contest the voluntariness of his confession. *Id.* at 1156. However, the court refused to consider the issue, concluding that the issue was procedurally barred. *Id.* at 1157. In rejecting Jackson's request, the court cited Oklahoma case law holding that issues decided in extraordinary writ appeals or direct appeals will not be reconsidered on direct appeal following retrial. *Id.* (citing *Brown v. State*, 989 P.2d 913 (Okla. Crim. App. 1998) and *Humphreys v. State*, 947 P.2d 565 (Okla. Crim. App. 1997)).

Jackson I and *Jackson II* are factually distinguishable and do not require that this court give preclusive effect to Judge Turnbull's *Jackson v. Denno* ruling. Unlike the *Jackson* cases, this case does not present a direct appeal following Murphy's retrial. Nor is this case a request for post-conviction relief to which the Oklahoma Post Conviction Relief Act, 22 O.S. § 1086, would apply. Rather, this case is a federal civil rights case, brought after the State of Oklahoma opted not to retry Murphy and at a point when, procedurally, no valid state conviction or judgment exists. This court cannot give preclusive effect to a legal nullity.

Nor is the court persuaded by the Sixth Circuit and Second Circuit cases cited by the City. *See* [Doc. #175, pp. 24-26 (citing *Hatchett v. City of Detroit*, 495 F. App'x 567 (6th Cir. 2012) and Doc. #340, p. 7 (citing *Owens v. Treder*, 873 F.2d 604, 610-11 (2d Cir. 1989)]. In *Hatchett*, an unpublished decision, the Sixth Circuit rejected plaintiff's argument that the *Jackson v. Denno* hearing could not preclude his civil rights claim because his conviction was "set aside," noting that "Michigan courts treat a factual finding as to voluntariness pursuant to a [*Jackson v. Denno*] hearing as a final determination on the merits." *Id.* at 570. Under Oklahoma law, however, the jury, rather than the trial judge, is the final arbiter of voluntariness.[14] *See Parent v. State*, 18 P.3d 348, 353 (Okla. Crim. App. 2000); *Hopper v. Oklahoma*, 736 P.2d 538, 539-40 (Okla. Crim. App. 1987) ("If the confession is determined to be voluntary by the trial judge, the question of

[14] Oklahoma has adopted the "Massachusetts Rule," also known as the "Humane Rule," to determine the voluntariness of an accused person's confession. *See Hopper v. Oklahoma*, 736 P.2d 538, 539-40 (Okla. Crim. App. 1987). Other courts adopting the Massachusetts Rule generally conclude that the jury, rather than the trial court, makes the final determination as to the voluntariness of an accused's statement. *See, e.g.*, *Law v. State*, 318 A.2d 859, 871 (Md. Ct. Spec. App. 1974) ("Once the statement was admitted, the final determination of its voluntariness and the weight to be accorded it were matters for the jury."); *Commonwealth v. Blanchette*, 564 N.E.2d 992, 996 (Mass. 1991) ("If the judge determines that the statements are voluntary, the question should be submitted to the jury so that they may make the final determination.").

voluntariness is submitted to the jury, together with all the facts and circumstances surrounding the confession."); [Jury Instruction No. 16, given by Judge Turnbull in the state murder trial, Doc. #175-34, p. 2 ("However, if you find that the confession was induced by coercion or by a promise of immunity or a lesser punishment than might otherwise be inflicted, or that the confession was made under threat of violence or force, you should disregard the confession in arriving at your verdict.")]; *see also* Okla. Unif. Jury Instruction – Criminal 9-12 ("If after considering the evidence you determine that the statement was made by the defendant and was voluntary, you may give it whatever weight you feel it deserves.").

Further, the United States District Court for the Western District of Michigan recently disagreed with *Hatchett*, stating "[t]his Court is not persuaded that Michigan courts would reach the same conclusion as the court did in *Hatchett*." *Peterson v. Heymes*, No. 15-CV-969, 2017 WL 4349456, at *6 (W.D. Mich. Sept. 29, 2017). In *Peterson*, the Western District cited Sixth Circuit case law broadly holding that a "judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel," to conclude that, because Peterson's conviction had been vacated, "no valid and final judgment exists in Peterson's criminal case, [and] collateral estoppel cannot preclude him from relitigating the issues raised in his criminal case." *Id.* at *4 (quoting *Erebia v. Chrysler Plastic Prods. Corp*., 891 F.2d 1212, 1215 (6th Cir. 1989)).

As for *Owens*, the Second Circuit's statement in that case was *dicta.* Further, the United States District Court for the Eastern District of New York recently qualified *Owens*, stating that "[the *Owens*] standard must be read in conjunction with other rulings holding that '[a] vacated judgment, by definition, cannot have any preclusive effect in subsequent litigation.'" *Tankleff v. Cnty. of Suffolk*, No. 09-CV-1207-JS-WDW, 2010 WL 5341929, at *4 (E.D.N.Y. Dec. 21, 2010).

A conclusion that preclusive effect should not be given to Judge Turnbull's ruling in the *Jackson v. Denno* hearing is consistent with the pronouncements of other courts under factually similar circumstances. *See Spurlock v. Whitley*, 971 F. Supp. 1166, 1177 (M.D. Tenn. 1997) (concluding that a civil plaintiff's criminal guilty plea did not preclude plaintiff's subsequent civil claims because the guilty plea was vacated); *Thomas v. Riddle*, 673 F. Supp. 262, 266 (N.D. Ill. 1987) (declining to give preclusive effect to a trial court's subsequently reversed denial of a suppression motion, although the denial was reversed on other grounds, reasoning that "a judgment that has been vacated, reversed or set aside on appeal is thereby deprived of all conclusive effect, both as to res judicata and as to collateral estoppel"); *Chandler v. Louisville Jefferson Cnty. Metro Gov't*, No. 10-CV470-H, 2011 WL 781183, at *2 (W.D. Ky. Mar. 1, 2011); *McCray v. City of New York*, No. 03-CV-10080-DAB, 2007 WL 4352748, at **12-13 (S.D.N.Y. Dec. 11, 2007); *Evans v. City of Chicago*, NO. 04-C-3570, 2006 WL 463041, at *15 (N.D. Ill. Jan. 6, 2006).

Thus, this court is persuaded that issue preclusion does not apply, and Judge Turnbull's ruling in the *Jackson v. Denno* hearing is not conclusive. Murphy may challenge the voluntariness of her confession in this case.

The court now turns to whether Murphy's Fifth Amendment rights were violated. In opposition to the City's motion, Murphy submits evidentiary materials to support the following: (1) that Cook rewound and started the tape over during Murphy's statement [Doc. #339, Exh. 102, p. 238:10-15]; (2) that Cook ran his hands up Murphy's legs during the interrogation, which "scared" Murphy [Doc. #339, Exh. 116, p. 27:15-22 and Doc. #339, Exh. 119, p. 225:2-5]; (3) that Cook promised Murphy that, if she confessed, Murphy could see her daughter, receive therapy, and go home [Doc. #339, Exh. 121, p. 204:17-25; Doc. #339, Exh. 122, p. 192:1-9]; (4) that Murphy informed Cook several times that she had been hit on the head, but Cook did not examine

her for concussion symptoms [Doc. #339, Exh. 174, p. 679:13-22; Dkt. #55, ¶ 45]; and (5) that Cook yelled at Murphy during the interrogation until she agreed to make a deal [Doc. #339, Exh. 143, p. 241:3-17; Doc. #339, Exh. 123, p. 240:10-14]. These evidentiary materials, viewed in the light most favorable to non-movant Murphy, establish a genuine issue of material fact as to whether Cook violated Murphy's Fifth Amendment right against self-incrimination during the September 12, 1994 interrogation. *See Sharp v. Rohling*, 793 F.3d 1216, 1235 (10th Cir. 2015) (concluding that, based on the totality of the circumstances, "[plaintiff's] will was overborne once Detective . . . promised her she would not go to jail after she admitted to participating in the crime"); *see also Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.") (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)).[15]

[15] The City also argues that Murphy waived her right to bring any claim that her constitutional rights were violated when she was questioned while she was a minor, allegedly in violation of 10 O.S. 1991 § 1109(a). However, during the dispositive motion hearing in this matter, Murphy's attorney informed the court that Murphy does not contend that 10 O.S. 1991 § 1109(a) was violated. Therefore, the City's motion regarding that statute is moot. Further, the court is persuaded that any violation of § 1109(a) cannot provide an independent basis for section 1983 tort liability, as the U.S. Supreme Court has never held that the Constitution requires the presence of a parent or guardian during the interrogation of a minor. *See Blankenship v. Estep*, 316 F. App'x 758, 760 (10th Cir. 2009) ("The Supreme Court has never held that juveniles have a right to the presence of a parent or guardian during custodial interrogation, let alone that the parent or guardian also must be advised of *Miranda*'s requirements."); *Wilson v. Oklahoma*, 363 F. App'x 595, 611 n.16 (10th Cir. 2010). *See also J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (discussing age as consideration in *Miranda* analysis, but not presence of parent or guardian). In fact, the Oklahoma Court of Criminal Appeals recognized that "the statute *expands* upon the rights of juveniles granted by the U.S. Constitution and the Oklahoma Constitution." *State v. M.A.L.*, 765 P.2d 787, 790 (Okla. Crim. App. 1988) (emphasis added).

2. Fourteenth Amendment

The City next argues that Murphy cannot prove a violation of her Fourteenth Amendment due process right to a fair trial, as she cannot establish the necessary intentional or reckless misconduct.

To establish a substantive due process cause of action for failure to investigate, plaintiff must show that the state actor "intentionally or recklessly failed to investigate, thereby shocking the conscience." *Amrine v. Brooks*, 522 F.3d 823, 834 (8th Cir. 2008).[16] Neither negligence nor gross negligence rises to the level of a constitutional deprivation. *Id*. at 833. The Eighth Circuit has held that

> the following circumstances indicate reckless or intentional failure to investigate that shocks the conscience: (1) evidence that the state actor attempted to coerce or threaten the defendant, (2) evidence that investigators purposefully ignored evidence suggesting the defendant's innocence, (3) evidence of systematic pressure to implicate the defendant in the face of contrary evidence.

Winslow v. Smith, 696 F.3d 716, 732 (8th Cir. 2012) (quoting *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009)). "Negligent failure to investigate other leads or suspects does not violate due process." *Wilson v. Lawrence Cnty.*, 260 F.3d 946, 955 (8th Cir. 2001).

As previously stated, viewed in the light most favorable to Murphy, there is sufficient evidence to allow the reasonable inference that a state actor—specifically Cook—attempted to

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[16] The City's motion for summary judgment cites only Eighth Circuit case law regarding the reckless investigation claim, and does not raise the issue of whether the Tenth Circuit would recognize a substantive due process claim based on reckless investigation. *See, e.g., Hernandez v. City of El Paso*, No. EP-08-CV-222-PRM, 2011 WL 3667174, at *5 (W.D. Tex. Aug. 18, 2011), *aff'd* 490 F. App'x 654 (5th Cir. 2012) (noting that "there is no evidence that the Fifth Circuit has ever recognized such a cause of action," and declining to do so). However, because the City does not challenge the validity of the cause of action itself, the court will not consider the legal viability of a substantive due process reckless investigation claim in the Tenth Circuit, but will assume without deciding that the Tenth Circuit would recognize the cause of action as articulated by the Eighth Circuit.

coerce Murphy. Further, Murphy has submitted evidence based upon which a reasonable factfinder could conclude that, following Murphy's confession, Cook chose not to pursue other investigatory avenues. *See* [Doc. #339, Exh. 175, p. 751:7-11, p. 753:24 to p. 753:8 (Cook never considered whether Lee committed the murder and never questioned Lee's truthfulness); Doc. #339, Exh. 29, p. 65:8-23 (infant Wood's diaper was never tested for fingerprints)]. If the evidence is viewed in the light most favorable to Murphy, a reasonable fact finder could find that Cook systematically attempted to coerce Murphy to implicate herself, despite the potential for exculpatory evidence to the contrary. Thus, a genuine issue of fact exists as to whether Murphy's interrogation violated her Fourteenth Amendment substantive due process rights. *See Wilson*, 260 F.3d at 955 (agreeing with district court's reasoning that "[i]f Wilson's allegations about unlawful coercion are proved true, a reasonable factfinder could determine that Defendants recklessly or intentionally chose to force Wilson to confess instead of attempting to solve the murder through reliable but time consuming investigatory techniques designed to confirm their suspicions") (alterations in original).[17]

B. Municipal Policy or Custom

As previously stated, "[a] municipality is not liable solely because its employees caused injury." *Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015) (citing *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006)). Rather, "a plaintiff asserting a § 1983 claim must

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[17] However, the court does not find any evidentiary materials to support Murphy's assertion that Cook "deliberately framed" Murphy. Murphy cites only the following exchange from Cook's deposition testimony taken in this matter: "Q: All right, sir. After she confessed, did you deliberately frame her? A: I don't remember anything about how I felt or what I thought about after her confession." [Doc. #339, Exh. 13, p. 37:14-17]. The court is not persuaded by Murphy's interpretation of Cook's testimony. Evidence that Cook does not recall his conduct after Murphy's confession does not substantiate Murphy's claim that she was "deliberately framed" after her confession.

show 1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged. Through its *deliberate* conduct, the municipality must have been the 'moving force' behind the injury." *Id.* (internal citations and quotations omitted).

> A municipal policy or custom may take the form of (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] to 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law'"; (3) "the decisions of employees with final policymaking authority"; (4) "the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval"; and (5) the "failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused."

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (alterations in original) (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90 (10th Cir. 2010)). The court will separately consider each form.

1. Formal Regulation or Policy Statement

Murphy cites two TPD formal regulations or policy statements which she contends were unconstitutional. [Doc. #338, p. 34]. First, based on the testimony of former chief and final policymaker Palmer, Murphy alleges that the City gave "full authority" to its interrogators regarding the method and manner of interrogations, including the power to make threats. However, the evidentiary materials submitted do not support Murphy's claim. Palmer did not testify that the "full authority" of the police department included the authority to make threats.[18]

[18] Murphy relies on the deposition testimony of former homicide sergeant Wayne Allen that the "full authority of the department" included the authority to decide what threats and promises to make. [Doc. #339, Exh. 50, p. 15:19 to p. 16:10]. However, during the dispositive motion hearing in this matter, the parties agreed that former chief Palmer is the only final policymaker in this matter. *See Brammer-Hoelter*, 602 F.3d at 1189 (municipal liability based on decisions of employees applies only to final policymakers).

See [Doc. #339, Exh. 49, p. 27:12 to p. 29:15]. To the contrary, Palmer testified to his belief that TPD's policies prohibited interrogators from violating the constitutional rights of citizens. [Doc. #339, Exh. 49, p. 29:1-13]. It is undisputed that one of the written policies of TPD was to protect the constitutional rights of all person, and that TPD officers swore to "defend, enforce, and obey" the Constitution and laws of the United States as well as state and local laws. [CSOMF at ¶¶ 65 and 71]. Further, Palmer testified that TPD officers had no authority to make promises, and that striking, assaulting, or otherwise illegally touching interrogees was prohibited. [Doc. #339, Exh. 52, p. 37:11-17; Doc. #174-41, p. 31:4-14, p. 39:13-24]. Based on this evidence, the court is persuaded that any grant of "full authority" to interrogators was constrained by TPD's policy requiring its officers to "defend, enforce, and obey" the Constitution.

Murphy's position not only lacks evidentiary support, it also lacks support in the relevant law. Murphy attempts to analogize this case to *City of Canton*, wherein the trial court ruled that the jury properly found that the city had a custom or policy of vesting "complete authority" with the police supervisor of when medical treatment would be administered to prisoners. *See* [Doc. #338, p. 40 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 382 (1988) (characterization of the theory of liability by the district court)]. However, *City of Canton* was premised on a failure to train theory, rather than a facially unconstitutional policy or procedure. *City of Canton*, 489 U.S. at 386 ("There can be little doubt that on its face the city's policy regarding medical treatment for detainees is constitutional."). In other words, § 1983 liability in *City of Canton* depended upon the grant of authority, *coupled with* the failure to adequately train, and then only if the failure to train amounted to deliberate indifference to the rights of persons with whom the police came into contact. *Id.* at 388. *City of Canton* is therefore distinguishable and does not obviate against summary judgment as to this issue.

Second, Murphy alleges that TPD had in force an unconstitutional policy which treated police officers differently than citizens during interrogations, because in 1994 TPD had a regulation—part of the "Police Officer Bill of Rights"—which forbade the use of threats or promises during interrogations of police officers, but did not have a similar written prohibition applicable to interrogations of ordinary citizens. As an initial matter, Murphy's alleged second formal policy—which forbade threats or promises during interrogations of police officers, but not ordinary citizens—appears to be little more than a restatement of Murphy's first alleged formal policy—that TPD officers had *carte blanche* authority in the conduct of interrogations of ordinary citizens—which this court has rejected.

Further, Murphy has not cited nor has the court identified any Supreme Court or Tenth Circuit authority standing for the proposition that a *lack of a written policy* amounts to a formal regulation or policy statement for purposes of § 1983 tort liability. Rather, Murphy appears to be attempting to shoehorn her theory of liability into the "formal regulation or policy statement" context in order to take advantage of the Supreme Court's pronouncement in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). Pursuant to *City of Canton*, the omissions alleged here are more properly considered in connection with Murphy's failure to train theory. Thus, the court finds that Murphy has failed to present evidence of an unconstitutional formal regulation or policy statement.

2. Informal Custom or Usage

Municipal liability may also "be based on an informal 'custom' so long as this custom amounts to 'a widespread practice that, although not authorized by written law or express

municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Brammer-Hoelter*, 602 F.3d at 1189 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). However, when the evidence is viewed in the light most favorable to Murphy, no evidence exists of a widespread TPD practice of constitutional violations in interrogations or investigations.

