No.

IN THE
Supreme Court of the United States

CITY OF CLEVELAND, KAREN LAMENDOLA, ADMINISTRATOR FOR ESTATE OF FRANK STOIKER, AND J. REID YODER, ADMINISTRATOR FOR ESTATES OF EUGENE TERPAY, JAMES T. FARMER, AND JOHN STAIMPEL,

Petitioners,

v.

RICKY JACKSON, KWAME AJAMU, FKA RONNIE BRIDGEMAN, AND WILEY EDWARD BRIDGEMAN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 17-3840/3843

RICKY JACKSON (17-3840); KWAME AJAMU, FKA RONNIE BRIDGEMAN, AND WILEY EDWARD BRIDGEMAN (17-3843),

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND; JEROLD ENGLEHART; KAREN LAMENDOLA, GUARDIAN AD LITEM ON BEHALF OF FRANK STOIKER; ESTATE OF EUGENE TERPAY, ADMINISTRATOR; ESTATE OF JAMES T. FARMER, ADMINISTRATOR; ESTATE OF JOHN STAIMPEL, ADMINISTRATOR,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland,

No. 1:15-cv-00989

Christopher A. Boyko, District Judge.

AMENDED OPINION

Argued: **June 14, 2018**
Decided and Filed: **May 20, 2019**

ARGUED: ELIZABETH C. WANG, Loevy & Loevy, Boulder, Colorado, for all Appellants.

WILLIAM M. MENZALORA, City of Cleveland, Cleveland, Ohio, for Appellee City of Cleveland.

STEPHEN W. FUNK, Roetzel & Andress, LPA, Akron, Ohio, for Appellees Karen Lamendola and the Estates of Eugene Terpay, James Farmer, and John Staimpel.

ON BRIEF: ELIZABETH C. WANG, Loevy & Loevy, Boulder, Colorado, for Appellant Ricky Jackson.

TERRY H. GILBERT, JACQUELINE C. GREENE, Friedman & Gilbert, Cleveland, Ohio, David E. Mills, The Mills Law Office LLC, Cleveland, Ohio, for Appellants Kwame Ajamu and Wiley Bridgeman.

WILLIAM M. MENZALORA, City of Cleveland, Cleveland, Ohio, for Appellee City of Cleveland.

STEPHEN W. FUNK, Roetzel & Andress, LPA, Akron, Ohio, for Appellees Karen Lamendola and the Estates of Eugene Terpay, James Farmer, and John Staimpel.

Before

Rogers, Circuit Judge

Bush, Circuit Judge*

BUSH, J., delivered the opinion of the court in which ROGERS, J., joined.

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* The Honorable Damon J. Keith, United States Circuit Judge, was a member of the original panel but passed away on April 28, 2019 and did not participate in the panel's decision on rehearing.

JOHN K. BUSH, Circuit Judge:

Appellants Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu served a long time in prison for a crime they did not commit. For Jackson, it was thirty-nine years; for Bridgeman, thirty-seven years; for Ajamu, twenty-five years. They each spent close to two and a half of those years on death row.

These men cannot get back any of the time they lost or erase the things they experienced. The best they can hope for is a remedy of damages under 42 U.S.C. § 1983 and Ohio law. This appeal concerns whether their complaints state sufficient facts for certain claims not to be dismissed and whether the men have presented enough evidence for other claims to overcome summary judgment.

In 1975, Jackson, Ajamu, and Bridgeman were convicted of murder. Their convictions were based largely on the purportedly eyewitness testimony of Edward Vernon, who then was thirteen years old. In 2014, nearly forty years later, Vernon recanted, disclosing that police officers had coerced him into testifying falsely. Vernon's recantation led to the overturning of appellants' convictions.

The exonerated men filed suit in the Northern District of Ohio, alleging § 1983 claims based on alleged violations of their constitutional rights by the officers and the City of Cleveland ("Cleveland"), along with state-law claims for indemnification against Cleveland. This appeal requires us to untangle a knot of legal issues surrounding the district court's grant of appellees' motions for judgment on the pleadings and for summary judgment and its denial of appellants' motions to amend their complaints. We **AFFIRM** the district court's grant of summary judgment as to the § 1983 claims based on conspiracy, but

we **REVERSE** and **REMAND** the district court's (1) judgment on the pleadings as to the indemnification claims; (2) denial of appellants' motions to amend their complaints to substitute the administrator of the estates of the deceased officers as a party in their place; (3) summary judgment as to § 1983 claims arising from violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), fabrication of evidence, and malicious prosecution; and (4) summary judgment as to claims against Cleveland based on *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

I. BACKGROUND

A. Factual Background

As befits this stage of the litigation, we recite the relevant facts in the light most favorable to the plaintiffs, who are appellants here. See *Ciminillo* v. *Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

In 1973, the Cleveland Division of Police promulgated General Police Order 19-73 ("GPO 19-73"), entitled "PRETRIAL DISCOVERY RIGHTS OF DEFENSE ATTORNEYS AND COURTS IN CRIMINAL CASES." R. 101-7, PageID 1630.[1] GPO 19-73 provided that "defense counsel may be entitled" to several types of evidence, including "[e]vidence favorable to the defendant." *Id.* But it also included a section entitled "EXCEPTION TO THE FOREGOING," which contained the following provision: "The foregoing does not authorize the discovery or the inspection of . . . statements made by witnesses or prospective witnesses to state agents." *Id.* The Manual of Rules used by the Division of Police (the "Manual")

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[1] All record citations are citations to the record in No. 17-3840 (Jackson's suit) unless otherwise indicated. Citations to the record in Ajamu and Bridgeman's suit will be prefaced by "No. 17-3843."

did not otherwise instruct officers in handling potentially exculpatory information and did not mention *Brady*, as the Manual's last update had occurred before *Brady* was decided.

As described later in this opinion, some testimony suggests that Cleveland police officers may have received no formal training in their *Brady* obligations, and may not have known that *Brady* imposed any obligations upon them.

Deposition testimony also reveals that, regardless of how officers understood their obligations under *Brady*, violations of those obligations were common. Although it was generally understood that anything in a detective's file that was pertinent to a case "should go to the prosecutor," it was up to individual officers whether they followed this policy, and they did not always do so. R. 103, PageID 3794. The general practice at the time, followed in "every case," was for detectives to provide prosecutors with only "arrest reports, witness forms and written statements taken by the Statement Unit," and "photos," while omitting to turn over other evidence, including potentially exculpatory evidence, unless it was specifically requested by the prosecutor. *Id.* at PageID 3672-75. Deposition testimony describes this as a "practice," which "happened more than it should," of "detectives not [turning] over all the evidence to prosecutors." R. 104, PageID 3970.

Some detectives took a more proactive role by "manipulating the evidence" before giving it to prosecutors. *Id.* at PageID 3967. This was done, one officer testified, "because winning the case was what it was all about. It wasn't about what was fair, it wasn't about what was honest, it was about winning." *Id.* at PageID 3967-68.

Against this backdrop of evidence of incomplete *Brady* knowledge and frequent *Brady* violations, the record tells the following story.

On May 19, 1975, Edward Vernon, then twelve years old, was riding the bus home from school when he heard two gunshots. Being twelve, Vernon exited the bus at the earliest opportunity and ran to where he believed the shots originated. Coming upon the scene, Vernon found a gunshot victim, but nothing to indicate who was responsible for the shooting. After police had secured the area, Vernon left and met up with a friend who told Vernon that the perpetrators were Ricky Jackson, Kwame Ajamu (then known as Ronnie Bridgeman), and Wiley Bridgeman (collectively, "Plaintiffs"). Vernon, a civic-minded youth, returned to the crime scene and told an officer that he knew who had committed the shooting, whereupon the officer recorded Vernon's contact information.