Although the Tenth Circuit has never adopted a bright-line rule as to the number of similar incidents required to establish the existence of a municipal policy or custom, most courts, including the Tenth Circuit, have concluded that one prior incident is insufficient. *See Williams v. City of Tulsa*, 627 F. App'x 700, 704 (10th Cir. 2015); *Wilson v. Cook Cnty.*, 742 F.3d 775, 780 (7th Cir. 2014) ("Although this court has not adopted any bright-line rules for establishing what constitutes a widespread custom or practice, it is clear that a single incident—or even three incidents—do not suffice."); *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (two instances of misconduct were insufficient to indicate a "persistent and widespread" pattern of misconduct); *Dunn v. City of Newton, Kan.*, No. 02-1346-WEB, 2003 WL 22462519, at *7 (D. Kan. Oct. 23, 2003) (two incidents insufficient).[19]

Murphy has presented no evidence of an unconstitutional informal custom or usage. Although Murphy cites the LaRoye Hunter case[20], based on the above authorities, a single incident

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[19] Nor is this a situation where proof of a single incident is sufficient, as, for the reasons previously discussed, TPD's formal policies were not unconstitutional. *See City of Oklahoma City*, 471 U.S. at 824 ("But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.") (internal footnotes omitted).

[20] The LaRoye Hunter case refers to *State of Oklahoma v. LaRoye C. Hunter, III*, Tulsa County Case No. CF-1989-5196. ("Hunter Case"). In 1989, LaRoye Hunter was charged with Murder, First Degree and Arson, First Degree in the District Court of Tulsa County. [Doc. #175-50]. At

cannot be reasonably construed to establish the necessary "persistent and widespread" practice of misconduct. Further, the admissible evidentiary materials submitted do not establish that the Hunter case and the issues presented in this matter are sufficiently similar.

The state court's docket in the Hunter Case reflects only the following with respect to the suppression of Hunter's confession: "Beasley B.R.: Deft's Motion to Suppress Deft's Confession: Sustained. Case Remanded to Preliminary Hearings on 8/9/90 at 9:00 a.m. Deft in Custody and Represented by Loretta [Radford]. State by Dennis Fries. Reba Gibson Reporting." [Doc. #175-50, p. 9]. The court did not enter an order providing its reasons for suppressing Hunter's confession. Although Murphy alleges that Cook stopped the tape during Hunter's interrogation, Murphy has presented no admissible evidence that Cook coerced Hunter's confession.[21] *See* [Doc. #359]. Thus, Murphy has provided no evidence of a sufficient similarity to the Hunter case.

Murphy provides no further evidence of a persistent or widespread pattern of unconstitutional interrogations or investigations. Palmer testified that, prior to his deposition taken in this case, he had never heard that Mike Cook had coerced a confession [Doc. #175-41, p. 94:10-12]. Moreover, Cook's former partner, retired TPD officer, Kenneth Mackinson, averred that, to his knowledge, Cook never coerced a confession or violated a suspect's constitutional rights. [Doc. #175-40, ¶ 11]. Outside of Murphy's testimony regarding her own interrogation, Murphy

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the time he was charged, Hunter was seventeen (17) years old. Cook participated in Hunter's interrogation, and was present when Hunter confessed. However, Hunter's confession was subsequently suppressed, and the charges against Hunter were dropped. Prior to the charges being dropped, Hunter was represented by then-Tulsa County Public Defender Loretta Radford.

[21] This court previously concluded that evidence of Cook's allegedly coercive tactics included in the contemporaneous newspaper articles or Radford's testimony is inadmissible hearsay and character evidence, respectively, unless used as "specific contradiction" during Cook's cross-examination. [Doc. #359].

has presented no evidence of any other TPD officer ever making promises to, threatening, or otherwise violating the constitutional rights of an interrogee. To the extent that Murphy relies upon Allen's testimony that interrogators had the full authority to decide what kind of touching would occur, what kind of promises to make, and what kind of threats to make, [Doc. #339, Exh. 50, p. 16:1-10], this testimony does not give rise to an inference that TPD engaged in a widespread practice of coercing interrogees that, although not authorized by regulation or express municipal policy, was "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Brammer-Hoelter*, 602 F.3d at 1189. *See also Bryson v. City of Oklahoma City,* 627 F.3d 784, 791 (10th Cir. 2010). Allen did not testify that other TPD officers routinely touched, threatened, or made promises to citizens that were being interrogated, and this court may not speculate that such practices constituted a custom or usage within the department. *See James v. Chavez,* 830 F. Supp. 2d 1208, 1258 (D.N.M. 2011) ("While the Court must indulge all reasonable inferences in favor of the non-movant, the non-movant still has an obligation to produce evidence once the burden shifts to him or her."). Nor has Murphy produced any evidence of constitutional violations due to reckless investigation generally. Accordingly, the court finds that Murphy has failed to show an unconstitutional informal custom or usage.

3. Decision of a Final Policymaker

For purposes of section 1983 liability, a municipal policy may also exist based on the "decisions of employees with final policymaking authority." *Bryson,* 627 F.3d at 788. At the dispositive motion hearing held in this matter, the parties agreed that the sole final policymaker in this case is former Chief of Police Ron Palmer. As previously discussed, Palmer's testimony that the City gave "full authority" to its interrogators regarding the method and manner of interrogations does not constitute an unconstitutional policy. Murphy identifies no additional

statements or decisions of Palmer (regarding interrogations or investigations), and the court finds no evidence upon which the jury may find an unconstitutional policy based on a decision of the final policymaker.

4. Ratification by Final Policymaker of the Decisions of Subordinates

"[I]f a subordinate's position is subject to review by the municipality's authorized policymakers and the authorized policymakers approve a subordinate's decision and the basis for it, their ratification will be chargeable to the municipality." *Moss v. Kopp,* 559 F.3d 1155, 1169 (10th Cir. 2009). *See also Cacioppo v. Town of Vail, Colo*., 528 F. App'x 929, 933 (10th Cir. 2013) ("[A] municipality will not be found liable . . . unless a final decisionmaker ratifies an employee's specific unconstitutional actions, as well as the basis for these actions.") (quoting *Bryson,* 627 F.3d at 790). However, where the municipality is not aware of the unconstitutional actions with respect to the plaintiff, the municipality cannot be liable. *Bryson*, 627 F.3d at 790.

As previously stated, Palmer testified that, prior to his deposition taken in this case, he had never heard that Cook had coerced a confession. [Doc. #175-41, p. 94:10-12]. Murphy has presented no evidence suggesting that Palmer was aware of Cook's alleged misconduct.[22] Nor has Murphy offered any evidence that Palmer ratified the alleged deficiencies in the investigation. Thus, no genuine issue of material fact as to ratification exists.

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[22] Murphy does assert that Palmer's statement that interrogators had "full authority" is "at least as reprehensible as ratification." [Doc. #338, p. 39]. However, the Tenth Circuit has declined to recognize "hybrid" theories of municipal liability, *Cacioppo*, 528 F. App'x at 934, and, as previously discussed, there is no evidence of an unconstitutional policy or custom. Further, during the dispositive motion hearing held in this matter, Murphy cited to Cook's training records, produced as COT 646-COT 647. However, Cook's training records have no bearing on Palmer's knowledge of Cook's specific decisions in the Murphy investigation.

5. Failure to Adequately Train or Supervise Employees

Murphy's case primarily relies upon theories of failure to train and supervise. The court will separately consider each theory.

a. Failure to train

As previously mentioned, the U.S. Supreme Court has held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. However, such circumstances are "limited"—"[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). The *Connick* Court went on to state:

> "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bryan Cnty*., 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.

Id. at 1360.

Due to this stringent standard of fault, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Id.* However, the Supreme Court has not foreclosed the possibility that, in rare circumstances, "the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id.* at 1361. Such rare circumstances in which deliberate indifference may be found absent a pattern

of unconstitutional conduct exist when a municipality fails to train employees in "specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations." *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998).

In this case, there is no evidence of a pattern of similar constitutional violations during the interrogation of citizens. Although Murphy cites the LaRoye Hunter case, as previously discussed, the Hunter case does not constitute evidence of a *pattern* of constitutional violations sufficient to provide notice of a deficiency likely to result in a violation of constitutional rights.

Nor is this a situation in which deliberate indifference may be found absent a pattern of unconstitutional conduct. Murphy has presented no additional evidence of inadequate training in interrogations or investigations more broadly. Rather, it is undisputed that, at the time of the Murphy's interrogation, the basic training for TPD officers, detectives, and supervisors was approximately fourteen weeks at the TPD police academy. The police academy included a legal block on Constitutional rights, statutes, and ordinances, as well as instruction on *Miranda* warnings, interviewing, interrogations, and juvenile law. [CSOMF at ¶ 56; Doc. #175-40, ¶ 3; Doc. #175-44, ¶¶ 9 and 11]. From at least 1978 to 2003, in order to maintain CLEET (Council of Law Enforcement Education and Training) certification, all TPD officers were required to attend forty hours of in-service training yearly that included current legal procedures, and every officer also received monthly legal bulletins regarding new ordinances, statutes, and court decisions. [CSOMF at ¶ 57; Doc. #175-41, p. 14]. The evidentiary materials submitted demonstrate that the legal bulletins included training as to U.S. Supreme Court decisions examining the *Miranda* decision in three distinct areas—traffic stops, the public safety exception, and interruption to request counsel [Doc. #231-2]; *Miranda*'s requirements, including the application of *Miranda* to juveniles [Doc. #231-3]; the Supreme Court's decision in *Arizona v. Roberson*, 486 U.S. 675

(1988), regarding statements and confessions [Doc. #231-4]; questioning of juveniles [Doc. #231-5]; and statements and confessions from persons under eighteen [Doc. ##231-6; 231-7]. By 1988, all officers assigned to the Detective Division were required to complete forty hours of training in interrogations, arrest warrants, search warrants and affidavits. Officers assigned to the Homicide Unit also completed this additional forty hours of training. [CSOMF at ¶ 58].

Murphy relies heavily upon Cook's training records and deposition testimony to dispute the constitutional adequacy of TPD's training policies. However, evidence of a city's failure to train a single officer is insufficient to demonstrate a department-wide inadequacy. *See Meas v. City & Cnty. of San Francisco,* 681 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010) ("A *Monell* claim will fail where the plaintiff provides evidence as to only a single officer, rather than evidence regarding department-wide inadequacy in training.") (citing *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007)).[23] Additionally, Murphy's interpretation of Cook's deposition testimony is not supported by the transcript. Citing Cook's deposition testimony in this matter, Murphy alleges "Cook had no training that there were Constitutional limitations in interrogations." [Doc. #338, p. 4]. However, Cook testified at his deposition in 2017 that he did not know whether he knew in 1994 that there were constitutional limitations on the conduct of interrogations, not that he did not receive training on the constitutional limitations of the conduct of interrogations.[24]

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[23] Murphy also alleges that Cook's then-supervisor, Sergeant Allen, was inadequately trained. [Doc. #338, pp. 35-36]. However, Allen testified that he received training in interrogations during basic investigative training, and that he also received in-service training classes (although he could not recall if the content included interrogations), classes outside of the police department, and training on the current law made available by the district attorney's office. [Doc. #339, Exh. 60, p. 16:14-25 and p. 17:1-2, 6-8].

[24] Similarly, Cook testified in 2017 that he could not recall whether he had any training that presenting a coerced confession at trial violated substantive due process or whether he had heard

[Doc. #339, Exh. 162, p. 55:5-8]. In fact, Cook testified in 2017 that he could not recall any training he received in 1994 or the years prior. [Doc. #339, Exh. 39, p. 60:9-24].

Nor does the expert report of Dr. Michael Lyman create a disputed issue of fact regarding the adequacy of TPD's training procedures. Dr. Lyman identifies additional policies that he believes the City should have had in place. Dr. Lyman's proposed policies generally relate to the "do's and don'ts of interrogations," including prohibitions against threats and promises.[25] However, it is undisputed that TPD officers received training regarding interrogations, including a legal block during basic training, yearly in-service training, and periodic legal training bulletins.[26] [CSOMF at ¶¶ 56-57]. At least one legal training bulletin, issued on October 16, 1987, specifically stated that:

> Any coercion, physical or mental, which causes the suspect to waive his rights will invalidate his statement. Threats are strictly forbidden, but often there is little or no difference between a promise and a threat. Generally, promises of leniency should be avoided . . . . [I]t is permissible to tell a suspect that if he cooperates the prosecutor will be informed of his cooperation.

[Doc. #231-3, at COT 11.0014]. *See Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009) ("[A]s with any motion for summary judgment, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could

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that coercion could be mental as well as physical, not that he never received any training regarding constitutional limitation on interrogations. *See* [Doc. #339, Exhs. 158 and 159].

[25] Dr. Lyman's report does not identify additional policies he believes the City should have had in place apart from interrogations. [Doc. #339, Exh. 178, pp. 29-31]. Murphy has presented no other evidence of a constitutional inadequacy in TPD's training program regarding investigations generally. Thus, Murphy has failed to show a constitutional inadequacy in TPD's training program regarding the conduct of investigations generally.

[26] It is unclear whether Dr. Lyman received these materials to review, as Dr. Lyman states only that he reviewed "Miscellaneous Wayne Allen Training Reports," "Miscellaneous Departmental Memoranda," and "Miscellaneous Certificates of Training." [Doc. #191-9, pp. 35-37].

believe it, a court should not adopt that version of the facts.'") (quoting *York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008)); *Heiman v. United Parcel Serv., Inc*., 12 F. A'ppx 656, 664 (10th Cir. 2001) ("'Summary judgment is appropriate when an ill-reasoned expert opinion suggests the court adopt an irrational inference, or rests on an error of fact or law.'") (quoting *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 531 n.12 (5th Cir. 1999)). Further, neither Murphy nor Dr. Lyman present any evidence or authority that some of Dr. Lyman's suggested policies or training were constitutionally required. *Compare, e.g.*, [Doc. #191-9, pp. 29-30 (suggesting training or policies that investigators record interrogations in their entirety) *with United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991) (police are not required to record statements)]. *See also Parker v. City of Tulsa*, No. 16-CV-0134-CVE-TLW, 2017 WL 1397955, at *4 (N.D. Okla. Apr. 18, 2017), *appeal docketed* No. 17-5054 ("Plaintiff does not present any evidence that specific, written child abuse investigation policies were ubiquitous in police departments at the time."); *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (generalized deficiencies in training are insufficient).

In light of the undisputed evidence regarding TPD's training, the court is not persuaded "that it was highly predictable or plainly obvious," that a TPD officer would coerce a confession. *Cf. Bryson*, 627 F.3d at 789 ("We are not persuaded, however, that it was highly predictable or plainly obvious that a forensic chemist would decide to falsify test reports and conceal evidence if she received only nine months of on-the-job training and was not supervised by an individual with a background in forensic science."); *Barney*, 143 F.3d at 1308 ("Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."). Thus, Murphy has presented no evidence of a constitutional inadequacy in TPD's

training program, and the court finds that Murphy has failed to present evidence of deliberate indifference for purposes of § 1983 liability.

b. Failure to Supervise

The Tenth Circuit applies the same standard to failure to supervise claims. *See Schepp v. Fremont Cnty., Wyo.*, 900 F.2d 1448, 1454 (10th Cir. 1990). Thus, to withstand summary judgment, Murphy "must provide evidence of a failure to supervise, which amounts to deliberate indifference to the federal rights of persons with whom the [TPD officers] come into contact, and that there is a direct causal link between the constitutional deprivation and the inadequate supervision." *King v. Glanz,* No. 12-CV-137-JED-TLW, 2014 WL 2838035, at *2 (N.D. Okla. June 23, 2014).

In support of her failure to supervise theory, Murphy primarily relies on the following deposition testimony of Palmer:

> Q: How can an interrogator be supervised in respect of (sic) his interrogations without a video camera with sound or a tape recorder going at all times during the interrogation?
>
> A: He can be supervised by the supervisors sitting in on the interrogation if he so chooses. That's not possible all the time, obviously. That's not possible to video or audio at all times. So the supervision of any one individual in an interrogation is not continual.
>
> Q: So that when a person is an interrogator and they are alone with a suspect, there is no supervision of that interrogation in those circumstances. Correct?
>
> A: That's correct.

[Doc. #339, Exh. 73, p. 85:6-18]. Murphy also cites to Allen's deposition testimony that he never received a report on tactics used during an interrogation, [Doc. #339, Exh. 142, p. 22:5-25], as well as Allen's alleged lack of training. However, even when viewed in the light most favorable to Murphy, this evidence does not give rise to an inference of deliberate indifference by the City.

To satisfy the deliberate indifference standard, Murphy must show that "the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Barney*, 143 F.3d at 1307. Murphy has presented no evidence that the City's alleged failure to supervise interrogations was substantially certain to result in constitutional violations.

As previously stated, prior to his deposition, Palmer had never heard that Cook coerced a confession and therefore had no notice, actual or constructive, of any potential risk for harm resulting from Cook's interrogation of Murphy without physically present supervision during Murphy's interrogation. Nor has Murphy offered any evidence that Allen, Cook's immediate supervisor, was aware of any potential constitutional risk posed by Cook. In fact, there is no evidence that TPD was aware of a constitutional risk posed by *any other* TPD officer. Thus, Murphy has failed to show that the City had actual or constructive notice of a substantial certainty for a potential constitutional violation such that the City was "deliberately indifferent." *See Estate of Smith v. Silvas*, 414 F. Supp. 2d 1015 (D. Colo. 2006).

c. Direct Causal Link

As previously discussed, Murphy alleges that the City's training and supervision regarding interrogations and investigations was deficient. In order for liability to attach in a failure to train or supervise case, the identified deficiency in a city's training program must be "closely related to the ultimate injury, so that it actually caused the constitutional violation." *Carr v. Castle*, 337 F.3d 1221, 1231 (10th Cir. 2003) (quoting *Monell*, 436 U.S. at 691). A general lack of training or supervision is insufficient. *Id*.

The Tenth Circuit has recognized that "[t]he causal link between the officers' training and the alleged constitutional deprivation" is less direct in cases asserting that officers were not given

enough training. *See Allen v. Muskogee, Okla.*, 119 F.3d 837, 844 (10th Cir. 1997). Murphy provides no evidence regarding how the alleged lack of training actually caused the alleged constitutional violations. Although Dr. Lyman's report cites testimony by Cook that he would have followed written policies detailing the "do's and don'ts of interrogations," the court is unwilling to "partake of the post hoc, ergo propter hoc fallacy," of finding an adequate causal link. *See Carr*, 337 F.3d at 1231. *See also King*, 2014 WL 2838035, at *8; *City of Canton,* 489 U.S. at 391-92 ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."). Further, as noted above, the City's policy prohibited promises, coercion, or touching—conduct which forms the basis of many of Murphy's allegations. In short, Murphy has failed to show that the alleged failure to train or supervise was closely related to Murphy's alleged injury such that it actually caused the alleged constitutional violation.

Although Murphy has provided some evidence of a constitutional violation, a municipality cannot be liable under § 1983 solely because its employee caused injury or damage. Murphy has failed to produce evidence of the requisite unconstitutional policy or custom. The City is therefore entitled to the entry of summary judgment in its favor.

WHEREFORE, the City of Tulsa's Motion for Summary Judgment [Doc. #175] is granted.

DATED this 13th day of March, 2018.

GREGORY K. FRIZZELL, CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE DAWN MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-CV-528-GKF-FHM
	)	
THE CITY OF TULSA,	)	
	)	
Defendant.	)	

AMENDED OPINION AND ORDER[1]

This matter comes before the court on the defendant City of Tulsa's Motion for Summary Judgment [Doc. #175]. For the reasons discussed below, the motion is granted.

I. Background

On September 12, 1994, Travis Wood, the three-month-old son of Michelle Murphy, was found dead as a result of a stab wound to the chest and incised wound to the neck. The Tulsa Police Department, headed by then Chief Ron Palmer, oversaw the investigation of infant Wood's murder. That same day, Murphy made a statement to TPD detective Michael Cook.

[1] On March 13, 2018, this court issued an Opinion and Order granting the City of Tulsa's Motion for Summary Judgment [Doc. #175] and entered final judgment against plaintiff Michelle Murphy and in favor of defendant City of Tulsa. *See* [Doc. #384 and Doc. #386]. Murphy filed a Motion to Alter or Amend a Judgment Under FED. R. CIV. P. 59(e) [Doc. #387], which the court granted in part and denied in part. *See* [Doc. #395]. There, insofar as the court considered exhibits 2 through 7 appended to the City's amended reply, the court withdrew the portion of its Opinion and Order granting summary judgment as to Murphy's failure to train claim [Doc. #384], and granted Murphy leave to file a sur-reply to address exhibits 2 through 7 appended to the City's amended reply. This Opinion and Order is the same in all respects as to that issued on March 13, 2018, but for the court's discussion of the failure to train claim.

On September 15, 1994, Murphy was charged with murder in the first degree in the District Court in and for Tulsa County. Murphy was convicted of the charge in November of 1995 and served twenty (20) years of a sentence of life without parole. On May 30, 2014, Tulsa County District Court Judge William Kellough vacated and set aside Murphy's conviction and, on September 12, 2014, the charge against Murphy was dismissed with prejudice.

Murphy now brings this case against the City of Tulsa pursuant to 42 U.S.C. § 1983, the federal civil rights statute.[2] Murphy seeks section 1983 relief on the basis of two constitutional violations: (1) violation of Murphy's Fifth Amendment right against self-incrimination, and (2) violation of the Fourteenth Amendment due process clause's right to a fair trial.[3] The City moves for summary judgment in its favor.

II. Procedural History and Evidentiary Issues

Before considering the City's motion for summary judgment, however, the court must first address four evidentiary issues associated with Murphy's response.

In support of its motion, the City offers eighty-three (83) material facts to which it asserts there is no dispute. These facts are divided into six categories: (1) "The Tulsa Police Department's

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[2] Murphy's original Complaint also named the following defendants: TPD officers Cook, Wayne Allen, Doug Noordyke, B.K. Smith, and Gary Otterstrom; TPD forensic laboratory criminalists Ann Morris, Ann Reed, Tara Valouch, and David Sugiyama; Tulsa County prosecutor Timothy Harris; Department of Human Services employees Jeri Poplin and Doris Unap; and Oklahoma Bureau of Investigation agents Tom Gibson and Mary Long. [Doc. #2]. However, Murphy voluntarily dismissed these individual defendants prior to the filing of Murphy's First Amended Complaint. The original Complaint also identified "other unknown supervisors" as a defendant, but "other unknown supervisors" were not included in the First Amended Complaint.

[3] The City's motion for summary judgment also includes argument regarding a § 1983 malicious prosecution claim. However, during the dispositive motion hearing in this matter, held on February 9, 2018, Murphy's attorney informed the court that Murphy is not pursuing a separate § 1983 malicious prosecution claim. Thus, the court need not consider the City's argument regarding any potential § 1983 malicious prosecution claim.

Murder Investigation," fact nos. 1-28; (2) "Murphy's Confession And Probable Cause," fact nos. 29-36; (3) "Murphy's Confession was Given Knowingly and Voluntarily," fact nos. 37-46; (4) "Causation and Waiver," fact nos. 47-54; (5) "TPD Policies, Practices, Training, and Supervision," fact nos. 55-71; and (6) "The 'Earlier' Case – LaRoye Hunter," fact nos. 72-83.

Murphy's response to the motion includes over 1,000 pages of exhibits. The City subsequently moved to strike the exhibits attached to Murphy's response, arguing that the exhibits did not comply with Local Civil Rule 56.1. In an order dated August 29, 2017, the court concluded that Murphy's response failed to comply with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1) for five separate reasons. First, the court concluded that Murphy "frequently fail[ed] to 'refer with particularity' to those portions of the record upon which she relies," offering as an example Murphy's collective response to the City's first twenty-eight (28) statements of undisputed material facts. In response to the City's first 28 facts, Murphy responded with the statement "[t]he investigation was woefully inadequate, not 'thorough' or 'constitutionally sound' as asserted . . ." and cited to 140 of her own additional statements of undisputed fact, seventeen pages of an expert report prepared on her behalf by Dr. Michael D. Lyman, and twelve pages of deposition testimony from the unnamed "scene investigator." Second, Murphy did not use a consistent format for her references. Third, Murphy referenced missing exhibits. Fourth, Murphy occasionally referred to multi-page exhibits as a whole, without reference to page and line numbers. Finally, for some of the exhibits containing excerpts of testimony, Murphy did not identify the individual whose testimony was presented. In order to correct these identified deficiencies, the court granted Murphy additional time to file an amended response that complied with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1). *See* [Doc. #279].

Pursuant to Local Civil Rule 56.1(c):

> The response brief in opposition to a motion for summary judgment (or partial summary judgment) shall begin with a section which contains a concise statement of material facts to which the party asserts genuine issues of fact exist. **Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's facts that is disputed.** All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party.

LCvR 56.1(c) (emphasis added). The local rule is consistent with statements of the Tenth Circuit interpreting Fed. R. Civ. P. 56, and meant to further the purposes of Rule 56. The Tenth Circuit has stated that "on a motion for summary judgment, 'it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without . . . depending on the trial court to conduct its own search of the record.'" *Cross v. Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) (quoting *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978)). This court "is not required to comb through Plaintiffs' evidence to determine the bases for a claim that a factual dispute exists." *Bootenhoff v. Hormel Foods Corp*., No. CIV-11-1368-D, 2014 WL 3810329, at *2 n.3 (W.D. Okla. Aug. 1, 2014) (citing *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1199 (10th Cir. 2000))[4]; *see also Espinoza v. Coca-Cola Enters., Inc.*, 167 F. App'x 743, 746 (10th Cir. 2006) ("[W]here the nonmovant failed to support his case with adequate specificity, we will not fault the court for not searching the record on its own to make his case for him (nor will we take on that role of advocacy.")); *Boldridge v. Tyson Foods, Inc.*, No. 05-4055-SAC, 2007 WL 1299197, at *2 (D. Kan. May 2, 2007) ("It is not this court's task to comb through Plaintiff's submissions in an

[4] In *Mitchell*, the Tenth Circuit discussed the necessity of such a rule, reasoning, "[t]he district court has discretion to go beyond the referenced portions of these materials, but is not required to do so. If the rule were otherwise, the workload of the district courts would be insurmountable and summary judgment would rarely be granted." *Mitchell*, 218 F.3d at 1199 (alteration in original) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998)).

effort to link alleged facts to his arguments or to construct Plaintiff's arguments for him.") (quoting *Barcikowski v. Sun Microsystems, Inc.*, 420 F. Supp. 2d 1163, 1179 (D. Colo. 2006)); *Lucas v. Office of Colo. State Pub. Def.*, No. 15-CV-00713-CBS, 2016 WL 9632933, at *5 (D. Colo. Aug. 25, 2016) ("The Court has no obligation to scour the record in search of evidence to support any factual assertions, and where inadequate record citations have been made, the court has ignored them.").

Due to a change in Murphy's counsel, the court granted Murphy an additional extension to file her amended response. *See* [Doc. #335]. The amended response lists 197 additional material facts and again appends over 1,000 pages of exhibits which Murphy asserts preclude summary judgment. However, the amended response fails to correct several of the deficiencies previously identified by this court and, for the four following reasons, the court is persuaded that portions of Murphy's amended response do not comply with LCvR 56.1(c) and Fed. R. Civ. P. 56(c)(1).

First, Murphy again fails to "refer with particularity" to those portions of the record on which she relies. By way of example, Murphy did not correct all of the insufficiencies specifically identified by this court in its August 29, 2017 order regarding Murphy's opposition to the City's first twenty-eight undisputed material facts.

As previously mentioned, City fact nos. 1-28 relate to TPD's investigation of the murder of infant Wood. Murphy purports to specifically dispute only eight (8) of these facts. Rather, at the outset of Murphy's section stating the material facts to which she asserts a genuine issue of fact exists, Murphy again includes the following:

> 1-28. The investigation was woefully inadequate, not "thorough" or "constitutionally sound" as asserted on p. 31 citing these facts. See Plaintiff Facts ## 15, 21, 22, 24-103 and 142-195. *See also,* ***Plt. Ex. 178, Expert Report of Michael Lyman, pp. 107-124; Plt. Exh. 148, Transcript of Noordyke, p. 16, ll. 22-***

24, p. 23, ll. 1-3, p. 25, ll. 2-12, l. [sic] 26, ll. 2-6, p. 27, ll. 7-12, p. 31, ll. 3-16, p. 40, ll. 2-7, p. 46, ll. 4-15, p. 52, ll. 4-8, p. 65, ll. 1-24, p. 69, ll. 3-8, p. 29, ll. 7-12.[5]

[Doc. #338, p. 1 (internal footnote omitted)]. Murphy explains that "Fact ##" refers to Murphy's additional material facts to which she asserts there is no dispute. [Doc. #338, p. 1 n.1].

Although, unlike in her original response, Murphy identifies the scene investigator as TPD officer Noordyke and includes specific page and line references, Murphy again broadly refers to 135 of her own statements of additional undisputed material facts—each of which references one or more exhibits—as well as 17 pages of Dr. Lyman's expert report, and 13 pages of Noordyke's testimony. Similarly, Murphy cites only her own statements of additional undisputed material facts to dispute the following undisputed material facts offered by the City: 20, 23, 25, 27, 37, 38[6], and 67. As previously discussed by this court, this practice requires the court to first find the referenced statements of undisputed material fact in a separate section of Murphy's response, look to the exhibits referenced in that later section, and comb through the record to find the relevant material in support of Murphy's proposition. The court is not persuaded that this burdensome procedure satisfies the particularity requirement of LCvR 56.1(c).

Second, Murphy fails to properly address many of the City's assertions of undisputed material fact. Murphy purports to dispute City fact nos. 22, 46, 52, 53[7], 56, 57, 63, 72, 73, and 80,

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[5] With the court's permission, Murphy supplemented her amended response to include a reference to page 29, lines 7-12 on February 9, 2018. *See* [Doc. # 365].

[6] In addition to her own statement of additional undisputed material facts, Murphy also refers the court to "pp. 28-29, below, items A-L" with regard to fact nos. 37 and 38 offered by the City. However, looking to pages 28-29 (both as denominated by Murphy and as identified by the ECF header), the court does not see any items designated "A-L."

[7] The court specifically excluded Murphy's argument regarding the City's undisputed material fact nos. 52 and 53 by order of September 20, 2017. *See* [Doc. #331].

but includes only argument and no reference to any portion of the evidentiary record upon which Murphy relies. It is well established that "argument of counsel is not evidence, and cannot provide a proper basis to deny summary judgment." *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1061 (10th Cir. 2009). *See also Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004) ("To defeat a motion for summary judgment, evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise.").

Third, although Murphy has remedied most of the deficiencies from her prior brief with regard to missing exhibits, one deficiency remains. In opposition to the City's undisputed material fact no. 13, Murphy refers to Exhibit 15, which was not provided to the court.

Finally, Murphy does not purport to specifically dispute fact nos. 1-10, 12, 14, 16-19, 21, 24, 26, 28, 31, 33-36, 40-45, 48-51, 54, 64-66, 69, 74-79, and 81-83.[8]

To the extent that Murphy identifies a numbered material fact of the City relative to which she cites with particularity to the evidentiary record to demonstrate a dispute as required by LCvR 56.1(c), the court will consider the issue for purposes of the City's motion for summary judgment. The court will not "seach[] through the record on plaintiff's behalf, however, to compile the relevant facts." *Stallings v. Werner Enters.*, 598 F. Supp. 2d 1203, 1210 (D. Kan. 2009). To do

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[8] The City offers admissible evidence in support of these facts. The City offers certified transcripts of Murphy's preliminary hearing, *Jackson v. Denno* hearing, and criminal trial, *Fisher v. Shamburg*, 624 F.2d 156, 162 n.7 (10th Cir. 1980) ("[W]e note that it is proper to consider a certified transcript on a motion for summary judgment."); investigation records of the Tulsa Police Department, Fed. R. Evid. 803(8) (hearsay exception for public records); *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2016 WL 4036187, at *2 (N.D. Okla. July 20, 2016); and certified depositions, affidavits, admissions, and interrogatory answers, Fed. R. Civ. P. 56(c)(1). To the extent that the City offers uncertified interview transcripts as exhibits, the court finds that Fed. R. Evid. 801, the rule against hearsay, is inapplicable, as the statements are not offered for the truth of the matter asserted. *See, e.g.*, [Doc. #175, p. 2, ¶ 5 ("TPD officers and detectives obtained written and recorded statements from Christina Carter, Christona Lowther, and William Green) (citing Lowther taped statement, Carter taped statement, and supplementary offense report)].

so would require the court to comb through the record, essentially charting Murphy's arguments for her, in a manner not required by the Tenth Circuit. Thus, the court concludes that Murphy fails to properly address the following facts, and the court will consider them undisputed for purposes of the City's motion for summary judgment: 1-10, 12-14, 16-28, 31, 33-38, 40-46, 48-54, 56-57, 63-67, 69, and 72-83.

III. Summary Judgment Standard

Pursuant to Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Further, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In considering a motion for summary judgment, "[t]he evidence and reasonable inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party." *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (quoting *Anderson*, 477 U.S. at 249). Summary judgment is appropriate only "where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Stover,* 382 F.3d at 1070 (quoting Fed. R. Civ. P. 56(c)).

IV. Undisputed Material Facts

The court finds the following facts regarding the investigation, trial, conviction, and release of Murphy:

At approximately 6:15 a.m., on Monday, September 12, 1994, EMSA and officers from the Tulsa Police Department ("TPD") arrived on scene at Michelle Murphy's apartment in response to a 911 call regarding the stabbing death of a baby. Officer BK Smith and Officer Gary Neece were among the first to arrive. They were directed to the back door of the apartment, where Smith observed Murphy's three-month old son, Travis Wood, dead, lying in a pool of blood. [CSOMF at ¶ 1]. Smith and Neece entered Murphy's apartment through the back door to search for additional victims. They exited the apartment and set up a perimeter to protect the crime scene. Smith then guarded the back door of Murphy's apartment until he was relieved by a day shift officer. [CSOMF at ¶ 2]. Ultimately, nine uniformed TPD officers and four detectives, including Det. Doug Noordyke, Scene Investigator, assisted in investigating the homicide of Travis Wood. [CSOMF at ¶ 3].

TPD officers immediately separated the witnesses. Murphy and her neighbors, Christina Carter and Christona Lowther, were each placed in separate patrol cars. [CSOMF at ¶ 4]. TPD officers and detectives obtained written and recorded statements from Carter, Lowther, and William Green. [CSOMF at ¶ 5]. TPD officers and detectives also interviewed Murphy's other neighbors, James Fields, Kathy Evans, Steve Mann, LaDonna Summer, William Lee, Kevin Washington, Mike Jarnagan, Pat Jarnagan, and the security guard for the apartment complex. They also interviewed the probation officer of one of Murphy's acquaintances. [CSOMF at ¶ 6]. 911

calls had been made by Lee and Lowther. As part of the investigation, TPD officers obtained copies of these calls. [CSOMF at ¶ 8].

Allen assigned the homicide investigation to Det. Corporal Mike Cook, a 20-year TPD veteran and a 13-year homicide detective. At the time, Cook had investigated hundreds of homicide cases. [CSOMF at ¶ 7]. Allen also assigned Noordyke, a 13-year TPD veteran, as the crime scene investigator. Noordyke's training included police academy training in crime scene processing, evidence recovery, and fingerprinting. He also attended specialized schools in blood stain pattern analysis and latent print examinations and had received training with senior SIU officers regarding crime scene processing. At the time of the Murphy investigation, Noordyke had processed hundreds of crime scenes. [CSOMF at ¶ 9].

When Noordyke arrived at the scene, it had been taped off and preserved. His first duties were to document the scene with video, photographs, sketches, and narrative report. He also recovered physical evidence and processed the scene for prints. [CSOMF at ¶ 10].[9] There were no signs of forced entry into the apartment.[10] [CSOMF at ¶ 11]. Noordyke collected the sheet/drape that separated the kitchen from the living room because it was stained with what appeared to be blood. He also obtained samples from what appeared to be blood on the outside of the front screen door and near the body of the baby. [CSOMF at ¶ 12]. Noordyke recovered seven

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[9] The City references both the deposition transcript of Noordyke and the Amended Complaint to support its factual position. A complaint is not competent evidence for summary judgment. *See Wheeler v. Perry*, No. CIV-15-198-F, 2015 WL 5672607 (W.D. Okla. Aug. 21, 2015). However, Noordyke's deposition testimony sufficiently supports the City's assertion.