The next day, Detectives Eugene Terpay and James Farmer went to Vernon's house and requested that he go down to the station to give a statement. As Vernon later recounted, when his mother asked to accompany him to the station, the officers "told her, no, he'll be all right, he'll be all right." R. 99-1, PageID 1183. At the station, Vernon told Terpay and Farmer that Plaintiffs had committed the shooting and gave their descriptions, which he was able to do because he knew them from the neighborhood. The following day, Terpay and Farmer again went to Vernon's house and asked him for Plaintiffs' addresses.

Detective John Staimpel, along with his partner Frank Stoiker, was working the case with Terpay and Farmer. On May 25, Staimpel and another detective, whose name Vernon cannot remember, picked Vernon up at his house

to bring him to a line-up. Vernon's mother again asked to accompany him, and Vernon recalls the detectives saying, "[N]o, he'll be all right. We'll bring him back after the lineup." *Id.* at PageID 1189. The detectives brought Vernon to the line-up and, as he recollects, asked him if "I see anybody that I recognize up there," which Vernon interpreted as asking whether he had seen anyone in the line-up commit the shooting. *Id.* at PageID 1190. Vernon replied that he had not. Ricky Jackson and Wiley Bridgeman, who had been arrested earlier in the day, were in that line-up. From Vernon's point of view, he had been forthright up until this point: he had honestly told the detectives that (he thought) he knew who had committed the crime, but he had never said that he had actually witnessed the crime, and so when he was asked at the line-up whether he saw anyone whom he had seen commit the crime, he said no.

The two detectives then brought Vernon into a room, whereupon Staimpel accused Vernon of lying, threatened to send his parents to jail for perjury, banged on a table, and used racial pejoratives to describe Vernon. (Vernon and Plaintiffs are African-Americans.) After Vernon began to cry, Staimpel said, "[W]e'll fix it," and the detectives left the room. *Id.* at PageID 1191. When the detectives returned, they gave Vernon a piece of paper, explained to him that it said he had failed to identify Jackson and Bridgeman in the line-up because he had been scared of their retaliating, and told Vernon to sign it, which Vernon did.

Stoiker signed a police report dated May 25, 1975, which described Stoiker and Staimpel's picking Vernon up and taking him to the line-up, Vernon's failing to identify Jackson and Bridgeman, and Vernon's explaining

this failure as due to his being "very afraid" of Plaintiffs. R. 114-19, PageID 5113.

The day after the line-up, Terpay and Farmer again spoke with Vernon. The detectives brought Vernon to the station, where he told them that he had not witnessed the crime and that he had never said that he had witnessed the crime. Terpay was wroth, yelling at Vernon and accusing him of having lied when he had gone to the line-up and said "that this is not them." R. 99-1, PageID 1194. Terpay threatened to send Vernon's parents to jail for perjury, and Vernon agreed to testify that he had seen Plaintiffs commit the crime.

A police report dated May 28, 1975 indicates that Stoiker and Staimpel "[c]onsulted with [the prosecutor] who issued papers charging [Plaintiffs] with [homicide]." R. 114-28, PageID 5321.

Prior to Jackson's trial, Terpay coached Vernon regarding his testimony and afterwards reviewed the trial transcript with Vernon to ensure that his testimony in the trials of Bridgeman and Ajamu was consistent.

Plaintiffs were convicted at separate trials. They were sentenced to death, but their sentences were later reduced to life imprisonment.

For nearly forty years, Vernon struggled with the knowledge that his testimony had put Plaintiffs in prison. He later testified, "Through out [sic] the years this case has . . . be[en] heavy on my emotion, my everything." R. 99-2, PageID 1234. "I wanted to come forward throughout the years, but I was scared, scared to come forward and tell the truth . . . with this battle in my mind, battle in my spirit, battle in my heart . . . . I'm battling with this . . . pretty much all my life . . ." R. 99-1, PageID 1203. The years did not lessen the turmoil in Vernon's mind.

One day in 2013, Vernon finally disburdened his conscience. He was lying in a hospital bed, stricken with hypertension and kidney failure, when his pastor visited and told him that Innocence Project attorneys were seeking to exonerate Plaintiffs. Vernon testified:

> So, after he stated that and I said, okay, well, you know what—I got up out of the bed and I just broke down and I cried on his shoulder and I said, well, I'm ready to tell the truth, I'm ready to come forward and tell the truth that Ricky Jackson did not commit the crime that he went to prison for.

Id. at PageID 1203-04.

Vernon formally recanted his testimony against each of the three Plaintiffs in November 2014. After the recantation, the prosecutor for Cuyahoga County, where Cleveland is located, admitted that there was "no evidence tying any of the three convicted defendants to the crimes" and that "[t]hey have been victims of a terrible injustice." R. 116, PageID 6302-03.

B. Procedural History

On May 19, 2015, Jackson filed suit against Terpay, Farmer, Stoiker,[2] Staimpel, and Cleveland (collectively, "Defendants"), as well as others,[3] alleging a multitude of state and federal claims. Bridgeman and Ajamu filed suit against the same defendants on July 2, 2015. On October

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[2] Karen Lamendola is acting as guardian ad litem on behalf of Stoiker and is therefore the named defendant-appellee representing Stoiker's interests. We continue to refer to Stoiker as a Defendant for narrative convenience.

[3] Plaintiffs also named another former officer, Jerold Englehart, in their notices of appeal. However, in their appellate briefs, they expressly abandon their claims against Englehart. Jackson Br. at 33; Ajamu & Bridgeman Br. at 6.

1, 2015, Cleveland moved for judgment on the pleadings, under Federal Rule of Civil Procedure 12(c), as to the state-law claims in both complaints. The district court granted both motions.

In November 2015, Jackson, and Bridgeman and Ajamu in their parallel lawsuit, all moved for leave to file amended complaints substituting the administrator of the estates of the deceased Defendants (the "administrator") for those Defendants. (J. Reid Yoder is the administrator of all of the estates.) The district court denied those motions as futile, reasoning that a § 1983 claim brought in Ohio does not survive a defendant's death.

On January 27, 2017, Stoiker (the only living individual Defendant) moved for summary judgment in both lawsuits, arguing that he was not involved in any unconstitutional activity and that, even if he was, he is protected by qualified immunity. On the same date, Cleveland also moved for summary judgment as to the *Monell* claims, arguing that Plaintiffs had failed to provide evidence sufficient for a jury to find Cleveland liable. The district court granted both motions for summary judgment.

II. DISCUSSION

We review de novo a judgment on the pleadings under Federal Rule of Civil Procedure 12(c), applying the same standard we apply to review the grant of a motion to dismiss under Rule 12(b)(6). *Warrior Sports, Inc.* v. *Nat'l Collegiate Athletic Ass'n*, 623 F.3d 281, 284 (6th Cir. 2010). We therefore "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true" to determine whether the "complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Doe* v. *Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018) (citations and internal quotation marks omitted).

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend "should [be] freely give[n] . . . when justice so requires." "We review a district court's order denying a Rule 15(a) motion to amend for an abuse of discretion." *Rose* v. *Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Gen. Elec. Co.* v. *Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990)). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States* v. *Arny*, 831 F.3d 725, 730 (6th Cir. 2016) (citation and internal quotation marks omitted).