[10] Murphy purports to dispute the City's assertion with the following: "There was glaring evidence of unforced entry. *See Plt. Exh. 148, Transcript of Noordyke, p. 46, ll. 4-15*." However, evidence of *unforced* entry is not competent evidence to dispute the City's assertion that there was no evidence of *forced* entry. Accordingly, the court will treat the City's statement of material fact no. 11 as undisputed for purposes of the motion for summary judgment.

knives from Murphy's apartment, including a 9-inch dagger in the closet and a large knife with a 7 ¼-inch blade found between the couch cushions. [CSOMF at ¶ 13]. The agent from the Medical Examiner's office arrived at the scene, examined the victim and found a "stab wound just below the neck and a deep large laceration across the throat that was close to being a full decapitation of the infant." [CSOMF at ¶ 14]. In addition to obtaining latent prints, video, and crime scene photographs, Noordyke collected 25 separate pieces of evidence on September 12, 1994. [CSOMF at ¶ 15]. Throughout the course of its investigation, TPD generated 232 pages of TRACIS documents. The investigation included: securing the crime scene; canvassing the area for potential witnesses; separating the witnesses at the scene; obtaining witness statements; documenting the crime scene with video, photographs and diagrams; obtaining and processing evidence; obtaining DNA evidence and evidence from the Medical Examiner's office; having detectives re-visit the scene; and interviewing Murphy and obtaining her tape-recorded confession. [CSOMF at ¶ 25].

Officer Gary Otterstrom was assigned to sit with Murphy in his patrol car until the detectives arrived. While Murphy was seated in the passenger seat of the patrol car, she stepped out of the vehicle several times to speak with neighbors and smoke cigarettes. [CSOMF at ¶ 23]. Allen, the on-scene supervisor, instructed Otterstrom to obtain a written search waiver from Murphy so that she could give permission for the officers to search her residence for evidence. At 7:17 a.m., September 12, 1994, Allen witnessed Otterstrom read Murphy her *Miranda* warnings from a card and then observed Murphy willingly sign a Consent to Search form for her apartment. [CSOMF at ¶ 24].

Cook arrived at the crime scene between 7:30 and 8:00 a.m. As the detective assigned to the case, he was responsible for interviewing the witnesses and putting together the reports. [CSOMF at ¶ 16]. At approximately 8:40-8:45 a.m., Cook went to the detective division to talk

to Murphy. [CSOMF at ¶ 17]. Cook interviewed Harold Eugene Wood (Murphy's common-law husband and infant Wood's father) and took a tape-recorded statement of Murphy. [CSOMF at ¶ 18]. Cook subsequently arrested Murphy. [CSOMF at ¶ 31]. After obtaining Murphy's recorded statement, Cook interviewed Murphy's neighbors, William Lee and LaDonna Summer. [CSOMF at ¶ 19]. Cook also took a recorded statement of Scottie Dale Ritchie, a close friend of Harold Eugene Wood, and obtained copies of recorded conversations between Murphy and Earl Peck while she was in jail after her arrest. [CSOMF at ¶¶ 26 and 28]. Cook prepared a prosecution report for the Tulsa County District Attorney's Office, which identified each witness and summarized their testimony. [CSOMF at ¶ 27].

Cook and Noordyke returned to the scene two additional times. First, they went back to Murphy's apartment at night, on September 19, 1994, to see the field of view from the front door and front window as well as from the back door and the back window. They checked the view during the daylight hours and returned after dark. They specifically wanted to see if they could view where the body was on the floor, from outside the back window, looking through the mini blinds as fourteen-year old William Lee had described to police. This line of sight was confirmed. [CSOMF at ¶ 20]. In March of 1995, Cook and Noordyke were called back out to Murphy's apartment because the maintenance supervisor reported a possible break-in. The detectives discovered a box from Murphy's closet had been overturned onto her bed and a maroon-handled knife was next to overturned boxes on Murphy's bed. [CSOMF at ¶ 21].

Pursuant to 22 O.S. § 285, Murphy's preliminary hearing was held on November 14 and 15, 1994 before the Honorable J. Peter Messler. Private counsel represented Murphy. [CSOMF at ¶ 33]. At the preliminary hearing, the State presented nine witnesses including William Lee and officers Smith and Otterstrom. Cook did not testify and Murphy's taped confession was not

offered into evidence. [CSOMF at ¶ 34]. At the end of the two-day preliminary hearing, Judge Messler denied Murphy's demurrer; found probable cause existed that first-degree murder had been committed; and found probable cause existed that Murphy committed the crime. He bound Murphy over for trial for first-degree murder. [CSOMF at ¶ 35].

At a separate proceeding before the trial, on November 9, 1995, Judge E.R. (Ned) Turnbull conducted a *Jackson v. Denno* hearing to determine whether Murphy's statement was voluntary. Murphy was represented by counsel at this hearing. [CSOMF at ¶ 37]. At the *Jackson v. Denno* hearing, Cook testified regarding Murphy's statement. The notification of rights waiver was admitted without objection as State's exhibit 1. [CSOMF at ¶ 38]. Cook testified that he did not coerce Murphy in any way with any kind of punishment or promise; he did not threaten her in any way, with either physical force or mental intimidation; and he did not promise anything to get her to talk. Cook also described the manner in which he read Murphy her *Miranda* rights and obtained the rights waiver.[11] [CSOMF at ¶ 39]. Murphy testified that Cook never hit her and never used any kind of physical force against her; she never told Cook she needed to see a physician; and that she understood her rights and waived them by signing and initialing the waiver of rights. [CSOMF at ¶ 40]. At the conclusion of the *Jackson v. Denno* hearing, Judge Turnbull found that the State had shown by a preponderance of the evidence that Murphy's statement to Cook was voluntary

[11] Murphy objects on the basis that "Cook now disavows his trial testimony. (Plt. Exh. 125, Deposition of Det. Cook, p. 282, l. 9- p. 283, l. 14)." [Doc. #338, p. 2, ¶ 39]. In support thereof, Murphy cites to deposition testimony of Cook taken in this matter. However, the court has reviewed the entirety of the exchange between Cook and Murphy's then-attorney during Cook's deposition, and the court is not persuaded by Murphy's characterization of Cook's deposition testimony. At the outset, Cook testified that, although he did not recall his testimony during Murphy's criminal trial, he assumed that the official transcript was accurate. [Doc. #349, p. 5]. Further, Cook refused to agree that the transcript was untrustworthy. [*Id.*]. Nothing in Cook's testimony proves, or is even indicative, that Cook has "disavowed his trial testimony."

and that Murphy was properly read her rights. Thus, Judge Turnbull overruled Murphy's motion to suppress her statements. [Doc. #175-32, p. 63:1-6].

During Murphy's criminal trial, which began on November 16, 1995, Murphy's taped statement to Cook was played for the jury, copies of the transcript of the statement were given to the jurors, and the statement was admitted into evidence. [CSOMF at ¶ 41]. Jury Instruction No. 16 given by the trial court defined "voluntary confession" and instructed that:

> A "voluntary confession" is a statement, freely and knowingly made by a person who is not under arrest or in custody, to a police officer or any other person which admits facts that tend to establish the commission of an offense. Such confession is freely and knowingly made when the person voluntarily states his involvement with the alleged crime or reveals details of it, without threats, pressure, coercion, or duress from any police officer or police agent.
>
> The state has offered evidence that a confession was made by the defendant to Michael Cook on September 12, 1994 [*sic*] if you find that the defendant made the alleged confession, and made it freely and voluntarily, you may take it into consideration with all the other facts in evidence and give it whatever weight and credit you find it deserves. However, if you find that the confession was induced by coercion or by a promise of immunity or a lesser punishment than might otherwise be inflicted, or that the confession was made under threat of violence or force, you should disregard the confession in arriving at your verdict.

[Doc. #175-34, p. 2].

In November of 1995, the jury convicted Murphy of first-degree murder and sentenced her to life without parole. With separate appellate counsel, Murphy appealed her conviction to the Oklahoma Court of Criminal Appeals, and the court found no error in Murphy's conviction. [CSOMF at ¶¶ 45-46; Doc. #175-35]. On September 5, 2013, Murphy filed an Application for Post-Conviction Relief. [CSOMF at ¶ 47; Doc. #97-21]. On May 29, 2014, then-Tulsa County District Attorney Tim Harris filed a motion to confess the application for post-conviction relief. [CSOMF at ¶ 49; Doc. #175-1]. On May 30, 2014, Tulsa County District Judge William C. Kellough vacated Murphy's judgment and sentence. [CSOMF at ¶ 50; Doc. #175-36]. After

vacating Murphy's conviction, Judge Kellough retained jurisdiction to re-try Murphy. Judge Kellough set an appearance bond and ordered her to reappear on June 24, 2014 at 9:00 a.m. for a status conference. [CSOMF at ¶ 51; Doc. #175-36]. Rather than retry Murphy, the State of Oklahoma filed a Motion to Dismiss the case with prejudice. [CSOMF at ¶ 51; Doc. #175-53].

The court finds the following facts regarding the Tulsa Police Department's policies, procedures, and training in 1994:

In 1994, the basic training for TPD officers, detectives and supervisors involved in the Murphy murder investigation was approximately 14 weeks at the TPD police academy which included a legal block on constitutional rights, statutes and ordinances, as well as instruction on *Miranda* warnings, interviewing, interrogations and juvenile law. [CSOMF at ¶ 56; Doc. #175-40, ¶ 3; Doc. #175-44, ¶¶ 9 and 11].[12] From at least 1978 to 2003, in order to maintain CLEET (Council of Law Enforcement Education and Training) certification, all TPD officers were required to attend forty hours of in-service training yearly that included current legal procedures

[12] The court denied Murphy's motion to strike the City's exhibit 40, the affidavit of former homicide detective Kenneth Mackinson, who averred that the TPD police academy's legal block included constitutional rights and interrogations. *See* [Doc. #355]. Murphy objects to the City's factual assertions regarding training as to constitutional rights and interrogations, citing deposition testimony in this case of Palmer and Cook. However, the court is not persuaded by Murphy's characterization of the deposition testimony. Palmer did not testify that homicide detectives were not required to be trained in interrogations, but rather that "[t]here was no requirement specifically that [he was] aware of" and that he "d[idn't] know exactly what the curriculum was for them to come into the Detective Division." [Doc. #339, Exh. 52, p. 37:6-8]. Further, Cook did not testify that he had no training in interrogations but, rather, that he could not recall his knowledge of whether there were constitutional limitations on interrogations, either in 1994 or 2017. [Doc. #339, Exh. 162, p. 55:5-8]. Even viewed in the light most favorable to Murphy, Cook's recollection of constitutional limitations on interrogations is not dispositive as to whether or not he actually received training. Because Murphy has presented no evidence to dispute the City's undisputed material facts regarding training as to constitutional rights and interrogations, the court will treat the facts as undisputed for purposes of the City's motion. *See* Fed. R. Civ. P. 56(e)(2).

and, every officer also received monthly legal bulletins regarding new ordinances, statutes, and court decisions.[13] [CSOMF at ¶ 57; Doc. #175-41, p. 13:18 to 14:7]. By 1988, all officers assigned to the Detective Division were required to complete forty hours of training in interrogations, arrest warrants, search warrants and affidavits. Officers assigned to the Homicide Unit also completed this additional forty hours of training.[14] [CSOMF at ¶ 58].

In 1994, one of the written policies of the Tulsa Police Department was to protect the constitutional rights of all persons. [CSOMF at ¶ 65; Doc. #106-6, COT 4]. In 1994, TPD officers were required to take an oath of office which stated, in part, "I, _____, having been duly appointed a Police Officer of the City of Tulsa, and a Peace Officer of the State of Oklahoma, do solemnly swear, that I will defend, enforce, and obey, the Constitution and Laws of the United States, the State of Oklahoma and the Charter and Ordinances of the City of Tulsa." [CSOMF at ¶ 71; Doc. #106-6, COT 3]. Therefore, the City's general guidelines required TPD officers to be stewards of the Constitution of the United States, the laws of Oklahoma, and the laws of the City of Tulsa. [Doc. #339, Exh. 56, p. 32:15-24]. Although TPD's policy required officers to follow the Constitution, it was not possible to write a policy for every facet or intricacy of the Constitution. [CSOMF at ¶ 68; Doc. #175-41, p. 17:9-18].

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[13] Murphy objects to the City's reliance on the Mackinson affidavit to support its assertion that "every officer also received monthly legal bulletins regarding new ordinances, statutes, and court decisions" as hearsay, and argues that Mackinson cannot testify regarding all TPD's officers' receipt of the materials. However, the court finds sufficient evidence in the record to support the City's factual statement. *See* [Doc. #231-2 to Doc. #231-6; Doc. #175-41, p. 13:18 to p. 14:7].

[14] *See supra* n. 16.

V. Discussion

"A plaintiff suing a municipality under section 1983 for the acts of one of its employees must prove: (1) that a municipal employee committed a constitutional violation, and (2) that a municipal policy or custom was the moving force behind the constitutional deprivation." *Myers v. Okla. Cnty. Bd. of Cnty. Comm'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998) (citing *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978)); *see also Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015) ("[A] plaintiff asserting a § 1983 claim must show '1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged.' Through 'its *deliberate* conduct,' the municipality must have been the 'moving force' behind the injury.") (emphasis in original) (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997)). A municipality cannot be liable under § 1983 solely because its employee caused injury or damage. *See Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006). Nor may a municipality be liable "if a jury finds that the municipal employee committed no constitutional violation." *Myers*, 151 F.3d at 1316.

A. Constitutional Violation

As previously stated, Murphy asserts two constitutional violations: (1) violation of her Fifth Amendment right against self-incrimination through the use of Murphy's allegedly coerced statement at her criminal trial, and (2) violation of the Fourteenth Amendment due process clause's right to a fair trial. The court will consider each alleged violation separately.

1. Fifth Amendment

The City argues that Murphy is collaterally estopped from claiming that her statement was coerced by virtue of Judge Turnbull's ruling in the *Jackson v. Denno* hearing and, therefore, Murphy cannot establish a Fifth Amendment violation. The court is not persuaded.

"In accordance with the doctrine of issue preclusion (previously known as collateral estoppel), once a court has decided an issue of fact or law necessary to its judgment, the same parties or their privies may not relitigate that issue in a suit brought upon a different claim." *Okla. Dep't of Pub. Safety v. McCrady*, 176 P.3d 1194, 1199 (Okla. 2007) (internal footnote omitted). However, for issue preclusion to apply, there must exist "**a final determination of a material issue common to both cases**." *Id.* (emphasis in original) (footnote omitted). A criminal conviction may have preclusive effect in a subsequent civil action arising from the same events. *Lee v. Knight*, 771 P.2d 1003, 1006 (Okla. 1989).

Under Oklahoma law, a judgment reversed, set aside, or vacated is of no preclusive effect. *See Wininger v. Day*, 376 P.2d 211, 213 (Okla. 1962) (in considering assertion that collateral estoppel should apply, stating "[t]he validity, if any, of such contention must necessarily be based on the fact or assumption that the verdict in the [first] case does validly exist"); *Brumark Corp. v. Corp. Comm'n of the State of Okla.*, 924 P.2d 296, 301 (Okla. Civ. App. 1996) ("A judgment that is reversed on appeal—and the cause remanded—loses its conclusive character and cannot stand as a bar to further suit on the same cause of action.") (quoting *Mobbs v. City of Lehigh*, 655 P.2d 547, 549 n.5 (Okla. 1982)); *Williams Prod. Mid-Continent Co. v. Patton Prod. Corp*., 277 P.3d 499, 501 (Okla. Civ. App. 2012) ("In what appears to be a case of first impression before an Oklahoma court, we hold a second judgment predicated on a prior judgment later reversed cannot stand."); *see also Woodrow v. Ewing*, 263 P.2d 167, 172 (Okla. 1953) ("The judgment, *until properly set aside* is conclusive not only as to all questions actually decided but also as to all germane issues that might have been litigated or availed of.") (emphasis added); *Franklin Savs. Ass'n v. Office of Thrift Supervision*, 35 F.3d 1466, 1469 (10th Cir. 1994) ("'A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as

res judicata and as collateral estoppel.'") (quoting *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir. 1988)); *Joseph A. ex rel. Corrine Wolfe v. Ingram*, 275 F.3d 1253, 1266 (10th Cir. 2002) (same); *Eastom v. City of Tulsa*, No. 11-CV-0581-HE, 2012 WL 12540242, at *2 (N.D. Okla. Mar. 2, 2012) ("However, because plaintiff's conviction was vacated, there is no ruling that can be given preclusive effect.") (citing *United States v. Lacey*, 982 F.2d 410, 412 (10th Cir. 1992)).

Here, Judge Kellough vacated Murphy's judgment and sentence. [CSOMF at ¶ 50; Doc. #175-36]. Rather than retry Murphy, the State of Oklahoma dismissed the charge. [CSOMF at ¶ 51; Doc. #175-53]. As a result, based on the foregoing cases, the court is persuaded that no "final order" exists which would have any preclusive effect in this matter.

The City urges the court to consider two Oklahoma Court of Criminal Appeals decisions and give conclusive effect to Judge Turnbull's *Jackson v. Denno* ruling. *See* [Doc. #175, pp. 19-23 (citing *Jackson v. State*, 41 P.3d 395 (Okla. Crim. App. 2001) ("*Jackson I*") and *Jackson v. State*, 146 P.3d 1149 (Okla. Crim. App. 2006) ("*Jackson II*")]. However, this court is not satisfied that these cases require the court to ignore what appears to be well-established Oklahoma case law holding that vacated judgments are of no preclusive effect. In *Jackson I*, the court concluded that Shelton Jackson's confession was not coerced, but reversed Jackson's conviction for first-degree murder and remanded the matter for a new trial on the basis of ineffective assistance of counsel. *Jackson I*, 41 P.3d at 401. A jury again convicted Jackson, and Jackson appealed his second conviction and sentence to the Oklahoma Court of Criminal Appeals. *Jackson II*, 146 P.3d at 1154. During his second appeal, Jackson again sought to contest the voluntariness of his confession. *Id.* at 1156. However, the court refused to consider the issue, concluding that the issue was procedurally barred. *Id.* at 1157. In rejecting Jackson's request, the court cited Oklahoma case law holding that issues decided in extraordinary writ appeals or direct appeals will not be

reconsidered on direct appeal following retrial. *Id.* (citing *Brown v. State,* 989 P.2d 913 (Okla. Crim. App. 1998) and *Humphreys v. State,* 947 P.2d 565 (Okla. Crim. App. 1997)).

Jackson I and *Jackson II* are factually distinguishable and do not require that this court give preclusive effect to Judge Turnbull's *Jackson v. Denno* ruling. Unlike the *Jackson* cases, this case does not present a direct appeal following Murphy's retrial. Nor is this case a request for post-conviction relief to which the Oklahoma Post Conviction Relief Act, 22 O.S. § 1086, would apply. Rather, this case is a federal civil rights case, brought after the State of Oklahoma opted not to retry Murphy and at a point when, procedurally, no valid state conviction or judgment exists. This court cannot give preclusive effect to a legal nullity.

Nor is the court persuaded by the Sixth Circuit and Second Circuit cases cited by the City. *See* [Doc. #175, pp. 24-26 (citing *Hatchett v. City of Detroit*, 495 F. App'x 567 (6th Cir. 2012) and Doc. #340, p. 7 (citing *Owens v. Treder*, 873 F.2d 604, 610-11 (2d Cir. 1989)]. In *Hatchett,* an unpublished decision, the Sixth Circuit rejected plaintiff's argument that the *Jackson v. Denno* hearing could not preclude his civil rights claim because his conviction was "set aside," noting that "Michigan courts treat a factual finding as to voluntariness pursuant to a [*Jackson v. Denno*] hearing as a final determination on the merits." *Id.* at 570. Under Oklahoma law, however, the jury, rather than the trial judge, is the final arbiter of voluntariness.[15] *See Parent v. State*, 18 P.3d

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[15] Oklahoma has adopted the "Massachusetts Rule," also known as the "Humane Rule," to determine the voluntariness of an accused person's confession. *See Hopper v. Oklahoma,* 736 P.2d 538, 539-40 (Okla. Crim. App. 1987). Other courts adopting the Massachusetts Rule generally conclude that the jury, rather than the trial court, makes the final determination as to the voluntariness of an accused's statement. *See, e.g., Law v. State*, 318 A.2d 859, 871 (Md. Ct. Spec. App. 1974) ("Once the statement was admitted, the final determination of its voluntariness and the weight to be accorded it were matters for the jury."); *Commonwealth v. Blanchette*, 564 N.E.2d 992, 996 (Mass. 1991) ("If the judge determines that the statements are voluntary, the question should be submitted to the jury so that they may make the final determination.").

348, 353 (Okla. Crim. App. 2000); *Hopper v. Oklahoma*, 736 P.2d 538, 539-40 (Okla. Crim. App. 1987) ("If the confession is determined to be voluntary by the trial judge, the question of voluntariness is submitted to the jury, together with all the facts and circumstances surrounding the confession."); [Jury Instruction No. 16, given by Judge Turnbull in the state murder trial, Doc. #175-34, p. 2 ("However, if you find that the confession was induced by coercion or by a promise of immunity or a lesser punishment than might otherwise be inflicted, or that the confession was made under threat of violence or force, you should disregard the confession in arriving at your verdict.")]; *see also* Okla. Unif. Jury Instruction – Criminal 9-12 ("If after considering the evidence you determine that the statement was made by the defendant and was voluntary, you may give it whatever weight you feel it deserves.").

Further, the United States District Court for the Western District of Michigan recently disagreed with *Hatchett*, stating "[t]his Court is not persuaded that Michigan courts would reach the same conclusion as the court did in *Hatchett*." *Peterson v. Heymes*, No. 15-CV-969, 2017 WL 4349456, at *6 (W.D. Mich. Sept. 29, 2017). In *Peterson*, the Western District cited Sixth Circuit case law broadly holding that a "judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel," to conclude that, because Peterson's conviction had been vacated, "no valid and final judgment exists in Peterson's criminal case, [and] collateral estoppel cannot preclude him from relitigating the issues raised in his criminal case." *Id.* at *4 (quoting *Erebia v. Chrysler Plastic Prods. Corp*., 891 F.2d 1212, 1215 (6th Cir. 1989)).

As for *Owens*, the Second Circuit's statement in that case was *dicta*. Further, the United States District Court for the Eastern District of New York recently qualified *Owens*, stating that "[the *Owens*] standard must be read in conjunction with other rulings holding that '[a] vacated

judgment, by definition, cannot have any preclusive effect in subsequent litigation.'" *Tankleff v. Cnty. of Suffolk*, No. 09-CV-1207-JS-WDW, 2010 WL 5341929, at *4 (E.D.N.Y. Dec. 21, 2010).

A conclusion that preclusive effect should not be given to Judge Turnbull's ruling in the *Jackson v. Denno* hearing is consistent with the pronouncements of other courts under factually similar circumstances. *See Spurlock v. Whitley*, 971 F. Supp. 1166, 1177 (M.D. Tenn. 1997) (concluding that a civil plaintiff's criminal guilty plea did not preclude plaintiff's subsequent civil claims because the guilty plea was vacated); *Thomas v. Riddle*, 673 F. Supp. 262, 266 (N.D. Ill. 1987) (declining to give preclusive effect to a trial court's subsequently reversed denial of a suppression motion, although the denial was reversed on other grounds, reasoning that "a judgment that has been vacated, reversed or set aside on appeal is thereby deprived of all conclusive effect, both as to res judicata and as to collateral estoppel"); *Chandler v. Louisville Jefferson Cnty. Metro Gov't*, No. 10-CV470-H, 2011 WL 781183, at *2 (W.D. Ky. Mar. 1, 2011); *McCray v. City of New York*, No. 03-CV-10080-DAB, 2007 WL 4352748, at **12-13 (S.D.N.Y. Dec. 11, 2007); *Evans v. City of Chicago*, NO. 04-C-3570, 2006 WL 463041, at *15 (N.D. Ill. Jan. 6, 2006).

Thus, this court is persuaded that issue preclusion does not apply, and Judge Turnbull's ruling in the *Jackson v. Denno* hearing is not conclusive. Murphy may challenge the voluntariness of her confession in this case.

The court now turns to whether Murphy's Fifth Amendment rights were violated. In opposition to the City's motion, Murphy submits evidentiary materials to support the following: (1) that Cook rewound and started the tape over during Murphy's statement [Doc. #339, Exh. 102, p. 238:10-15]; (2) that Cook ran his hands up Murphy's legs during the interrogation, which "scared" Murphy [Doc. #339, Exh. 116, p. 27:15-22 and Doc. #339, Exh. 119, p. 225:2-5]; (3) that Cook promised Murphy that, if she confessed, Murphy could see her daughter, receive therapy,

and go home [Doc. #339, Exh. 121, p. 204:17-25; Doc. #339, Exh. 122, p. 192:1-9]; (4) that Murphy informed Cook several times that she had been hit on the head, but Cook did not examine her for concussion symptoms [Doc. #339, Exh. 174, p. 679:13-22; Dkt. #55, ¶ 45]; and (5) that Cook yelled at Murphy during the interrogation until she agreed to make a deal [Doc. #339, Exh. 143, p. 241:3-17; Doc. #339, Exh. 123, p. 240:10-14]. These evidentiary materials, viewed in the light most favorable to non-movant Murphy, establish a genuine issue of material fact as to whether Cook violated Murphy's Fifth Amendment right against self-incrimination during the September 12, 1994 interrogation. *See Sharp v. Rohling,* 793 F.3d 1216, 1235 (10th Cir. 2015) (concluding that, based on the totality of the circumstances, "[plaintiff's] will was overborne once Detective . . . promised her she would not go to jail after she admitted to participating in the crime"); *see also Arizona v. Fulminante,* 499 U.S. 279, 287 (1991) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.") (quoting *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960)).[16]

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[16] The City also argues that Murphy waived her right to bring any claim that her constitutional rights were violated when she was questioned while she was a minor, allegedly in violation of 10 O.S. 1991 § 1109(a). However, during the dispositive motion hearing in this matter, Murphy's attorney informed the court that Murphy does not contend that 10 O.S. 1991 § 1109(a) was violated. Therefore, the City's motion regarding that statute is moot. Further, the court is persuaded that any violation of § 1109(a) cannot provide an independent basis for section 1983 tort liability, as the U.S. Supreme Court has never held that the Constitution requires the presence of a parent or guardian during the interrogation of a minor. *See Blankenship v. Estep,* 316 F. App'x 758, 760 (10th Cir. 2009) ("The Supreme Court has never held that juveniles have a right to the presence of a parent or guardian during custodial interrogation, let alone that the parent or guardian also must be advised of *Miranda*'s requirements."); *Wilson v. Oklahoma,* 363 F. App'x 595, 611 n.16 (10th Cir. 2010). *See also J.D.B. v. North Carolina,* 131 S. Ct. 2394 (2011) (discussing age as consideration in *Miranda* analysis, but not presence of parent or guardian). In fact, the Oklahoma Court of Criminal Appeals recognized that "the statute *expands* upon the rights of juveniles granted by the U.S. Constitution and the Oklahoma Constitution." *State v. M.A.L.,* 765 P.2d 787, 790 (Okla. Crim. App. 1988) (emphasis added).

2. Fourteenth Amendment

The City next argues that Murphy cannot prove a violation of her Fourteenth Amendment due process right to a fair trial, as she cannot establish the necessary intentional or reckless misconduct.

To establish a substantive due process cause of action for failure to investigate, plaintiff must show that the state actor "intentionally or recklessly failed to investigate, thereby shocking the conscience." *Amrine v. Brooks*, 522 F.3d 823, 834 (8th Cir. 2008).[17] Neither negligence nor gross negligence rises to the level of a constitutional deprivation. *Id*. at 833. The Eighth Circuit has held that

> the following circumstances indicate reckless or intentional failure to investigate that shocks the conscience: (1) evidence that the state actor attempted to coerce or threaten the defendant, (2) evidence that investigators purposefully ignored evidence suggesting the defendant's innocence, (3) evidence of systematic pressure to implicate the defendant in the face of contrary evidence.

Winslow v. Smith, 696 F.3d 716, 732 (8th Cir. 2012) (quoting *Akins v. Epperly*, 588 F.3d 1178, 1184 (8th Cir. 2009)). "Negligent failure to investigate other leads or suspects does not violate due process." *Wilson v. Lawrence Cnty.*, 260 F.3d 946, 955 (8th Cir. 2001).

As previously stated, viewed in the light most favorable to Murphy, there is sufficient evidence to allow the reasonable inference that a state actor—specifically Cook—attempted to

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[17] The City's motion for summary judgment cites only Eighth Circuit case law regarding the reckless investigation claim, and does not raise the issue of whether the Tenth Circuit would recognize a substantive due process claim based on reckless investigation. *See, e.g., Hernandez v. City of El Paso*, No. EP-08-CV-222-PRM, 2011 WL 3667174, at *5 (W.D. Tex. Aug. 18, 2011), *aff'd* 490 F. App'x 654 (5th Cir. 2012) (noting that "there is no evidence that the Fifth Circuit has ever recognized such a cause of action," and declining to do so). However, because the City does not challenge the validity of the cause of action itself, the court will not consider the legal viability of a substantive due process reckless investigation claim in the Tenth Circuit, but will assume without deciding that the Tenth Circuit would recognize the cause of action as articulated by the Eighth Circuit.

coerce Murphy. Further, Murphy has submitted evidence based upon which a reasonable factfinder could conclude that, following Murphy's confession, Cook chose not to pursue other investigatory avenues. *See* [Doc. #339, Exh. 175, p. 751:7-11, p. 753:24 to p. 753:8 (Cook never considered whether Lee committed the murder and never questioned Lee's truthfulness); Doc. #339, Exh. 29, p. 65:8-23 (infant Wood's diaper was never tested for fingerprints)]. If the evidence is viewed in the light most favorable to Murphy, a reasonable fact finder could find that Cook systematically attempted to coerce Murphy to implicate herself, despite the potential for exculpatory evidence to the contrary. Thus, a genuine issue of fact exists as to whether Murphy's interrogation violated her Fourteenth Amendment substantive due process rights. *See Wilson*, 260 F.3d at 955 (agreeing with district court's reasoning that "[i]f Wilson's allegations about unlawful coercion are proved true, a reasonable factfinder could determine that Defendants recklessly or intentionally chose to force Wilson to confess instead of attempting to solve the murder through reliable but time consuming investigatory techniques designed to confirm their suspicions") (alterations in original).[18]

B. Municipal Policy or Custom

As previously stated, "[a] municipality is not liable solely because its employees caused injury." *Mocek v. City of Albuquerque*, 813 F.3d 912, 933 (10th Cir. 2015) (citing *Graves v. Thomas*, 450 F.3d 1215, 1218 (10th Cir. 2006)). Rather, "a plaintiff asserting a § 1983 claim must

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[18] However, the court does not find any evidentiary materials to support Murphy's assertion that Cook "deliberately framed" Murphy. Murphy cites only the following exchange from Cook's deposition testimony taken in this matter: "Q: All right, sir. After she confessed, did you deliberately frame her? A: I don't remember anything about how I felt or what I thought about after her confession." [Doc. #339, Exh. 13, p. 37:14-17]. The court is not persuaded by Murphy's interpretation of Cook's testimony. Evidence that Cook does not recall his conduct after Murphy's confession does not substantiate Murphy's claim that she was "deliberately framed" after her confession.

show 1) the existence of a municipal policy or custom and 2) a direct causal link between the policy or custom and the injury alleged. Through its *deliberate* conduct, the municipality must have been the 'moving force' behind the injury." *Id.* (internal citations and quotations omitted).

> A municipal policy or custom may take the form of (1) "a formal regulation or policy statement"; (2) an informal custom "amoun[ting] to 'a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law'"; (3) "the decisions of employees with final policymaking authority"; (4) "the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval"; and (5) the "failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused."

Bryson v. City of Okla. City, 627 F.3d 784, 788 (10th Cir. 2010) (alterations in original) (quoting *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1189-90 (10th Cir. 2010)). The court will separately consider each form.

1. Formal Regulation or Policy Statement

Murphy cites two TPD formal regulations or policy statements which she contends were unconstitutional. [Doc. #338, p. 34]. First, based on the testimony of former chief and final policymaker Palmer, Murphy alleges that the City gave "full authority" to its interrogators regarding the method and manner of interrogations, including the power to make threats. However, the evidentiary materials submitted do not support Murphy's claim. Palmer did not testify that the "full authority" of the police department included the authority to make threats.[19]

[19] Murphy relies on the deposition testimony of former homicide sergeant Wayne Allen that the "full authority of the department" included the authority to decide what threats and promises to make. [Doc. #339, Exh. 50, p. 15:19 to p. 16:10]. However, during the dispositive motion hearing in this matter, the parties agreed that former chief Palmer is the only final policymaker in this matter. *See Brammer-Hoelter*, 602 F.3d at 1189 (municipal liability based on decisions of employees applies only to final policymakers).

See [Doc. #339, Exh. 49, p. 27:12 to p. 29:15]. To the contrary, Palmer testified to his belief that TPD's policies prohibited interrogators from violating the constitutional rights of citizens. [Doc. #339, Exh. 49, p. 29:1-13]. It is undisputed that one of the written policies of TPD was to protect the constitutional rights of all person, and that TPD officers swore to "defend, enforce, and obey" the Constitution and laws of the United States as well as state and local laws. [CSOMF at ¶¶ 65 and 71]. Further, Palmer testified that TPD officers had no authority to make promises, and that striking, assaulting, or otherwise illegally touching interrogees was prohibited. [Doc. #339, Exh. 52, p. 37:11-17; Doc. #174-41, p. 31:4-14, p. 39:13-24]. Based on this evidence, the court is persuaded that any grant of "full authority" to interrogators was constrained by TPD's policy requiring its officers to "defend, enforce, and obey" the Constitution.

Murphy's position not only lacks evidentiary support, it also lacks support in the relevant law. Murphy attempts to analogize this case to *City of Canton*, wherein the trial court ruled that the jury properly found that the city had a custom or policy of vesting "complete authority" with the police supervisor of when medical treatment would be administered to prisoners. *See* [Doc. #338, p. 40 (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 382 (1988) (characterization of the theory of liability by the district court)]. However, *City of Canton* was premised on a failure to train theory, rather than a facially unconstitutional policy or procedure. *City of Canton*, 489 U.S. at 386 ("There can be little doubt that on its face the city's policy regarding medical treatment for detainees is constitutional."). In other words, § 1983 liability in *City of Canton* depended upon the grant of authority, *coupled with* the failure to adequately train, and then only if the failure to train amounted to deliberate indifference to the rights of persons with whom the police came into contact. *Id.* at 388. *City of Canton* is therefore distinguishable and does not obviate against summary judgment as to this issue.

Second, Murphy alleges that TPD had in force an unconstitutional policy which treated police officers differently than citizens during interrogations, because in 1994 TPD had a regulation—part of the "Police Officer Bill of Rights"—which forbade the use of threats or promises during interrogations of police officers, but did not have a similar written prohibition applicable to interrogations of ordinary citizens. As an initial matter, Murphy's alleged second formal policy—which forbade threats or promises during interrogations of police officers, but not ordinary citizens—appears to be little more than a restatement of Murphy's first alleged formal policy—that TPD officers had *carte blanche* authority in the conduct of interrogations of ordinary citizens—which this court has rejected.

Further, Murphy has not cited nor has the court identified any Supreme Court or Tenth Circuit authority standing for the proposition that a *lack of a written policy* amounts to a formal regulation or policy statement for purposes of § 1983 tort liability. Rather, Murphy appears to be attempting to shoehorn her theory of liability into the "formal regulation or policy statement" context in order to take advantage of the Supreme Court's pronouncement in *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) ("Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker."). Pursuant to *City of Canton*, the omissions alleged here are more properly considered in connection with Murphy's failure to train theory. Thus, the court finds that Murphy has failed to present evidence of an unconstitutional formal regulation or policy statement.

2. Informal Custom or Usage

Municipal liability may also "be based on an informal 'custom' so long as this custom amounts to 'a widespread practice that, although not authorized by written law or express

municipal policy, is so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" *Brammer-Hoelter*, 602 F.3d at 1189 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)). However, when the evidence is viewed in the light most favorable to Murphy, no evidence exists of a widespread TPD practice of constitutional violations in interrogations or investigations.

Although the Tenth Circuit has never adopted a bright-line rule as to the number of similar incidents required to establish the existence of a municipal policy or custom, most courts, including the Tenth Circuit, have concluded that one prior incident is insufficient. *See Williams v. City of Tulsa*, 627 F. App'x 700, 704 (10th Cir. 2015); *Wilson v. Cook Cnty.*, 742 F.3d 775, 780 (7th Cir. 2014) ("Although this court has not adopted any bright-line rules for establishing what constitutes a widespread custom or practice, it is clear that a single incident—or even three incidents—do not suffice."); *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (two instances of misconduct were insufficient to indicate a "persistent and widespread" pattern of misconduct); *Dunn v. City of Newton, Kan.*, No. 02-1346-WEB, 2003 WL 22462519, at *7 (D. Kan. Oct. 23, 2003) (two incidents insufficient).[20]

Murphy has presented no evidence of an unconstitutional informal custom or usage. Although Murphy cites the LaRoye Hunter case[21], based on the above authorities, a single incident

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[20] Nor is this a situation where proof of a single incident is sufficient, as, for the reasons previously discussed, TPD's formal policies were not unconstitutional. *See City of Oklahoma City*, 471 U.S. at 824 ("But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation.") (internal footnotes omitted).