"We review a district court's grant of summary judgment de novo." *Adair* v. *Charter Cty. of Wayne*, 452 F.3d 482, 486 (6th Cir. 2006) (quoting *Allen* v. *Mich. Dep't of Corr.*, 165 F.3d 405, 409 (6th Cir. 1999)). Summary judgment is appropriate when "no genuine dispute as to any material fact" exists and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Peffer* v. *Stephens*, 880 F.3d 256, 262 (6th Cir. 2018) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). At the summary judgment stage, "the evidence is construed and all reasonable inferences are drawn in favor of the nonmoving party." *Burgess* v. *Fischer*, 735 F.3d 462, 471 (6th Cir. 2013) (citing *Hawkins* v. *Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008)).

Numerous decisions by the district court are now on appeal: (1) the district court's dismissal, with prejudice, of Plaintiffs' claims against Cleveland for indemnification under state law; (2) the district court's denial of Plaintiffs' motions to substitute the administrator of the deceased

Defendants' estates as a defendant; (3) the district court's grant of summary judgment to Stoiker on the § 1983 claims; and (4) the district court's grant of summary judgment to Cleveland on the *Monell* claims. We address each issue in turn.

A. Indemnification Claims

The claims against Cleveland under Ohio Revised Code § 2744.07(B)[4] seek indemnification for damages based on the alleged torts of the individual Defendants, who are former employees of Cleveland. Section 2744.07(B) provides that "a political subdivision shall indemnify and hold harmless an employee" found liable for that employee's acts, so long as the employee was "acting in good faith" and "within the scope of employment."[5] The district court granted Cleveland's motions for judgment on the pleadings, reasoning that § 2744.07(B) provides only a tortfeasor employee, and not a tort victim, with the right to bring a claim of indemnification against the tortfeasor's employer.

Plaintiffs argue that the district court erred in dismissing their indemnification claims with prejudice be-

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[4] At the time of the district court's opinion, the relevant language appeared in § 2744.07(A)(2), so the district court cited that provision. See *Jackson* v. *City of Cleveland*, No. 1:15CV989, 2016 WL 3952117, at *2 (N.D. Ohio July 20, 2016). Because the Ohio Revised Code has since been amended, we cite the subsection in which the relevant language now appears, subsection (B). The language has not been changed in any way that would affect the district court's, or our, analysis.

[5] Cleveland's brief does not address whether the defendant officers were acting "in good faith" and within the scope of their employment for purposes of the indemnification claims, and the district court did not consider those issues. We will not address unargued principles of Ohio law on which the district court did not rule.

cause the claims were not yet ripe and unripe claims, if they are to be dismissed, should only be dismissed without prejudice.

Generally, a claim may not be adjudicated on its merits unless it is ripe. See *Nat'l Rifle Ass'n of Am.* v. *Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). A claim is unripe when it "is anchored in future events that may not occur as anticipated, or at all." *Id.* (citing *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983); *Dames & Moore* v. *Regan*, 453 U.S. 654, 689 (1981)). This prohibition comes both from the case or controversy requirement of Article III and from prudential considerations. See *Brown* v. *Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985) (noting that a ripeness analysis includes a discretionary determination beyond the Article III standing considerations).

The ripeness doctrine exists "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967)). Application of this doctrine "requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances." *Brown*, 763 F.2d at 801. Of primary importance is "whether the issues tendered are appropriate for judicial resolution," and, if so, the degree of "hardship to the parties if judicial relief is denied" before the claim is allowed to ripen further. *Young* v. *Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981) (quoting *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967)).

Indemnification claims are frequently brought while unripe, depending as they often do on the favorable adjudication of underlying tort claims. Because of this, as a

general matter, a claim for indemnification for damages that may be awarded on an underlying tort claim should not be adjudicated on the merits until the underlying claim is adjudicated. See, *e.g.*, *Safety Nat'l Cas. Corp.* v. *Am. Special Risk Ins. Co.*, 99 F. App'x 41, 43 (6th Cir. 2004) (finding unripe a claim of indemnification for fraudulent conveyance because, among other reasons, the underlying claim for fraudulent conveyance had not yet been adjudicated); see also *Armstrong* v. *Ala. Power Co.*, 667 F.2d 1385, 1388-89 (11th Cir. 1982) (affirming dismissal of indemnity suits as premature prior to entry of judgment in underlying lawsuit); *A/S J. Ludwig Mowinckles Rederi* v. *Tidewater Constr. Co.*, 559 F.2d 928, 932 (4th Cir. 1977) (holding indemnification issue not ripe prior to adjudication of underlying claims).

Because the ripeness doctrine is discretionary, courts sometimes apply an exception for indemnification claims that have no possibility of success, regardless of the merits of the underlying claims. See, *e.g.*, *Cincinnati Ins. Co.* v. *Grand Pointe, LLC*, No. 1:05-CV-161, 2006 WL 1806014, at *9 (E.D. Tenn. June 29, 2006) (collecting cases in support of the proposition that "a court may grant summary judgment on the issue of indemnification if it can determine the allegations in the complaint could under no circumstances lead to a result which would trigger the duty to indemnify" (citations and internal quotation marks omitted)).

The Sixth Circuit has not analyzed the propriety of this exception, and we need not do so now because, even if it is permissible for district courts to adjudicate indemnification claims with no possibility of success prior to the adjudication of underlying tort claims, this is not such a case.

If Plaintiffs' indemnification claims have no possibility of success, that would be because Ohio law provides that only the tortfeasor employees, and not the parties injured by them, may bring claims under Ohio Revised Code §2744.07(B). The district court did an admirable job analyzing Ohio court cases before holding that Ohio law does so provide. See *Jackson* v. *City of Cleveland*, No. 1:15CV989, 2016 WL 3952117, at *2 (N.D. Ohio July 20, 2016). But the only cases available to the district court were from the Ohio courts of appeal, as the Ohio Supreme Court had yet to opine on the issue.

The judgments of Ohio appellate courts not being binding on the Ohio Supreme Court, there remains a possibility that Plaintiffs' indemnification claims could succeed: Plaintiffs would need to win their underlying tort action and, while that action was pending, the Ohio Supreme Court would need to adopt their interpretation of Ohio Revised Code §2744.07(B). Although the latter eventuality may seem remote, it is far from impossible and, as it happens, the Ohio Supreme Court has accepted an appeal addressing this very issue. See *Ayers* v. *Cleveland*, 106 N.E.3d 65 (Ohio 2018) (Table).

Because it is not impossible for Plaintiffs to prevail on their indemnification claims, those claims are not ripe for adjudication. As discussed above, in evaluating whether a claim is ripe, courts should determine (1) whether a matter is "appropriate for judicial resolution" and (2) whether the parties would undergo hardship "if judicial relief is denied" on their claim before it ripens further. *Young*, 652 F.2d at 625. Neither factor supports finding the indemnification claims are ripe here.

First, interpreting Ohio Revised Code §2744.07(B) is best avoided unless necessary. Federal courts generally avoid interpreting unsettled state law because state

"courts are in the better position to apply and interpret" their own jurisdiction's law. *Travelers Indem. Co.* v. *Bowling Green Prof'l Assocs., PLC*, 495 F.3d 266, 272 (6th Cir. 2007). As the Supreme Court said in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941) and repeated in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959):

> Had we or they (the lower court judges) no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of [state] law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.

Thibodaux, 360 U.S. at 27 (quoting *Pullman*, 312 U.S. at 499). Where, as here, adjudicating an issue of state law is unnecessary because the litigation is in its early stages, and state law is unsettled, the inappropriateness of deciding the issue in federal court weighs in favor of finding the claim unripe for adjudication in federal court.