[21] The LaRoye Hunter case refers to *State of Oklahoma v. LaRoye C. Hunter, III*, Tulsa County Case No. CF-1989-5196. ("Hunter Case"). In 1989, LaRoye Hunter was charged with Murder, First Degree and Arson, First Degree in the District Court of Tulsa County. [Doc. #175-50]. At

cannot be reasonably construed to establish the necessary "persistent and widespread" practice of misconduct. Further, the admissible evidentiary materials submitted do not establish that the Hunter case and the issues presented in this matter are sufficiently similar.

The state court's docket in the Hunter Case reflects only the following with respect to the suppression of Hunter's confession: "Beasley B.R.: Deft's Motion to Suppress Deft's Confession: Sustained. Case Remanded to Preliminary Hearings on 8/9/90 at 9:00 a.m. Deft in Custody and Represented by Loretta [Radford]. State by Dennis Fries. Reba Gibson Reporting." [Doc. #175-50, p. 9]. The court did not enter an order providing its reasons for suppressing Hunter's confession. Although Murphy alleges that Cook stopped the tape during Hunter's interrogation, Murphy has presented no admissible evidence that Cook coerced Hunter's confession.[22] *See* [Doc. #359]. Thus, Murphy has provided no evidence of a sufficient similarity to the Hunter case.

Murphy provides no further evidence of a persistent or widespread pattern of unconstitutional interrogations or investigations. Palmer testified that, prior to his deposition taken in this case, he had never heard that Mike Cook had coerced a confession [Doc. #175-41, p. 94:10-12]. Moreover, Cook's former partner, retired TPD officer, Kenneth Mackinson, averred that, to his knowledge, Cook never coerced a confession or violated a suspect's constitutional rights. [Doc. #175-40, ¶ 11]. Outside of Murphy's testimony regarding her own interrogation, Murphy

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the time he was charged, Hunter was seventeen (17) years old. Cook participated in Hunter's interrogation, and was present when Hunter confessed. However, Hunter's confession was subsequently suppressed, and the charges against Hunter were dropped. Prior to the charges being dropped, Hunter was represented by then-Tulsa County Public Defender Loretta Radford.

[22] This court previously concluded that evidence of Cook's allegedly coercive tactics included in the contemporaneous newspaper articles or Radford's testimony is inadmissible hearsay and character evidence, respectively, unless used as "specific contradiction" during Cook's cross-examination. [Doc. #359].

has presented no evidence of any other TPD officer ever making promises to, threatening, or otherwise violating the constitutional rights of an interrogee. To the extent that Murphy relies upon Allen's testimony that interrogators had the full authority to decide what kind of touching would occur, what kind of promises to make, and what kind of threats to make, [Doc. #339, Exh. 50, p. 16:1-10], this testimony does not give rise to an inference that TPD engaged in a widespread practice of coercing interrogees that, although not authorized by regulation or express municipal policy, was "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Brammer-Hoelter*, 602 F.3d at 1189. *See also Bryson v. City of Oklahoma City,* 627 F.3d 784, 791 (10th Cir. 2010). Allen did not testify that other TPD officers routinely touched, threatened, or made promises to citizens that were being interrogated, and this court may not speculate that such practices constituted a custom or usage within the department. *See James v. Chavez,* 830 F. Supp. 2d 1208, 1258 (D.N.M. 2011) ("While the Court must indulge all reasonable inferences in favor of the non-movant, the non-movant still has an obligation to produce evidence once the burden shifts to him or her."). Nor has Murphy produced any evidence of constitutional violations due to reckless investigation generally. Accordingly, the court finds that Murphy has failed to show an unconstitutional informal custom or usage.

3. Decision of a Final Policymaker

For purposes of section 1983 liability, a municipal policy may also exist based on the "decisions of employees with final policymaking authority." *Bryson,* 627 F.3d at 788. At the dispositive motion hearing held in this matter, the parties agreed that the sole final policymaker in this case is former Chief of Police Ron Palmer. As previously discussed, Palmer's testimony that the City gave "full authority" to its interrogators regarding the method and manner of interrogations does not constitute an unconstitutional policy. Murphy identifies no additional

statements or decisions of Palmer (regarding interrogations or investigations), and the court finds no evidence upon which the jury may find an unconstitutional policy based on a decision of the final policymaker.

4. Ratification by Final Policymaker of the Decisions of Subordinates

"[I]f a subordinate's position is subject to review by the municipality's authorized policymakers and the authorized policymakers approve a subordinate's decision and the basis for it, their ratification will be chargeable to the municipality." *Moss v. Kopp,* 559 F.3d 1155, 1169 (10th Cir. 2009). *See also Cacioppo v. Town of Vail, Colo*., 528 F. App'x 929, 933 (10th Cir. 2013) ("[A] municipality will not be found liable . . . unless a final decisionmaker ratifies an employee's specific unconstitutional actions, as well as the basis for these actions.") (quoting *Bryson,* 627 F.3d at 790). However, where the municipality is not aware of the unconstitutional actions with respect to the plaintiff, the municipality cannot be liable. *Bryson*, 627 F.3d at 790.

As previously stated, Palmer testified that, prior to his deposition taken in this case, he had never heard that Cook had coerced a confession. [Doc. #175-41, p. 94:10-12]. Murphy has presented no evidence suggesting that Palmer was aware of Cook's alleged misconduct.[23] Nor has Murphy offered any evidence that Palmer ratified the alleged deficiencies in the investigation. Thus, no genuine issue of material fact as to ratification exists.

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[23] Murphy does assert that Palmer's statement that interrogators had "full authority" is "at least as reprehensible as ratification." [Doc. #338, p. 39]. However, the Tenth Circuit has declined to recognize "hybrid" theories of municipal liability, *Cacioppo*, 528 F. App'x at 934, and, as previously discussed, there is no evidence of an unconstitutional policy or custom. Further, during the dispositive motion hearing held in this matter, Murphy cited to Cook's training records, produced as COT 646-COT 647. However, Cook's training records have no bearing on Palmer's knowledge of Cook's specific decisions in the Murphy investigation.

5. Failure to Adequately Train or Supervise Employees

Murphy's case primarily relies upon theories of failure to train and supervise. The court will separately consider each theory.

a. Failure to train

As previously mentioned, the U.S. Supreme Court has held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. However, such circumstances are "limited"—"[a] municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). The *Connick* Court went on to state:

> "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his actions." *Bryan Cnty*., 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.

Id. at 61-62. Due to this stringent standard of fault, "[a] pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Id.* at 62. However, the Supreme Court has not foreclosed the possibility that, in rare circumstances, "the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." *Id.* at 64. Such rare circumstances in which deliberate indifference may be found absent a pattern of unconstitutional conduct exist when a municipality fails to train

employees in "specific skills needed to handle recurring situations, thus presenting an obvious potential for constitutional violations." *Barney v. Pulsipher*, 143 F.3d 1299, 1308 (10th Cir. 1998).

In this case, there is no evidence of a pattern of similar constitutional violations during the interrogation of citizens. Although Murphy cites the LaRoye Hunter case, as previously discussed, one prior incident does not constitute evidence of a *pattern* of constitutional violations sufficient to provide notice of a deficiency likely to result in a violation of constitutional rights.

Nor is this a situation in which deliberate indifference may be found absent a pattern of unconstitutional conduct. Murphy has presented no additional evidence of inadequate training in interrogations or investigations more broadly. Rather, it is undisputed that, at the time of Murphy's interrogation, the basic training for TPD officers, detectives, and supervisors was approximately fourteen weeks at the TPD police academy. The police academy included a legal block on Constitutional rights, statutes, and ordinances, as well as instruction on *Miranda* warnings, interviewing, interrogations, and juvenile law. [CSOMF at ¶ 56; Doc. #175-40, ¶ 3; Doc. #175-44, ¶¶ 9 and 11]. From at least 1978 to 2003, in order to maintain CLEET (Council of Law Enforcement Education and Training) certification, all TPD officers were required to attend forty hours of in-service training yearly that included current legal procedures, and every officer also received monthly legal bulletins regarding new ordinances, statutes, and court decisions. [CSOMF at ¶ 57; Doc. #175-41, p. 14]. The evidentiary materials submitted demonstrate that the legal bulletins included training as to U.S. Supreme Court decisions examining the *Miranda* decision in three distinct areas—traffic stops, the public safety exception, and interruption to request counsel [Doc. #231-2]; issues involved in confessions, including whether a suspect can be threatened or promised leniency [Doc. #231-3]; the Supreme Court's decision in *Arizona v. Roberson*, 486 U.S. 675 (1988), regarding statements and confessions [Doc. #231-4]; questioning of juveniles [Doc.

#231-5]; and statements and confessions from persons under eighteen [Doc. ##231-6; 231-7]. By 1988, all officers assigned to the Detective Division were required to complete forty hours of training in interrogations, arrest warrants, search warrants and affidavits. Officers assigned to the Homicide Unit also completed this additional forty hours of training. [CSOMF at ¶ 58].

Citing the Eastern District of Oklahoma's decision in *Ibarra v. City of Tahlequah*, Murphy argues that these undisputed facts establish only a baseline of training, and that the court must consider the adequacy of training "in light of the surrounding circumstances." *See* [Doc. #396, pp. 5-6 (citing *Ibarra v. City of Tahlequah*, No. 12-CV-0098-JHP, 2013 WL 1991546, at *11 (E.D. Okla. May 13, 2013)]. However, in *Ibarra*, the court noted evidence only that Tahlequah police officers received the training required for CLEET certification and were required to read the Policy and Procedure Manual. *Id.* This evidence was "not dispositive because every department requires different training depending on that past conduct by officers in a department and the situations officers are likely to face in the future." *Id.* Here, however, the City presents undisputed evidence of the training received at TPD's police academy [CSOMF at ¶ 56; Doc #175-40, ¶ 3; Doc. #175-44, ¶¶ 9 and 11]; by TPD officers assigned to the Detective Division [CSOMF at ¶ 58]; and legal bulletins issued to TPD [Doc. #231-2 to #231-7]. Thus, unlike in *Ibarra*, the City presents evidence of the training provided to members of the Tulsa police department rather than relying solely on statewide CLEET certification or statements of policy.[24] Furthermore, the Tenth Circuit previously declined to require more than a baseline level of training, finding "no reason to conclude that [defendant] received constitutionally deficient training" where the evidence demonstrated that

[24] Moreover, unlike in this case, Ibarra presented sufficient evidence to establish notice to the final policymaker of potential constitutional violations. *Id.* at *12. Thus, *Ibarra* was not based on a single-incident theory of *Monell* liability.

the jailer completed a state certified basic officer training program and a single correctional officer course after he was hired. *See Barney*, 143 F.3d at 1308.

Murphy also contends a genuine dispute of material fact exists based on the *content* of the training provided, arguing that the City presents no evidence that it specifically forbid threats in post-*Miranda* interrogations.[25] However, the Supreme Court has rejected this level of nuance, noting, "[section 1983] does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States." *Connick*, 563 U.S. at 68. "[I]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Id.* at 67 (quoting *City of Canton*, 489 U.S. at 392). However, "showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability." *Id.* at 68. A plaintiff must do more than prove "that an injury or

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[25] At least one legal training bulletin, issued on October 16, 1987, stated that:

> Any coercion, physical or mental, which causes the suspect to waive his rights will invalidate his statement. **Threats are strictly forbidden, but often there is little or no difference between a promise and a threat**. Generally, promises of leniency should be avoided . . . . [I]t is permissible to tell a suspect that if he cooperates the prosecutor will be informed of his cooperation.

[Doc. #231-3, at COT 11.0014 (emphasis added)]. Although Murphy asserts that the October 16 bulletin is limited to pre-*Miranda* interrogations, and therefore does not prohibit threats in post-*Miranda* interrogations, Murphy's interpretation is contrary to the legal bulletin interpreted as a whole. The bulletin purports to be "a concise statement of the issues involved in confessions," [Doc. #231-3, at COT 11.0010], and discusses a broad range of topics related to the voluntariness of confessions generally, including threats or coercion, intoxicated or mentally disabled suspects, questioning juveniles, and suspects known to lie. *See generally* [Doc. #231-3]. Moreover, Murphy's sur-reply argument tacitly concedes that the TPD officers received training forbidding threats in pre-*Miranda* interrogations.

accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct." *City of Canton*, 489 U.S. at 391.

For the most part, Murphy premises her failure to train claim on the City's purported failure to train police officers in the alleged "particular injury-causing conduct"—specifically, a prohibition of threats or promises during post-*Miranda* interrogations. Murphy claims the City omitted training specific to post-*Miranda* interrogations and points to additional training which she alleges would have prevented her constitutional injury. However, this type of theory is insufficient as a matter of law to establish *Monell* municipal liability. Murphy must do more than point to additional training that would have been helpful. For the same reasons, Murphy's claim that a TPD regulation—part of the "Police Officer Bill of Rights"—which forbade the use of threats or promises during interrogations of police officers, coupled with the lack of a similar written prohibition applicable to interrogations of ordinary citizens, amounts to a failure to train is deficient. Again, Murphy claims that the City omitted specific training as to the alleged "particular injury-causing conduct," which is insufficient for municipal liability.

Nor does Murphy come forward with other evidence pertaining to the adequacy of the training received through the TPD police academy, CLEET certification, Detective Division training, and legal bulletins so as to create a genuine dispute of material fact as to whether the City provided constitutionally deficient training. *See Barney*, 143 F.3d at 1308. Murphy relies upon Cook's training records and deposition testimony to dispute the constitutional adequacy of TPD's training policies. However, evidence of a city's failure to train a single officer is insufficient to demonstrate a department-wide inadequacy. *See Meas v. City & Cnty. of San Francisco*, 681 F. Supp. 2d 1128, 1142 (N.D. Cal. 2010) ("A *Monell* claim will fail where the plaintiff provides evidence as to only a single officer, rather than evidence regarding department-wide inadequacy

in training.") (citing *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007)).[26] Additionally, Murphy's interpretation of Cook's deposition testimony is not supported by the transcript. Citing Cook's deposition testimony in this matter, Murphy alleges "Cook had no training that there were Constitutional limitations in interrogations." [Doc. #338, p. 4]. However, Cook testified at his deposition in 2017 that he did not know whether he knew in 1994 that there were constitutional limitations on the conduct of interrogations, not that he did not receive training on the constitutional limitations of the conduct of interrogations.[27] [Doc. #339, Exh. 162, p. 55:5-8]. In fact, Cook testified in 2017 that he could not recall any training he received in 1994 or the years prior. [Doc. #339, Exh. 39, p. 60:9-24].

Likewise, the expert report of Dr. Michael Lyman does not create a disputed issue of fact regarding the adequacy of TPD's training procedures. Dr. Lyman identifies additional policies that he believes the City should have had in place. Dr. Lyman's proposed policies generally relate to the "do's and don'ts of interrogations," including prohibitions against threats and promises.[28]

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[26] Murphy also alleges that Cook's then-supervisor, Sergeant Allen, was inadequately trained. [Doc. #338, pp. 35-36]. However, Allen testified that he received training in interrogations during basic investigative training, and that he also received in-service training classes (although he could not recall if the content included interrogations), classes outside of the police department, and training on the current law made available by the district attorney's office. [Doc. #339, Exh. 60, p. 16:14-25 and p. 17:1-2, 6-8]. Although Allen did not testify that he received specific training that threats were unconstitutional or prohibited in post-*Miranda* interrogations, as previously stated, the Supreme Court does not require this level of nuance. *Connick*, 563 U.S. at 68. Thus, Murphy fails to present evidence sufficient to create a dispute as to the adequacy of the training received. *See Barney*, 143 F.3d at 1308.

[27] Similarly, Cook testified in 2017 that he could not recall whether he had any training that presenting a coerced confession at trial violated substantive due process or whether he had heard that coercion could be mental as well as physical, not that he never received any training regarding constitutional limitation on interrogations. *See* [Doc. #339, Exhs. 158 and 159].

[28] Dr. Lyman's report does not identify additional policies he believes the City should have had in place apart from interrogations. [Doc. #339, Exh. 178, pp. 29-31]. Murphy has presented no other

However, it is undisputed that TPD officers received training regarding interrogations, including a legal block during basic training, yearly in-service training, and periodic legal training bulletins.[29] [CSOMF at ¶¶ 56-57]. At least one legal training bulletin specifically forbade promises and threats. [Doc. #231-3, at COT 11.0014]. *See Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir. 2009) ("[A]s with any motion for summary judgment, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts.'") (quoting *York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008)); *Heiman v. United Parcel Serv., Inc*., 12 F. A'ppx 656, 664 (10th Cir. 2001) ("Summary judgment is appropriate when an ill-reasoned expert opinion suggests the court adopt an irrational inference, or rests on an error of fact or law.") (quoting *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 531 n.12 (5th Cir. 1999)). Further, neither Murphy nor Dr. Lyman present any evidence or authority that some of Dr. Lyman's suggested policies or training were constitutionally required. *Compare, e.g.*, [Doc. #191-9, pp. 29-30 (suggesting training or policies that investigators record interrogations in their entirety) *with United States v. Short*, 947 F.2d 1445, 1451 (10th Cir. 1991) (police are not required to record statements)]. *See also Parker v. City of Tulsa*, No. 16-CV-0134-CVE-TLW, 2017 WL 1397955, at *4 (N.D. Okla. Apr. 18, 2017), *aff'd*, — F. App'x —, 2018 WL 4026442 (10th Cir. Aug. 22, 2018) ("Plaintiff does not present any evidence that specific, written child abuse

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evidence of a constitutional inadequacy in TPD's training program regarding investigations generally. Thus, Murphy has failed to show a constitutional inadequacy in TPD's training program regarding the conduct of investigations.

[29] It is unclear whether Dr. Lyman received these materials to review, as Dr. Lyman states only that he reviewed "Miscellaneous Wayne Allen Training Reports," "Miscellaneous Departmental Memoranda," and "Miscellaneous Certificates of Training." [Doc. #191-9, pp. 35-37].

investigation policies were ubiquitous in police departments at the time."); *Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (generalized deficiencies in training are insufficient). Finally, Dr. Lyman's suggestions require more nuance than demanded by the Constitution. *Connick*, 563 U.S. at 68. The court cannot exercise its authority to micromanage the City by imposing such requirements.

Finally, Murphy argues that Palmer's testimony that TPD officers had "full authority" to conduct interrogations amounts to training police officers to violate the Constitution. As an initial matter, Murphy presents no evidence that Palmer actively trained officers to violate the Constitution, and her argument invites the court to take a logical leap. Further, as previously discussed, Murphy presents no evidence to create a genuine dispute of material fact as to the constitutionality of the City's formal policies. Thus, Murphy's argument rests upon a faulty premise—that the City adopted an unconstitutional formal policy—and Palmer's testimony fails to create a disputed issue of material fact.

The City presents undisputed evidence that TPD officers received training regarding interrogations, constitutional rights, and legal issues implicated by interrogations. Murphy presents no evidence to dispute the adequacy of the instruction received. Thus, no genuine issue of material fact exists as to the adequacy of the training provided to TPD officers.[30]

Although the court finds no reason to question the adequacy of the City's training, a more fundamental flaw exists as to Murphy's failure to train theory of liability: Murphy provides no

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[30] Nor is the court persuaded by the cases cited by Murphy. In her sur-reply, Murphy cites *Garner v. Memphis Police Dep't*, 8 F.3d 358 (6th Cir. 1993), *O'Brien v. City of Grand Rapids*, 23 F.3d 990 (6th Cir. 1994), and *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616 (5th Cir. 2018). First, the case law cited is neither binding nor precedential upon this court. Further, neither *Garner* nor *O'Brien* premised liability on a failure to train theory, and *Littell* was decided a motion to dismiss, not a motion for summary judgment.

evidence "of how the City had notice that its actions (or failures to act) were likely to result in constitutional violations," and "how the City consciously chose to disregard the risk of harm." *Carr v. Castle*, 337 F.3d 1221, 1229 (10th Cir. 2003).

Murphy describes the City's alleged failure to prohibit threats in post-*Miranda* interrogations as a "policy of inaction" and points to Cook's testimony that he would have "paid attention to what was in his training." *See* [Doc. #396, pp. 4-5 (citing Doc. #396-4, p. 250:6-17)]. However, the Tenth Circuit rejected a similar argument in *Carr*, noting "[t]he touchstone of this inquiry . . . is the risk inadequate training poses and the City's awareness of that risk." *Carr*, 337 F.3d at 1229 (quoting *Brown v. Gray*, 227 F.3d 1278, 1288-89 (10th Cir. 2000)). Thus, "a finding of 'deliberate indifference' in [a *City of Canton*] situation requires a showing that 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Id.* (quoting *City of Canton*, 489 U.S. at 390). Here, as in *Carr*, Murphy primarily argues officers received inadequate training as to the prohibition of threats in post-*Miranda* interrogations, rather than pointing to any evidence of a deliberate choice by the City or a final policymaker regarding the training offered. Argument regarding the absence of specific training "merely demonstrate[s] the omniscience of hindsight," and does not create a genuine dispute of material fact as to deliberate indifference. *Id.* at 1230. *But cf. Allen v. Muskogee, Okla.*, 119 F.3d 837 (10th Cir. 1997) (relying on testimony that officers acted in accordance with specifically identified training that was contrary to training provided throughout the United States, rather than the absence of training).

Nor is this case analogous to *Brown v. Gray*, a case in which the Tenth Circuit concluded sufficient evidence existed to create a disputed fact as to deliberate indifference. *See Brown v.*

Gray, 227 F.3d 1278 (10th Cir. 2000). In *Brown*, a civil rights case arising from a shooting by an off-duty police officer, the final policymaker "testified repeatedly that a conscious decision was made not to distinguish between on-shift and off-shift scenarios in the training program." *Id.* at 1289. Here, Murphy points to Palmer's testimony that it was his role to keep officers up to date on legal matters, that written policies setting forth the broad outlines of the Constitution were required, and that he did not know why the policy manual did not include a prohibition against threats or promises. *See* [Doc. #396, pp. 4-5]. However, Murphy submits no evidence of a deliberate choice by the City not to train officers regarding the use of threats or promises in post-*Miranda* interrogations. Rather, Palmer's testimony belies any inference of a deliberate choice, as he testified he "did not know" why the manual included did not include the post-*Miranda* prohibitions on threats or promises.

Additionally, as discussed above by this court, the Constitution does not require the level of specificity demanded by Murphy in police training.[31] *Connick*, 563 U.S. at 68. Rather, in light of the undisputed evidence regarding TPD's training, this situation most closely approximates those cases in which the Tenth Circuit has concluded that the potential for a constitutional violation was not "highly predictable or plainly obvious." *Cf. Bryson*, 627 F.3d at 789 ("We are not persuaded, however, that it was highly predictable or plainly obvious that a forensic chemist would decide to falsify test reports and conceal evidence if she received only nine months of on-the-job training and was not supervised by an individual with a background in forensic science."); *Barney*,

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[31] In fact, Palmer testified that, although he agreed TPD should have written policies setting forth at least the broad outlines of constitutional rights, including in interrogations, he "[did not] think you can be specific in the application of the Constitution with every policy that you have. I mean, you can state certainly unequivocally that officers should follow the Constitution and whatever is in the Constitution. To write a policy for every facet or intricacy of the Constitution is impossible." [Doc. #396-3, p. 17:13-18].

143 F.3d at 1308 ("Specific or extensive training hardly seems necessary for a jailer to know that sexually assaulting inmates is inappropriate behavior."). Murphy presents no evidence of the need for additional training to understand that threats were prohibited in post-*Miranda* interrogations, particularly where it is tacitly conceded that officers were forbidden from threatening interogees in pre-*Miranda* situations.

Thus, Murphy has presented no evidence of a constitutional inadequacy in TPD's training program. Additionally, Murphy has failed to present evidence of deliberate indifference for purposes of § 1983 liability. Accordingly, no genuine dispute of material fact exists as to Murphy's § 1983 failure to train claim.

b. Failure to Supervise

The Tenth Circuit applies the same standard to failure to supervise claims. *See Schepp v. Fremont Cnty., Wyo.*, 900 F.2d 1448, 1454 (10th Cir. 1990). Thus, to withstand summary judgment, Murphy "must provide evidence of a failure to supervise, which amounts to deliberate indifference to the federal rights of persons with whom the [TPD officers] come into contact, and that there is a direct causal link between the constitutional deprivation and the inadequate supervision." *King v. Glanz*, No. 12-CV-137-JED-TLW, 2014 WL 2838035, at *2 (N.D. Okla. June 23, 2014).

In support of her failure to supervise theory, Murphy primarily relies on the following deposition testimony of Palmer:

> Q: How can an interrogator be supervised in respect of (sic) his interrogations without a video camera with sound or a tape recorder going at all times during the interrogation?
>
> A: He can be supervised by the supervisors sitting in on the interrogation if he so chooses. That's not possible all the time, obviously. That's not possible to video or audio at all times. So the supervision of any one individual in an interrogation is not continual.

> Q: So that when a person is an interrogator and they are alone with a suspect, there is no supervision of that interrogation in those circumstances. Correct?
>
> A: That's correct.

[Doc. #339, Exh. 73, p. 85:6-18]. Murphy also cites to Allen's deposition testimony that he never received a report on tactics used during an interrogation, [Doc. #339, Exh. 142, p. 22:5-25], as well as Allen's alleged lack of training. However, even when viewed in the light most favorable to Murphy, this evidence does not give rise to an inference of deliberate indifference by the City.

To satisfy the deliberate indifference standard, Murphy must show that "the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Barney*, 143 F.3d at 1307. Murphy has presented no evidence that the City's alleged failure to supervise interrogations was substantially certain to result in constitutional violations.

As previously stated, prior to his deposition, Palmer had never heard that Cook coerced a confession and therefore had no notice, actual or constructive, of any potential risk for harm resulting from Cook's interrogation of Murphy without physically present supervision during Murphy's interrogation. Nor has Murphy offered any evidence that Allen, Cook's immediate supervisor, was aware of any potential constitutional risk posed by Cook. In fact, there is no evidence that TPD was aware of a constitutional risk posed by *any other* TPD officer. Thus, Murphy has failed to show that the City had actual or constructive notice of a substantial certainty for a potential constitutional violation such that the City was "deliberately indifferent." *See Estate of Smith v. Silvas*, 414 F. Supp. 2d 1015 (D. Colo. 2006).

c. Direct Causal Link

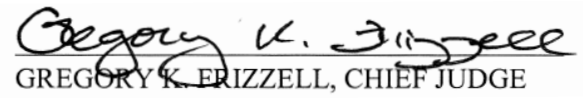
As previously discussed, Murphy alleges that the City's training and supervision regarding interrogations and investigations was deficient. In order for liability to attach in a failure to train or supervise case, the identified deficiency in a city's training program must be "closely related to the ultimate injury, so that it actually caused the constitutional violation." *Carr v. Castle*, 337 F.3d 1221, 1231 (10th Cir. 2003) (quoting *Monell*, 436 U.S. at 691). A general lack of training or supervision is insufficient. *Id*.

The Tenth Circuit has recognized that "[t]he causal link between the officers' training and the alleged constitutional deprivation" is less direct in cases asserting that officers were not given enough training. *See Allen v. Muskogee, Okla*., 119 F.3d 837, 844 (10th Cir. 1997). Murphy provides no evidence regarding how the alleged lack of training actually caused the alleged constitutional violations. Although Dr. Lyman's report cites testimony by Cook that he would have followed written policies detailing the "do's and don'ts of interrogations," the court is unwilling to "partake of the post hoc, ergo propter hoc fallacy," of finding an adequate causal link. *See Carr*, 337 F.3d at 1231. *See also King*, 2014 WL 2838035, at *8; *City of Canton*, 489 U.S. at 391-92 ("To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident."). Further, as noted above, the City's policy prohibited promises, coercion, or touching—conduct which forms the basis of many of Murphy's allegations. In short, Murphy has failed to show that the alleged failure to train or supervise was closely related to Murphy's alleged injury such that it actually caused the alleged constitutional violation.

Although Murphy has provided some evidence of a constitutional violation, a municipality cannot be liable under § 1983 solely because its employee caused injury or damage. Murphy has failed to produce evidence of the requisite unconstitutional policy or custom. The City is therefore entitled to the entry of summary judgment in its favor.

WHEREFORE, the City of Tulsa's Motion for Summary Judgment [Doc. #175] is granted.

DATED this 27th day of August, 2018.



GREGORY K. FRIZZELL, CHIEF JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHELLE DAWN MURPHY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 15-CV-528-GKF-FHM
	)	
THE CITY OF TULSA,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the court on the Motion to Alter or Amend a Judgment Under Fed. R. Civ. P. 59(e) [Doc. No. 387] of plaintiff Michelle Dawn Murphy. For the reasons discussed below, the motion is granted in part and denied in part.

I. Background

On September 12, 1994, Travis Wood, the three-month-old son of Michelle Murphy, was found dead as a result of a stab wound to the chest and incised wound to the neck. The Tulsa Police Department, headed by then Chief Ron Palmer, oversaw the investigation of infant Wood's murder. That same day, Murphy made a statement to TPD detective Michael Cook.

On September 15, 1994, Murphy was charged with murder in the first degree in the District Court in and for Tulsa County. Murphy was convicted of the charge in November of 1995 and served twenty (20) years of a sentence of life without parole. On May 30, 2014, Tulsa County District Court Judge William Kellough vacated and set aside Murphy's conviction and, on September 12, 2014, the charge against Murphy was dismissed with prejudice.

Murphy brought this case against the City of Tulsa pursuant to 42 U.S.C. § 1983, the federal civil rights statute, seeking relief on the basis of two constitutional violations: (1) violation of

Murphy's Fifth Amendment right against self-incrimination, and (2) violation of the Fourteenth Amendment due process clause's right to a fair trial. On March 13, 2018, this court granted the City's Motion for Summary Judgment [Doc. No. 175] and entered final judgment against Murphy and in favor of the City. *See* [Doc. No. 384 and Doc. No. 386]. Murphy now requests the court to amend and reverse its order granting summary judgment in favor of the City. [Doc. No. 387].

II. Motion to Reconsider Standard

Federal Rule of Civil Procedure 59 permits a motion to alter or amend a judgment within twenty-eight (28) days of entry of the judgment. FED. R. CIV. P. 59(e). "Grounds warranting a motion to alter or amend the judgment pursuant to Rule 59(e) 'include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice.'" *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (quoting *Servants of the Paraclete v. John Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)). Thus, a Rule 59 motion is "appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* However, "[i]t is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.* That is, a Rule 59(e) motion "is designed to permit relief in extraordinary circumstances and not to offer a second bite at the proverbial apple." *Syntroleum Corp. v. Fletcher Int'l, Ltd.*, No. 08-CV-384-JHP-FHM, 2009 WL 761322, at *1 (N.D. Okla. Mar. 19, 2009) (quoting *Maul v. Logan Cnty. Bd. of Cnty. Comm'rs*, No. CIV-05-605-C, 2006 WL 3447629, at *1 (W.D. Okla. Nov. 29, 2006)).

III. Supplementation of the Record

As an initial matter, in her motion, Murphy requests permission to supplement the record—specifically plaintiff's exhibit 49—to include page 31 of the deposition transcript of Ronald Palmer, which Murphy asserts was not included in the summary judgment record "because of an

inadvertent omission."[1] [Doc. No. 387, p. 13]. Murphy argues that "it would be 'manifest injustice' to her if the Court did not allow a supplement[.]" [*Id.* p. 14]. In considering whether a "manifest injustice" exists based on failure to permit Murphy to supplement the record after the entry of judgment, the court first finds it helpful to consider the procedural history of summary judgment briefing in this matter.

On July 12, 2017, the City filed its motion for summary judgment. [Doc. No. 175]. Murphy timely responded [Doc. No. 191], and briefing closed with the City's reply on August 11, 2017 [Doc. No. 231]. Additionally, the City filed a Motion to Strike the Documents Attached as Exhibits to Plaintiff's Response to the City's Motion for Summary Judgment [Doc. No. 230], seeking an order of the court striking Murphy's exhibits to her response for failure to comply with the Local Civil Rules of the Northern District of Oklahoma. Upon review, the court concluded that Murphy's response and attached exhibits did not comply with LCvR 56.1(c) and FED. R. CIV. P. 56(c)(1) for five separate reasons. [Doc. No. 279]. Accordingly, the court granted the City's motion to strike, but permitted Murphy to file an amended response that complied with LCvR 56.1(c) and FED. R. CIV. P. 56(c)(1). [*Id.* p. 6]. The City was also permitted to file an amended reply. [*Id.*]. The court subsequently extended Murphy's deadline to file an amended response to the motion for summary judgment by an additional twenty-one days. [Doc. No. 335]. Murphy filed her amended response on October 6, 2017, and her exhibits in support thereof on October 11, 2017. [Doc. No. 339]. On February 7, 2018, Murphy requested leave to supplement her amended response "to correct Scrivener's errors," which the court granted. [Doc. No. 363 and Doc. No. 365]. Murphy filed her Errata on February 9, 2018. [Doc. No. 366].

[1] Murphy does not argue that page 31 of the deposition transcription constitutes "newly discovered evidence," and, in fact, concedes that the content of the deposition testimony of page 31 was included in two separate filings.

Based on this lengthy procedural history, the court concludes Murphy had ample time and opportunity to amend and/or supplement her response exhibits prior to the court's judgment. Further, it is inappropriate to consider evidence available and known to the moving party on a Rule 59(e) motion to reconsider. *Cf. Grynberg v. Ivanhoe Energy, Inc*., 490 F. App'x 86, 101 (10th Cir. 2012) ("When supplementing a Rule 59(e) motion with additional evidence, the movant must show . . . that the evidence is newly discovered [and] if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence.") (quoting *Comm. for the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992)). Thus, the court concludes that denial of leave to supplement would not result in a "manifest injustice" and therefore the court denies Murphy's request for leave to supplement.[2] However, as discussed below on page 11-13, even considering the testimony on page 31, no question of fact exists.

IV. Plaintiff's Material Undisputed Facts

Murphy next argues that FED. R. CIV. P. 56(c) required the City to address plaintiff's "material undisputed facts" contained in her response brief and, because the City failed to do so, her "material undisputed facts" should be considered undisputed for purposes of the City's motion. [Doc. No. 387, pp. 11-13]. However, neither FED. R. CIV. P. 56 nor LCvR 56.1 require the City to address plaintiff's additional facts or the court to deem them undisputed.

[2] To the extent Murphy objects to the court's failure to consider page 31 of Palmer's deposition transcript because it was included in the court's record—although not appended to the amended response to the motion for summary judgment—"[t]he Court has no obligation to scour the record in search of evidence to support any factual assertions, and where inadequate record citations have been made, the court has ignored them." *Lucas v. Office of the Colo. State Pub. Def.*, No. 15-CV-00713-CBS, 2016 WL 9632933, at *5 (D. Colo. Aug. 25, 2016)

Pursuant to FED. R. CIV. P. 56,

> [a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a). Rule 56 goes on to require "[a] party asserting that a fact cannot be or is genuinely disputed" to support the assertion by citation to particular parts of the record or a showing that the materials cited do not establish the presence or absence of genuine dispute, or that the fact is not supported by admissible evidence. FED. R. CIV. P. 56(c). However, Rule 56 does not "address the *form* for making and supporting fact assertions." 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.81(3)(b)(i) (3d ed. 2014) (emphasis added). Rather, local rules generally provide the appropriate form and procedure. *Id.*

In this district, Local Civil Rule 56.1 governs summary judgment procedure. LCvR 56.1. Pursuant to LCvR 56.1, a movant's motion for summary judgment brief "shall begin with a section that contains a concise statement of material facts to which the moving party contends no genuine issue of fact exists." Each fact "shall be numbered and shall refer with particularity to those portions of the record upon which movant relies." LCvR 56.1(b). Relative to the non-movant's response brief,

> The response brief in opposition to a motion for summary judgment . . . shall begin with a section that contains a concise statement of material facts to which the party asserts genuine issues of fact exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies and, if applicable, shall state the number of the movant's facts that it is disputed. All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party.

LCvR 56.1(c).