Second, that no harm will befall Cleveland if "judicial relief is denied" for the time being also weighs in favor of finding the indemnification claims unripe. *Young*, 652 F.2d at 625. The district court's grant of Cleveland's motions for judgment on the pleadings as to Plaintiffs' indemnification claims did not release Cleveland from the litigation, as Plaintiffs still have Monell claims outstanding against Cleveland. The only effect that denying Cleveland's motions, or holding them in abeyance, would have on the litigation would be to delay adjudication of the indemnification claims until a later stage in the litigation. At that point, the district court may be able to avoid interpreting Ohio Revised Code §2744.07(B), because the Ohio Supreme Court may already have done so. The dis-

trict court should interpret Ohio law only if the Ohio Supreme Court has not done so by the time the underlying § 1983 claims have been properly adjudicated on remand, and if those claims are found to have merit.

The ripeness doctrine therefore requires that the indemnification claims not be adjudicated on the merits at the pleading stage, given the unsettled condition of state law. Because "a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits," the district court erred in dismissing those claims with prejudice. *Mich. Surgery Inv., LLC* v. *Arman*, 627 F.3d 572, 575 (6th Cir. 2010) (quoting *United States* v. *One Tract of Real Prop.*, 95 F.3d 422, 425-26 (6th Cir. 1996)).

B. Plaintiffs' Motions to Substitute

Plaintiffs sought leave to amend their complaints to substitute the administrator of the estates of Defendants Terpay, Staimpel, and Farmer as a party in place of those Defendants, as they are now deceased. District courts "should freely give leave" to amend a complaint pre-trial "when justice so requires." Fed. R. Civ. P. 15(a)(2). One permissible reason to deny leave is the "futility of [the] amendment[s]." *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

The district court denied leave to amend, reasoning that § 1983 claims brought in Ohio do not survive the death of the tortfeasor, and, therefore, the requested amendments would be futile.[6] On appeal, Defendants argue that the district court was correct, but also suggest an alternative ground for affirming—that Plaintiffs did

[6] The district court also denied leave to amend on futility grounds with regard to Plaintiffs' state-law claims against the deceased Defendants, but Plaintiffs do not appeal that ruling.

not timely present their claims to the estates of the deceased Defendants. We address the survival and timeliness arguments in turn.

1. Survival of § 1983 Claims

Defendants first argue that the denial of Plaintiffs' motions to amend should be affirmed because § 1983 claims do not survive the death of the tortfeasor in Ohio.

42 U.S.C. § 1988(a) provides that in actions to protect civil rights, where "the laws of the United States . . . are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held," shall be applied, "so far as the same is not inconsistent with the Constitution and laws of the United States."

The Supreme Court has interpreted this statutory language as requiring a three-step process for determining which jurisdiction's procedural law, such as provisions concerning statutes of limitations or the survival of claims, is used in § 1983 suits. See *Robertson* v. *Wegmann*, 436 U.S. 584, 588-89 (1978). First, a district court must determine whether there is an applicable federal law that covers the issue, and, if there is, apply it. See *id.* Second, if there is no relevant federal law, then the district court must determine what the appropriate rule is in the state where the district court sits. See *id.* at 588. Third, the district court must determine whether the law of that state is "inconsistent with the Constitution and laws of the United States;" if there is no inconsistency, the state law is used, but if inconsistency exists, a federal common-law rule is used. *Id.* at 588-89.

Because "[n]o federal statute or rule says anything about the survivorship of §1983 claims," *Crabbs* v. *Scott*, 880 F.3d 292, 294 (6th Cir. 2018), we turn to the relevant Ohio law, which provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

Ohio Rev. Code §2305.21. Plaintiffs argued before the district court that their claims fall within "injuries to the person," while Defendants argued that "injuries to the person" encompasses only physical injuries, and not the violation of rights alleged in this case. The district court agreed with Defendants, citing a district court case holding that under Ohio law, §1983 claims similar to those brought by Plaintiffs did not involve "injuries to the person." *Tinney* v. *Richland Cty.*, No. 1:14 CV 703, 2014 WL 6896256, at *2 (N.D. Ohio Dec. 8, 2014), aff'd, 678 F. App'x 362 (6th Cir. 2017).

On appeal, Defendants again argue that Plaintiffs' claims for malicious prosecution, fabrication of evidence, and *Brady* violations cannot be characterized as "injuries to the person" that survive the death of the tortfeasor. Therefore, they argue that *Tinney* controls the result here. Defendants also argue that *State ex rel. Crow* v. *Weygandt*, 162 N.E.2d 845, 848 (Ohio 1959), an Ohio Supreme Court case holding that state-law claims for malicious prosecution do not survive the death of a party, means that Plaintiffs' §1983 claims for malicious prosecution also do not survive. The *Weygandt* court based its holding on Ohio Revised Code §2311.21, which provided:

> Unless otherwise provided, no action or proceeding pending in any court shall abate by the death of either or both of the parties thereto, except actions for libel, slander, malicious prosecution, for a nuisance, or against a judge of a County Court for misconduct in office, which shall abate by the death of either party.

This provision is still in effect, its language unamended since the *Weygandt* decision except for one capitalization change. See Ohio Rev. Code §2311.21. Finally, Defendants point to *Stein-Sapir* v. *Birdsell*, 673 F.2d 165, 167 (6th Cir. 1982), a Sixth Circuit case recognizing the *Weygandt* rule.

Neither Defendants' reliance on *Tinney* nor their argument based on *Weygandt* is persuasive. To begin with, the Sixth Circuit's unpublished opinion affirming the district court in *Tinney* is no longer good law. After the district court's judgment in this case, *Tinney* was superseded by *Crabbs*, a published opinion of this circuit that expressly rejected *Tinney*'s holding and held instead that all §1983 claims are subject to the forum state's survival rules for personal injury actions, regardless of the specific type of injury underlying the §1983 claim. See *Crabbs*, 880 F.3d at 296.

It is immaterial that *Crabbs* addressed an unreasonable search claim under the Fourth and Fourteenth Amendments, see *id.* at 293, whereas Plaintiffs' claims here are for malicious prosecution, fabrication of evidence, and *Brady* violations. *Crabbs* expressly disagreed with *Tinney*, which did involve a malicious prosecution claim. The *Tinney* plaintiff had sued in Ohio; therefore, his §1983 claims were subject to Ohio survival rules just as Plaintiffs' claims are here. Noting that the *Tinney* court did not apply Ohio's survival rule for personal inju-

ry actions to a §1983 malicious prosecution claim, the *Crabbs* court announced that it was "part[ing] way with" *Tinney*. *Crabbs*, 880 F.3d at 296. With that language, *Crabbs* rejected *Tinney*'s reasoning pertaining to malicious prosecution claims.

If the explicit rejection of *Tinney* were not enough to defeat Defendants' argument, the *Crabbs* court's more general discussion of its rationale would be. Although *Crabbs* involved an unreasonable search claim, the reasoning applied to all §1983 claims. See 880 F.3d at 296. In explaining that all §1983 claims must be classified together for purposes of determining what state procedural rules apply, the *Crabbs* court cited *Wilson* v. *Garcia*, 471 U.S. 261 (1985), in which the Supreme Court addressed what state statute of limitations should apply in §1983 actions. See *Crabbs*, 880 F.3d at 294-95. (After *Wilson* was decided, Congress enacted a federal statute of limitations, codified at 28 U.S.C. §1658.) *Crabbs* cited *Wilson* for three general propositions. "*First*, the characterization of §1983 as a cause of action is itself a question of *federal* law . . . . *Second*, all §1983 claims must be characterized in the same way . . . . *Third*, §1983 actions are best characterized as personal injury actions." *Crabbs*, 880 F.3d at 294-95 (second emphasis added) (citing *Wilson*, 471 U.S. at 269-70, 271-75, 280).

More specifically, the *Crabbs* court reasoned that all §1983 claims must be treated the same way for survival-of-claims purposes, just as they are for statute-of-limitations purposes. *Id.* at 295. The court's language could not be clearer: "the appropriate level at which to generalize a §1983 claim under state law is as *a personal injury action, sounding in tort, and nothing further.*" *Id.* at 296 (emphasis added). Therefore, although *Weygandt* and Ohio Revised Code §2311.21 are still good law,

after *Crabbs*, they do not establish a separate survival rule for malicious prosecution claims brought under § 1983.

Our court's 1982 decision in *Stein-Sapir* is not to the contrary. Although Defendants argue that that opinion adopted the *Weygandt* rule, all *Stein-Sapir* did was apply *Weygandt*—and an Ohio Court of Appeals decision extending *Weygandt*'s survival rule to libel and slander claims—to hold that the plaintiff's state-law defamation claims did not survive the defendant's death. See *Stein-Sapir*, 673 F.2d at 167. *Stein-Sapir* involved only state law and did not mention § 1983.

When hearing a direct appeal, this court evaluates the merits of the case based on the current law and its interpretation, not the law and its interpretation existing when the district court entered its judgment. See *Chaz Concrete Co., LLC* v. *Codell*, 545 F.3d 407, 409 (6th Cir. 2008). After *Crabbs*, all claims brought under § 1983 are to be treated as actions sounding in personal injury tort. Because Ohio Revised Code § 2305.21 provides that actions for personal injury survive the death of the tortfeasor, and that statute does not conflict with the laws of the United States, see *Crabbs*, 880 F.3d at 295, all § 1983 actions brought in Ohio survive the death of the tortfeasor.

Therefore, through no fault of its own because its ruling predated *Crabbs*, the district court was in error as to its grounds for finding that the proposed amendments, substituting the administrator of the estates of Terpay, Staimpel, and Farmer for those Defendants, would be futile.

2. Timeliness of Plaintiffs' Claims Against the Estates

Defendants argue that we should affirm the district court on alternative grounds—namely, that the claims against the estates were not timely brought. Proper adjudication of this issue requires analysis of both Ohio and federal law. Defendants argue that Ohio estate law regarding the timely filing of claims defines which entities have the capacity to be sued, while Plaintiffs argue that those provisions are merely statutes of limitations. See Ohio Rev. Code §§ 2117.06, 2117.37.

The points of contention do not end there, however. If Plaintiffs are correct that Ohio estate law merely establishes statutes of limitations, the parties also dispute whether those statutes or the general Ohio statute of limitations applies to § 1983 suits. On the other hand, if Defendants are correct that Ohio estate law defines which entities have the capacity to be sued, the parties also disagree over whether federal courts hearing § 1983 actions are bound by that definition, as well as whether an exception to that definition, provided in Ohio Revised Code § 2117.06(G), applies to the facts of this case.

The district court did not address these issues, instead relying on its holding that the § 1983 claims did not survive the deaths of the deceased Defendants.[7] "It is the general rule that a federal appellate court does not con-

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[7] The district court did address timeliness with regard to Plaintiffs' state-law claims, but Plaintiffs do not challenge that analysis on appeal. The timeliness analysis required for the § 1983 claims differs from that required for the state-law claims: the former involves a three-step analysis to determine the applicable law, as described in section II(B)(1), *supra*. See *Robertson*, 436 U.S. at 588-89. The district court did not conduct this analysis.

sider an issue not passed upon below." *Lindsay* v. *Yates*, 498 F.3d 434, 441 (6th Cir. 2007) (quoting *United States* v. *Henry*, 429 F.3d 603, 618 (6th Cir. 2005)). This directive is not jurisdictional, however, and "a departure from this general rule may be warranted when 'the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of this already protracted litigation.'" *Katt* v. *Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (quoting *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988)).

We will follow the general rule and decline to address these issues in the first instance. These are thorny issues of first impression in this circuit, and because the district court has not yet addressed them, we do not believe they are "presented with sufficient clarity and completeness" for our review. *Id.*

3. Conclusion

The district court erred in finding that Plaintiffs' proposed amendments would be futile on the ground that § 1983 claims brought in Ohio do not survive the deaths of the tortfeasors, and we decline to address whether Defendants have presented an alternative ground on which the district court's denial of Plaintiffs' motions to amend could be affirmed. Because applying the wrong legal standard constitutes reversible error on abuse of discretion review, *United States* v. *Arny*, 831 F.3d 725, 730 (6th Cir. 2016), the district court's denial of the motions to file amended complaints is **REVERSED** and **REMANDED** for further proceedings.

C. Stoiker's Motion for Summary Judgment

We next address the district court's grant of summary judgment to Stoiker on the § 1983 claims that Stoiker vio-

lated Plaintiffs' Fourteenth Amendment right to due process by withholding exculpatory evidence, fabricating evidence, and conspiring to do the same, and Plaintiffs' Fourth Amendment right to be free of malicious prosecution.

If a police officer violates the Constitution, "42 U.S.C. §1983 provides a civil remedy for those" injured by the violation. *Peffer* v. *Stephens*, 880 F.3d 256, 263 (6th Cir. 2018). But officers sued under the aegis of §1983 are protected from liability by the doctrine of qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity does not apply if (1) "on the plaintiff's facts," a constitutional violation occurred, and (2) the alleged violation was of "clearly established constitutional rights of which a reasonable person would have known." *Hoover* v. *Radabaugh*, 307 F.3d 460, 465 (6th Cir. 2002) (quoting *Dickerson* v. *McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996)).

The district court found that there was insufficient evidence for a reasonable jury to find that Stoiker had committed any of the alleged constitutional violations. We address each of the appealed determinations in turn.

1. Constitutional Violations

a. Withholding Exculpatory Evidence

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme

Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Prosecutors are not the only state actors bound by *Brady*, and "police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material." *Moldowan* v. *City of Warren*, 578 F.3d 351, 379 (6th Cir. 2009).

Brady claims have three elements: "[1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999).

The district court granted summary judgment to Stoiker on the ground that Plaintiffs had failed to present evidence sufficient for a reasonable jury to find the second element—that Stoiker had suppressed evidence. It did so for two reasons. First, it held that there was insufficient evidence for a jury to find that Stoiker was involved with the unconstitutional activity at all, noting that Vernon had never identified Stoiker as one of the officers involved.[8] Second, even if Stoiker were involved, the district court held, there was insufficient evidence that he was aware of any exculpatory evidence, and an officer

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[8] "The only evidence that points to Stoiker's involvement are the signatures on the statement and the report. However, even if those are Stoiker's signatures, Plaintiff has not cited to any policy, practice, or procedure about the meaning or effect of signature [sic]. Therefore, the Court is left to speculate as to what the signature meant." *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3380456, at *3 (N.D. Ohio Aug. 4, 2017).

unaware of exculpatory evidence cannot suppress that evidence. We disagree with the district court's reasoning. Given the evidence in the record, although a jury might ultimately find that Stoiker did not suppress evidence, it would not be unreasonable in finding that he had.

Consider the following evidence. Vernon testified that Staimpel and another officer led him into a room after he failed to identify Plaintiffs at a line-up and coerced him into signing a false statement about that line-up. Staimpel testified at trial that (1) Stoiker was his partner and (2) Stoiker was present for the line-up. Based on Staimpel's testimony, a reasonable jury could infer that (3) Stoiker was present during the post-line-up interview of Vernon and (4) Stoiker was present when Vernon signed his false statement explaining his "fear" of Plaintiffs.

In addition, the record contains a police report, signed by Stoiker and dated the day that Vernon testified he was coerced into signing a false statement by two detectives, detailing the version of the line-up and subsequent interview that Vernon alleges were fabricated. The district court is correct that the report does not say that Stoiker was involved in that line-up and interview, but a jury is "allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them," *Galloway* v. *United States*, 319 U.S. 372, 396 (1943), and it is reasonable to infer that a detective who signs a report was involved in the events recounted in that report.

Because of this proof, a reasonable jury could find that Stoiker was present when Vernon was coerced into signing the allegedly false statement, in which he claimed that he had failed to identify Jackson and Bridgeman in the line-up because he was afraid of them. And if Stoiker

was present when Vernon was coerced into signing the allegedly false statement, he knew that Vernon had not given fear of Plaintiffs as his true reason for not identifying them—in other words, that the statement was false. That knowledge was exculpatory evidence. See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [Brady's disclosure] rule." (citation and internal quotation marks omitted)). If Stoiker was present, he also knew that detectives coerced Vernon's statement, which was a related, but separate, piece of exculpatory evidence. See *id.*

In addition, a reasonable jury could find that Stoiker was aware of a third piece of exculpatory evidence. While his possible awareness of this evidence is less clear-cut than of the above-mentioned pieces of exculpatory evidence, it would not be unreasonable for a jury to infer that Stoiker knew Vernon had said he had not seen Plaintiffs commit the crime with which they were charged. Whether or not Stoiker was told by other officers that Vernon had not seen Plaintiffs commit the murder, Vernon stated that he was asked at the line-up "if I could recognize anyone there who was at the shooting" and that he answered that question in the negative.[9] R. 99-3, PageID 1236.

Stoiker and the district court interpret that question as asking whether Vernon recognized anyone in the lineup. Vernon interpreted it as asking whether he had seen

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[9] As mentioned in section I(A), *supra*, Vernon alternatively recalled that he may have been asked if "I see anybody that I recognize up there." R. 99-1, PageID 1190.

anyone in the line-up commit the crime.[10] If Vernon's interpretation is correct, then the officers present—which a reasonable jury could find included Stoiker—knew that Vernon was claiming he had not seen Plaintiffs commit the crime when he answered "No" to their question. A reasonable jury could find that Vernon, the only witness to the events who has testified to the contents of that conversation, interpreted the question correctly.

As Stoiker did not disclose any of this evidence to prosecutors, a reasonable jury could find that Stoiker suppressed exculpatory evidence in violation of *Brady*.

As to the third element of a *Brady* claim, a reasonable jury could find that Plaintiffs suffered prejudice as a result of the alleged suppression. To show prejudice, Plaintiffs must show that the allegedly suppressed evidence was "material;" in other words, "that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 280, 281. Because Vernon's coerced statement formed the core of the prosecution's case, there is a reasonable likelihood that, had the juries in Plaintiffs' trials known that that statement was fabricated and coerced, or that Vernon had orally stated that he had not seen the shooting, the juries would not have convicted Plaintiffs. Therefore, a reasonable jury could find all three elements of a *Brady* claim satisfied.

b. Fabricating Evidence

The Due Process Clause of the Fourteenth Amendment is also "violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false ev-

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[10] Vernon later explained that he answered in the negative because "I didn't seen happen [sic] on May 19, 1975." R. 99-2, PageID 1233.

idence would have affected the decision of the jury." *Gregory* v. *City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006) (citing *Stemler* v. *City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997)).

Stoiker presents two arguments for why summary judgment was appropriate on this issue. First, he contends there was insufficient evidence that he was involved in the fabrication of Vernon's statement. Second, Stoiker argues there was insufficient evidence that the fabricated statement affected the decision of the jury. The district court agreed with both of Stoiker's arguments.

Turning to the first argument, a reasonable jury could find, as discussed in section II(C)(1)(a), *supra*, that Stoiker was in the room when Vernon was initially intimidated, left the room with Staimpel, and then returned to the room with Staimpel, at which point Staimpel coerced Vernon into signing the statement. This does not necessarily entail that Stoiker participated in the creation of the false statement, but a reasonable jury could infer that Stoiker either drafted, or assisted Staimpel in drafting, the false statement. If Stoiker was actively involved in the fabrication of the false statement, he knowingly fabricated evidence.

As for the second argument, there is, in fact, sufficient evidence for a reasonable jury to conclude that the false statement influenced the juries at Plaintiffs' trials. True, as the district court noted, although the statement was introduced in evidence by the defense at Jackson's trial, it was used only by defense counsel in an attempt to impeach Vernon's testimony and "it is unclear whether the jury in the Jackson trial had the statement while they

were deliberating."[11] *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3380456, at *3 (N.D. Ohio Aug. 4, 2017). Also, the statement was not admitted in evidence at Bridgeman's or Ajamu's trial at all. And it is fair to conclude, as the district court reasoned, that "Vernon's live testimony," not the statement, "led to the conviction[s] in all three trials." *Id.*

But the relevant question is not whether the fabricated evidence was shown to the jury; it is whether the statement affected the decision of the jury. For example, a fabricated search warrant affidavit, used to obtain evidence later shown to the jury, can form the basis for a fabrication-of-evidence suit. See *Webb* v. *United States*, 789 F.3d 647, 670 (6th Cir. 2015). And fabricated evidence that "is used as [the] basis for a criminal charge" can form the basis for a § 1983 claim because, absent that evidence, there would have been no jury. *Halsey* v. *Pfeiffer*, 750 F.3d 273, 294 n.19 (3d Cir. 2014).

A reasonable jury in the present case could find that the fabricated statement impacted the juries' decisions in the criminal trials in at least two ways. First, the prosecutor testified that his understanding of Vernon's statement was based on the copy in the police report and that, if he had known what had actually happened on the day of the line-up, he would have declined to prosecute: he does not, as he put it, "believe in prosecuting innocent people." R. 114-29, PageID 5350. The prosecutor did not speak to Vernon prior to bringing charges, and so the

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[11] Although the possibility is ultimately unnecessary to our holding on the fabrication-of-evidence claims, we note that because Vernon's statement was introduced in evidence at Jackson's trial, a reasonable jury could infer that the jury that convicted Jackson had access to the statement at some point in their deliberations.

false statement constituted the entire basis for his understanding of Vernon's involvement. If Staimpel and Stoiker had not fabricated Vernon's statement, therefore, charges would not have been brought, and, of course, a jury that is never empaneled is a jury that does not return a guilty verdict.

A jury in the present case also could find that the falsified statement caused the criminal verdicts because the statement coerced Vernon to testify in conformance with it. Unlike Staimpel's baseless threat to prosecute Vernon's parents if Vernon failed to sign a statement saying that he had seen Plaintiffs commit the crime, Vernon would have faced a real threat of prosecution for perjury had his testimony conflicted with his earlier signed statement. See *Osburn* v. *State*, 7 Ohio 212, 214-15 (1835) (admitting as evidence of perjury a paper signed by the defendant).

A reasonable jury could therefore find both that Stoiker participated in the fabrication of Vernon's statement and that there is a reasonable probability the statement affected the juries at Plaintiffs' trials.

c. Conspiracy to Withhold and Fabricate Evidence

To make out a claim for conspiracy to deprive them of their due process rights, Plaintiffs must show "that (1) a single plan existed, (2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights, and (3) an overt act was committed in furtherance of the conspiracy that caused the injury." *Robertson* v. *Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (internal quotation marks omitted) (quoting *Revis* v. *Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007)).

For the reasons discussed above, a reasonable jury could find that Stoiker and Staimpel planned to draft a false statement and coerce Vernon into signing that statement and that they committed an overt act in furtherance of that plan. Further supporting the conspiracy claim, it would not be unreasonable for a jury to infer that the detectives planned to withhold the existence of their acts from prosecutors for the purpose of tipping the scales against Plaintiffs, as informing prosecutors of the coercion would have rendered their actions meaningless.

However, the inquiry does not end there. We must also determine whether an individual can be held liable for conspiracy when the alleged conspiracy was undertaken by agreement with another individual or individuals employed by the same entity as the defendant.

The intracorporate conspiracy doctrine, which states that if "all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy," has been applied to 42 U.S.C. §1985(3) by this court. *Johnson* v. *Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839-40 (6th Cir. 1994) (quoting *Hull* v. *Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 510 (6th Cir. 1991)). Section 1985(3) creates a cause of action for a conspiracy between two or more persons to deprive another of the equal protection of the laws.

We have also held that the doctrine applies in §1985(2) suits. *Doherty* v. *Am. Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984). 42 U.S.C. §1985(2) creates a cause of action for a conspiracy to, among other actions, obstruct justice or to intimidate a party, witness, or juror.

But this circuit has never decided whether the intracorporate conspiracy doctrine also applies to suits under

§ 1983. See *DiLuzio* v. *Vill. of Yorkville*, 796 F.3d 604, 615 (6th Cir. 2015) (noting that "the Sixth Circuit has never held that the intracorporate conspiracy doctrine applies to municipal government officials in a § 1983 action and the district courts within our circuit are split on this question"). To determine whether there is a genuine dispute of material fact as to whether Stoiker conspired to violate Plaintiffs' constitutional rights, therefore, we must resolve this issue of first impression.

We are aware of only one circuit, the Eleventh, that has squarely addressed the issue and has determined that the intracorporate conspiracy doctrine applies in § 1983 actions as in § 1985 actions. See *Grider* v. *City of Auburn*, 618 F.3d 1240, 1261 (11th Cir. 2010); *Rehberg* v. *Paulk*, 611 F.3d 828, 854 (11th Cir. 2010). By contrast, we are aware of no circuit that has applied the doctrine in § 1985 actions but declined to apply it in § 1983 actions.[12]

We join the Eleventh Circuit and hold that the intracorporate conspiracy doctrine applies in § 1983 suits to bar conspiracy claims where two or more employees of the same entity are alleged to have been acting within the scope of their employment when they allegedly conspired together to deprive the plaintiff of his rights. See *Grider*, 618 F.3d at 1261-62; *cf. Johnson*, 40 F.3d at 841 ("[W]hen employees act outside the course of their employment, they and the corporation may form a conspiracy under 42 U.S.C. § 1985(3)."). We so hold because the considerations that support applying the intracorporate conspiracy doctrine in § 1985 suits pertain equally to the § 1983 context, and we discern no logical distinction upon which to

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[12] Some courts have held that the doctrine does not apply in the civil rights context at all. See, *e.g.*, *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994).

treat § 1983 conspiracy claims differently. *Cf. Hull*, 926 F.2d at 509-10 (holding that the intracorporate conspiracy doctrine applies to § 1985(3) claims and stating "that this court's opinion in Doherty [which applied the doctrine to *§ 1985(2)*—not § 1985(3)—claims] is dispositive of this issue"). Recognizing that district courts within this circuit have split on the question,[13] we will explain why the reasons for applying the doctrine to § 1983 outweigh the reasons for not doing so.

The intracorporate conspiracy doctrine was recognized in antitrust and civil rights cases based on the legal notion of corporations as "persons." See *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 769 n.15 (1984); *Doherty*, 728 F.2d at 339. When employees of a corporation act to further the purposes of that "person," principles from the law of agency dictate that those employees be treated not as separate "persons" but as part of the same "person." See *Hull*, 926 F.2d at 509-10; *Doherty*, 728 F.2d at 339. We have recognized the relevance of

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[13] Compare *Vaduva* v. *City of Xenia*, No. 3:17-cv-41, 2017 WL 4773076, at *3 (S.D. Ohio Oct. 23, 2017) (applying the intracorporate conspiracy doctrine in § 1983 suit); *Gillespie* v. *City of Battle Creek*, 100 F. Supp. 3d 623, 631-32 (W.D. Mich. 2015) (same); *Wright* v. *Bloomfield Twp.*, No. 12-15379, 2014 WL 5499278, at *15-16 (E.D. Mich. Oct. 30, 2014) (same); *Pardi* v. *Cty. of Wayne*, No. 12-12063, 2013 WL 1011280, at *14-15 (E.D. Mich. Mar. 14, 2013) (same); *Audio Visual Equip. & Supplies, Inc.* v. *Cty. of Wayne*, No. 06-10904, 2007 WL 4180974, at *5-6 (E.D. Mich. Nov. 27, 2007) (same); *Adcock* v. *City of Memphis*, No. 06-2109, 2007 WL 784344, at *4-5 (W.D. Tenn. Mar. 13, 2007) (same); *Turner* v. *Viviano*, No. 04-CV-70509-DT, 2005 WL 1678895, at *13 (E.D. Mich. July 15, 2005) (same), with *Tinney* v. *Richland Cty.*, No. 1:14 CV 703, 2015 WL 542415, at *12 (N.D. Ohio Feb. 10, 2015) (declining to apply the doctrine in a § 1983 suit), aff'd on other grounds, 678 F. App'x 362 (6th Cir. 2017); *Kinkus* v. *Vill. of Yorkville*, 476 F. Supp. 2d 829, 839-40 (S.D. Ohio 2007) (same), rev'd on other grounds, 289 F. App'x 86 (6th Cir. 2008).

these principles to suits against employees of local government entities as well as against employees of private corporations. See *Hull*, 926 F.2d at 509-10. Furthermore, the Supreme Court has made clear that municipalities are "persons" for purposes of § 1983. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

Because the intracorporate conspiracy doctrine follows from the legal definition of "person," which includes local governments, the doctrine has been developed to deal with the question whether there are two separate persons to form a conspiracy. See *Hull*, 926 F.2d at 510. The doctrine's application to other civil rights statutes has not been premised upon any factor unique to those statutes. We therefore see no reason to decline to apply the doctrine to § 1983. Section 1983 creates a cause of action against any "person" who deprives a plaintiff of his rights, just like § 1985. Therefore, if § 1985 cannot be violated by an alleged conspiracy where the alleged conspirators are all employees of the same entity acting within the scope of their employment, neither can § 1983.

Furthermore, we decline to adopt the rationale that because "[§]1985 is in its essence a conspiracy statute[,] [while] [§]1983 is not," the intracorporate conspiracy doctrine applies to the former but not the latter. *Kinkus* v. *Vill. of Yorkville*, 476 F. Supp. 2d 829, 840 (S.D. Ohio 2007). Although § 1983 does not expressly contemplate a cause of action for conspiracy, once we have recognized such a cause of action—which we have, see, *e.g.*, *DiLuzio*, 796 F.3d at 615-16—the question whether a conspiracy can exist where all alleged conspirators work for the same entity, and are alleged to have been acting in the scope of their employment, naturally arises. That inquiry is identical under § 1983 and § 1985. After all, we did not apply the intracorporate conspiracy doctrine in § 1985

actions on a theory that the text of that particular statutory provision demanded it. Instead, we simply adopted a conspiracy jurisprudence that developed outside the civil rights context. See *Hull*, 926 F.2d at 509.

Nor do we see any reason to limit application of the doctrine to cases in which a municipality is alleged to have conspired with one or more of its employees, in contrast to cases in which two or more employees are alleged only to have conspired with each other. We have made clear that "members of the same legal entity cannot conspire *with one another* as long as their alleged acts were within the scope of their employment." *Jackson* v. *City of Columbus*, 194 F.3d 737, 753 (6th Cir. 1999) (emphasis added) (citing *Johnson*, 40 F.3d at 840), abrogated on other grounds by *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506 (2002); accord *Hull*, 926 F.2d at 510. In *Hull*, we applied the doctrine to bar the plaintiff's §1985(3) claim alleging conspiracy against "a school district superintendent, the executive director of the district, and a school administrator, all of whom [were] employees or agents of the Board [of Education]." 926 F.2d at 510. The plaintiff did not allege that the school board itself was a conspirator, but we noted that "[s]ince all of the defendants [were] members of the same collective entity, there [were] not two separate 'people' to form a conspiracy." *Id.*

Finally, we have recognized an exception to the intracorporate conspiracy doctrine in §1985(3) suits where the defendants were alleged to have been acting outside the scope of their employment, see *Johnson*, 40 F.3d at 841, and we have indicated that the exception would apply equally in the §1983 context were we to apply the doctrine in §1983 suits, see *DiLuzio*, 796 F.3d at 616. Accordingly, the intracorporate conspiracy doctrine applies

to § 1983, and we assume that adopting the doctrine entails adopting the exception. *Cf. DiLuzio*, 796 F.3d at 616. But the scope-of-employment exception is unsupported by the record here because Plaintiffs have alleged that Stoiker and the other individual Defendants were acting "within the scope of their employment." R. 86, PageID 1018; No. 17-3843, R. 53, PageID 707.

Therefore, as a matter of law, Stoiker cannot be liable for conspiracy in violation of § 1983 where he is alleged to have conspired with other employees of the same government entity, in the scope of their employment, to violate Plaintiffs' rights. The district court's grant of summary judgment to Stoiker on the conspiracy claims is **AFFIRMED**.

d. Malicious Prosecution

The Fourth Amendment begins: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Amongst other protections, this guarantee affords people the right to be free of unjust prosecution. See *Mills* v. *Barnard*, 869 F.3d 473, 479-80 (6th Cir. 2017).[14]

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[14] Although we now analyze constitutional claims for malicious prosecution under the Fourth Amendment, "[p]rior to January 1994 . . . this circuit analyzed [such claims] as accruing under the Fourteenth rather than the Fourth Amendment." *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999) (citations omitted). We ceased doing so after the Supreme Court held in *Albright* v. *Oliver*, 510 U.S. 266, 271, 273-75 (1994) that malicious-prosecution claims must be asserted under the Fourth Amendment rather than the Fourteenth. In so holding, the *Albright* Court recognized "the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* at 274 (citing *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975)).

A malicious-prosecution claim has four elements: "(1) that a criminal prosecution was initiated against the plaintiff and that the defendant ma[d]e, influence[d], or participate[d] in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty . . . apart from the initial seizure; and (4) that the criminal proceeding must have been resolved in the plaintiff's favor."[15] *Id.* at 480 (alterations in original) (internal quotation marks omitted) (quoting *Sykes* v. *Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010)).

There being no dispute that Plaintiffs suffered a deprivation of liberty or that the criminal proceedings were resolved in their favor, we need only address the first two elements.

i. Stoiker Influenced or Participated in the Decision to Prosecute

The first element of the malicious-prosecution claim is met when an officer "could reasonably foresee that his misconduct would contribute to an independent decision

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[15] There are two types of § 1983 claims, both sounding in the Fourth Amendment, that are sometimes referred to as "malicious prosecution" claims. One is for the wrongful institution of legal process (which is the type most properly called a "malicious prosecution" claim) and the other is for continued detention without probable cause. See *Cleary* v. *Cty. of Macomb*, 409 F. App'x 890, 898 (6th Cir. 2011); see also *Gregory*, 444 F.3d at 747-49 (stating that claims for continued detention without probable cause are not properly considered "malicious prosecution" claims, but recognizing that courts' use of terminology varies). Although Plaintiffs are not always clear as to their intended theory of liability, they and Stoiker state the test for, and perform their analysis under, the wrongful institution of legal process theory, and we will do the same.

that results in a deprivation of liberty" and the misconduct actually does so. *Sykes*, 625 F.3d at 316 (quoting *Higazy* v. *Templeton*, 505 F.3d 161, 177 (2d Cir. 2007)). This element is met when an officer includes "misstatements and falsehoods in his investigatory materials" and those materials influence a prosecutor's decision to bring charges. *Id.*

A reasonable jury could find that Stoiker's misconduct influenced the decision to bring charges against Plaintiffs for two reasons. First, Stoiker and Staimpel "[c]onsulted with [the prosecutor] who issued papers charging [Plaintiffs] with [homicide]." R. 114-28, PageID 5321. Although the record does not indicate the contents of that consultation, it is reasonable to infer that it involved false statements about Vernon's identification of Plaintiffs and that this consultation influenced the prosecutor's decision to bring charges against Plaintiffs.

Second, the prosecutor's only knowledge of Vernon's involvement when deciding to bring charges was based on Vernon's statement, a statement that a jury could reasonably find to have been fabricated by Stoiker. And the prosecutor later testified that had he known about what actually happened on the day of the line-up—because Stoiker and Staimpel had told him during conversation, or because they had drafted an accurate statement for Vernon, or because Stoiker had drafted an accurate report concerning that day's events—the prosecutor would not have proceeded to trial.

ii. There Was a Lack of Probable Cause for the Criminal Prosecution

When a grand jury returns an indictment against a defendant, this creates a "presumption of probable cause," which is rebuttable by showing that:

> (1) [A] law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly ma[de] false statements (such as in affidavits or investigative reports) or falsifie[d] or fabricate[d] evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, [we]re material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions d[id] not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury).

King v. *Harwood*, 852 F.3d 568, 587–88 (6th Cir. 2017).

As discussed above, a reasonable jury could find that Stoiker falsified or fabricated evidence, and that the evidence did not consist solely of grand-jury testimony or preparation for that testimony. Stoiker argues, however, that even if he fabricated Vernon's false statement, that statement could not have been material to the grand jury's determination of probable cause, as it was not presented to the grand jury. Although Vernon may have testified to the grand jury in conformance with his fabricated statement, Stoiker argues, it was Vernon's testimony, not the earlier statement, that impacted the grand jury's decision.

But a careful reading of *King* shows that fabricated evidence can be material to a grand jury's determination of probable cause without being presented to the grand jury. If only evidence presented to a grand jury could be material to that grand jury's decision, plaintiffs would be faced with the Scylla and Charybdis of either admitting that the fabricated evidence was not material or claiming that it was material because it was presented to the

grand jury, thereby gracing the fabricator with the absolute immunity afforded to grand jury testimony. See *id.* at 589.

Instead, plaintiffs can show that a fabrication was material to the grand jury's determination by showing "that the officer has made knowing or reckless false statements or has falsified or fabricated evidence in the course of setting a prosecution in motion." *Id.* Here, according to the prosecutor, had Stoiker not fabricated Vernon's statement, there would have been no grand jury. But even had there been one, Vernon would not have testified falsely before it. Stoiker's fabrication was therefore material to the grand jury's determination because it "was material to the ultimate prosecution" of Plaintiffs.[16] *