As contemplated by LCvR 56.1(c), Murphy's response to the City's motion for summary judgment begins with a section titled "Disputed City Material Facts," which states the City's material facts to which Murphy asserts a dispute existed. Although, as discussed on pages 2 through 8 of the subject Opinion and Order, portions of this section do not comply with LCvR 56.1's requirements, the Disputed City Material Facts section amounts to "a concise statement of material facts to which [Murphy] asserts genuine issues of fact exist." However, the response then includes a completely separate section, titled "Plaintiff's Material Undisputed Facts (which further preclude summary judgment)." Local Civil Rule 56.1 does not contemplate or provide for a second, separate section setting forth additional "undisputed facts" of the non-movant. Nor does LCvR 56.1 require these facts to be treated as undisputed if not specifically converted by the movant in reply. In fact, although the rule provides that "[a]ll material facts set forth in the statement of the material facts *of the movant* shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party," the rule is silent as to material facts put forth by the nonmovant. Thus, the court was not obligated to deem Murphy's "Material Undisputed Facts" as admitted for purposes of summary judgment. *See Ciomber v. Coop. Plus, Inc.*, 527 F.3d 635, 643 (7th Cir. 2008) ("District courts are entitled to expect strict compliance with [local rules], and a court does not abuse its discretion when it opts to disregard facts presented in a manner that that does not follow the Rule's instructions.") (internal citations and quotations omitted).

As set forth in this court's Opinion and Order, the court considered plaintiff's additional facts "[t]o the extent that Murphy identifies a numbered material fact of the City relative to which she cites with particularity to the evidentiary record to demonstrate a dispute as required by LCvR 56.1(c)[.]" [Doc. No. 384, p. 7]. However, neither FED. R. CIV. P. 56 nor LCvR 56.1(c) required

the court to deem Murphy's additional facts as undisputed or otherwise comb through the record to compile the relevant facts. *Stallings v. Werner Enters.*, 598 F. Supp. 2d 1203, 1210 (D. Kan. 2009). Accordingly, there is no manifest injustice in not deeming plaintiff's additional facts undisputed, and the court declines to alter or amend its judgment on this basis.

V. Analysis of Motion to Alter or Amend Under FED. R. CIV. P. 59(e)

Murphy argues that reconsideration is appropriate for a variety of reasons, which can be broadly grouped into four separate arguments: (1) the City failed to demonstrate the absence of a genuine issue of material fact concerning the knowing presentation of a false confession at trial, or, in the alternative, a genuine issue of material fact exists regarding the knowing presentation of a false confession at trial; (2) the City failed to meets its burden to show no genuine issue of material fact exist concerning its formal policies or, alternatively, a question of fact exists as to the City's formal regulations and policies; (3) the City failed to meets its burden to show no genuine issue of material fact concerning training provided on the constitutional limitations of interrogations or, alternatively, a genuine issue of material facts exists as to the failure to train claim; and (4) a genuine issue of material fact exists as to the failure to supervise claim. The court will separately consider each argument.

A. Knowing Presentation of a False Confession at Trial

In her Rule 59(e) motion, Murphy asserts that the City violated her Fourteenth Amendment rights in three separate ways: (1) obtaining a coerced confession; (2) conducting a reckless investigation; and (3) Cook presenting the allegedly coerced confession, which was false, at trial. Murphy argues that the City failed to carry its summary judgment burden as to the presentation of the allegedly coerced, false confession at trial.

The court agrees that the City did not meets its burden as to whether the presentation of the allegedly coerced confession at Murphy's criminal trial amounted to a constitutional violation. As set forth in the Opinion and Order, the "evidentiary materials, viewed in the light most favorable to non-movant Murphy, establish a genuine issue of material fact as to whether Cook violated Murphy's Fifth Amendment right against self-incrimination during the September 12, 1994 interrogation." [Doc. No. 384, p. 23]. It is well established that a violation of the Fifth Amendment's right against self-incrimination does not occur until the coerced statement is used against the defendant in the criminal case. *See Chavez v. Martinez*, 538 U.S. 760, 767 (2003). It is undisputed that Murphy's September 12, 1994 statement was admitted into evidence during Murphy's criminal trial. [Doc. No. 384, p. 14]. Accordingly, the court concluded that a question of fact existed as to whether Murphy's Fifth Amendment constitutional right against self-incrimination was violated.[3]

To the extent that Murphy's motion to alter or amend asserts that the court must recognize a separate, Fourteenth Amendment claim *based on the very same conduct*, the court disagrees. The U.S. Supreme Court is "reluctant to expand the concept of substantive due process." *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994). Thus, "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Murphy claims that the City violated her Fourteenth Amendment right through presentation of a false, coerced confession. *See* [Doc. No. 36, ¶ 65]. Accordingly, Murphy's

[3] The Fifth's Amendment's right to self-incrimination is applicable to the states by virtue of the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

Fourteenth Amendment claim regarding presentation of the false, coerced confession at Murphy's criminal trial does little more than repackage Murphy's Fifth Amendment claim, and the Fifth Amendment, not the Fourteenth Amendment, must be the guide for analyzing the claim.[4] *See Lanza v. City of Chicago*, No. 08-C-5103, 2009 WL 1543680, at *4 (N.D. Ill. June 2, 2009).

Murphy does not argue that City failed to meets its burden or otherwise adequately address her asserted Fifth Amendment violation based on presentation of the confession. As such, Murphy's assertion that the City failed to meet its burden to demonstrate the absence of a genuine issue of material fact concerning the presentation of the confession at trial in violation of the Fourteenth Amendment does not warrant reconsideration, alteration, or amendment of the judgment under Rule 59. Murphy cannot show entitlement to Fourteenth Amendment relief and therefore no manifest injustice exists.

[4] Murphy's motion for summary judgment response and Rule 59 motion cite *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1990) and *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004) as supporting a separate Fourteenth Amendment claim for presentation of the false, coerced confession. Neither case is persuasive to this court. In both *Robinson* and *Pierce*, the false testimony or evidence originated from a third-party, and was not a self-incriminating statement made by the defendant. *Robinson*, 895 F.2d at 655-56 (knowing presentation of false statements by witnesses); *Pierce*, 359 F.3d at 1283 (DNA test results). Murphy's constitutional claim is based solely on the alleged false, coerced confession, and Murphy includes no evidence or argument regarding the presentation of any other false evidence in either her motion for summary judgment response or Rule 59 motion. *See* [Doc. No. 338, p. 29 ("The Jury May Find The Trial Violated the Fourteenth Amendment Right to a Fair Trial As the Result of (1) Cook's Presentation of *a Confession He Knew Was False* . . . .," and "Despite the First Amended Complaint's allegations of Cook's obtaining a *false confession* . . . .") (emphasis added), p. 39 ("Presentation of . . . (2) a False Confession . . . ."), p. 40 ("The Jury May Find That Failure To Supervise Caused (1) the False and/or Coerced Confession . . . ."); Doc. No. 387, pp. 7-9; *see also* Doc. No. 36, ¶¶ 65 and 404]. *See Young v. Dish Network, LLC*, No. 13-CV-114-JED-PJC, 2016 WL 6610828, at *1 (N.D. Okla. July 21, 2016) (where movant fails to cite to evidence to support Rule 59 argument, reconsideration is improper).

B. Formal Policies

1. Unconstitutional Policy on Threats of Loss of Children

Murphy next argues that the City failed to meets its burden to show that no genuine issue of material fact exists as to its unconstitutional policies on threats and promises—specifically, by not having policies prohibiting threatening homicide suspects with loss of their children if they do not confess. The court concludes that Murphy failed to adequately raise this issue in prior briefing and therefore consideration of this new issue is improper.

Murphy points to two paragraphs in the Amended Complaint as providing the City notice of this theory. *See* [Doc. No. 387, pp. 9 (citing Doc. No. 36, ¶¶ 302 and 359)]. Paragraph 302 of the Amended Complaint states "[t]he Final Policymaker was deliberately indifferent to depriving Tulsa citizens of their Fourteenth Amendment right to a Fair Trial by having the policy failures *set forth below in Paragraphs 303 to 368*." [Doc. No. 36, ¶ 302 (emphasis added)]. Although paragraph 359 alleges the City had no written policy prohibiting threatening homicide suspects with loss of their children if they do not confess, the Amended Complaint includes sixty-four other paragraphs of alleged unconstitutional policy failures, few of which are actually relied upon by Murphy at any point prior to her Rule 59(e) motion. In fact, both in written response to the motion and during the dispositive motion hearing, plaintiff's counsel argued that the City had *two* unconstitutional policies concerning constitutional limitations on interrogations: (1) that the City gave "full authority" to its interrogators regarding the method and manner of interrogations, including the power to make threats; and (2) treating police officers different than citizens during interrogations.[5] [Doc. No. 338, pp. 39-40]. A Rule 59 motion is not an appropriate vehicle to

[5] Despite Murphy's assertion she raised the issue in her response, her Rule 59 motion includes no citation to where the issue is raised, nor can the court independently identify the claim in Murphy's response brief.

advance new arguments or claims that were available for presentation at the time of the original argument. *See Sw. Aviation Specialists, LLC v. United States,* No. 10-CV-0089-CVE-TLW, 2012 WL 162300, at **2-3 (N.D. Okla. Jan. 19, 2012).

Moreover, the City addressed the constitutionality of its policies and customs *as a whole* in its motion for summary judgment. [Doc. No. 175, pp. 41-46]. Murphy cites no authority for the proposition that the City is required to address each alleged unconstitutional policy on an individual basis. As discussed by the court in its Opinion and Order, the City presented sufficient evidence regarding the constitutionality of the City's formal policies regarding interrogations as a whole. *See* [Doc. No. 384, pp. 26-28]. Although the moving party bears the initial burden to show an absence of evidence to support the non-moving party's case, "[o]nce the moving parties meet this burden, the burden shifts to the Plaintiffs to identify specific facts that show the existence of a genuine issue of material fact." *Considine v. Newspaper Agency Corp*., 43 F.3d 1349, 1356 (10th Cir. 1994). Murphy failed to adequately raise this issue in summary judgment briefing, and therefore consideration is not warranted under Rule 59.

2. Question of Fact as to Unconstitutional Formal Policy

Murphy next argues that the evidence presented allows the jury to find the City had an unconstitutional formal policy and therefore summary judgment is inappropriate. Specifically, Murphy points to page 31 of Chief Palmer's deposition testimony for the proposition that the City permitted threats during interrogations. However, as previously stated, Murphy did not include page 31 in her response and the court declines to permit her to supplement at this point. Moreover, even if the court were to consider the testimony on page 31, the court previously concluded that any grant of "full authority" to investigators was constrained by TPD's policy requiring its officers to "defend, enforce, and obey" the Constitution. Palmer testified that the City's policies prohibited

interrogators from violating the constitutional rights of citizens. Further, TPD's written policies and the oath sworn to by all officers required officers to protect the constitutional rights of all persons.[6] *See* [Doc. No. 384, pp. 26-27]. Murphy identifies no new evidence or case law to justify reconsideration. Rather, Murphy points only to evidence and arguments included in her summary judgment briefing. *See* [Doc. No. 387, pp. 15-17]. A Rule 59 motion is not a vehicle to reurge arguments and evidence already addressed in prior briefing. *See Servants of the Paraclete*, 204 F.3d at 1012.

Nevertheless, Murphy argues reconsideration is necessary to prevent a manifest injustice, reasoning that this court improperly weighed the evidence in reaching its conclusion as to whether an unconstitutional formal policy existed providing police officers "full authority" in interrogations. [Doc. No. 387, pp. 17-19; Doc. No. 390, pp. 2-4]. However, the court rejects this argument. The City provided admissible evidence of the constitutionality of the City's policies: the Tulsa Police Department had a written policy to protect the constitutional rights of all persons [Doc. No. 106-6, COT 4]; in 1994, TPD officers were required to take an oath to "defend, enforce, and obey, the Constitution and Laws of the United States, the State of Oklahoma and the Charter and Ordinances of the City of Tulsa" [Doc. No. 106-6, COT 3]; and TPD officers were trained on

[6] In her reply, Murphy asserts that this court's consideration of the oath was improper because the court failed to include the oath in its finding of undisputed material facts. [Doc. No. 390, pp. 9-10]. Murphy points to a recitation of undisputed material facts included on page 7 of the court's Opinion and Order, interpreting the list included on page 7 as exhaustive of the undisputed material facts identified by the court. To the contrary, the court qualified the list of undisputed material facts identified on page 7 as being based solely on Murphy's failure to properly address the City's facts as required by LCvR 56.1 and FED. R. CIV. P. 56. [Doc. No. 384, pp. 7-8]. The Opinion and Order includes a separate section—titled "Undisputed Material Facts"—which includes every fact treated by the court as undisputed for purposes of the motion. That section includes TPD's written policies and oath of office. [*Id.* p. 16].

constitutional rights, statutes and ordinances, as well as interrogations [Doc. No. 175-40, ¶ 3; Doc. No. 175-44, ¶¶ 9 and 11]. The burden then shifted to Murphy to come forward with admissible evidence to demonstrate a genuine issue of material fact. *Considine,* 43 F.3d at 1356. Murphy failed to do so. Murphy did not include page 31 of Palmer's deposition testimony in her response. Further, even considering such testimony, as discussed by the court in the previous Opinion and Order, Palmer testified that TPD's policies prohibited interrogators from violating the constitutional rights of citizens. *See* [Doc. No. 384, pp. 26-27]. Accordingly, this court did not improperly weigh evidence but, instead, concluded no evidence existed sufficient to create a genuine issue of material fact. *See Helget v. City of Hays*, 844 F.3d 1216, 1223 n.3 (10th Cir. 2017); *see also Cross v. Home Depot*, 390 F.3d 1283, 1290 (10th Cir. 2004) ("But on a motion for summary judgment, 'it is the responding party's burden to ensure that the factual dispute is portrayed with particularity, without . . . depending on the trial court to conduct its own search of the record.'") (quoting *Downes v. Beach*, 587 F.2d 469, 472 (10th Cir. 1978)). Thus, the court's conclusion as to the City's alleged formal policy regarding "full authority" in interrogations does not constitute a manifest injustice, and reconsideration, amendment, or alteration of the judgment as to this issue is improper.

Murphy also challenges the court's Opinion and Order regarding the alleged formal policy that protected police officers, but not citizens, from threats during interrogations, arguing that the court failed to address the policy. *See* [Doc. No. 387, pp. 10-11; Doc. No. 390, p. 7]. However, the court addressed Murphy's claim in its Opinion and Order and Murphy puts forth no other basis to justify reconsideration of its conclusion.[7] *See* [Doc. No. 384, p. 28]. Moreover, contrary to

[7] In her reply, Murphy argues for the first time that the court misapprehends Murphy's claim, and that Murphy does not contend that the lack of a policy itself is a policy. [Doc. No. 390, p. 7]. However, Murphy's reply is contrary to Murphy's own assertions in her Rule 59 motion in which

Murphy's assertions, the court devoted five pages of its Opinion and Order to the City's training on the constitutional limits of interrogation, which would include the protection of citizens. *See* [Doc. No. 384, pp. 33-38]. A Rule 59(e) motion "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Servants of the Paraclete*, 204 F.3d at 1012.

C. Training Provided on the Constitutional Limitations of Interrogations

Finally, Murphy argues that the City failed to carry its burden as to the training provided by the City on the constitutional limitations of interrogations or, alternatively, that a genuine issue of material fact exists.

Murphy argues that the City failed to put forth sufficient evidence of the *content* of its training regarding constitutional limitations on interrogations, and specifically objects to the court's consideration of material appended to the City's reply in support of its motion for summary judgment. *See* [Doc. No. 387, pp. 11 and 26-29]. Initially, the court notes that other district courts in this circuit have concluded that consideration of evidentiary material responding to matters placed in issue by the opposition brief that is attached to a reply is appropriate. *See, e.g., Altamirano v. Chem. Safety & Hazard Investigation Bd.*, 41 F. Supp. 3d 982, 993-94 (D. Colo. 2014). However, this court previously stated that it would not consider new evidence appended to the City's reply, and denied Murphy a sur-reply on that basis. [Doc. No. 249].

Insofar as the court considered the City's evidence of the content of its training regarding constitutional limitations on interrogations, which was amended to the City's reply, the court shall

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she states "the jury may find a policy of not protecting citizens from threats and promises, from the omission of protecting citizens, *by considering the complete absence of a policy* anywhere else that protects them . . . ." [Doc. No. 387, p. 10 (emphasis added)]. Murphy did not raise the alleged misapprehension of Murphy's position in her Rule 59 motion, and the court will not address the argument raised for the first time in the reply.

grant Murphy leave to file a sur-reply to address that evidence. Accordingly, the court withdraws that portion of its Opinion and Order granting summary judgment as to Murphy's failure to train claim. Murphy shall file a sur-reply of no more than five (5) pages addressing exhibits 2 through 7 appended to the City's amended reply no later than August 22, 2018. The court will then issue a separate order addressing Murphy's motion to reconsider as to the failure to train claim premised on a Fifth Amendment violation.

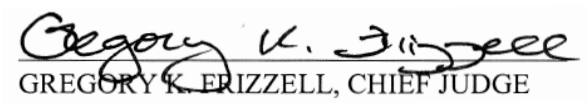
D. Failure to Supervise

Finally, Murphy argues that evidence of failure to supervise precludes summary judgment. *See* [Doc. No. 387, pp. 29-30]. However, Murphy points only to evidence previously offered during briefing on the motion for summary judgment, and offers no new arguments. In fact, much of the evidence raised in Murphy's Rule 59 motion regarding failure to supervise relates to the City of Tulsa's *training* program. [*Id.*]. The evidence cited by Murphy does not provide a basis under Rule 59(e) for the court to reconsider its prior ruling granting summary judgment on this issue.

VI. Conclusion

WHEREFORE, Plaintiff Michelle Murphy's Motion to Alter or Amend a Judgment Under Fed. R. Civ. P. 59(e) [Doc. No. 387] is granted in part and denied in part. The motion is granted as to the failure to train claim premised on a Fifth Amendment violation. Murphy may file a sur-reply of no more than five (5) pages addressing exhibits 2 through 7 appended to the City's amended reply no later than August 22, 2018. The motion is otherwise denied.

ENTERED this 8th day of August, 2018.



GREGORY K. FRIZZELL, CHIEF JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHELLE DAWN MURPHY, Plaintiff - Appellant, v. THE CITY OF TULSA, Defendant - Appellee.	No. 18-5097

ORDER

Before **BACHARACH**, **McHUGH**, and **EID**, Circuit Judges.

This matter is before the court on *Plaintiff-Appellant Michelle Dawn Murphy's Petition for Panel Rehearing*. The petition is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk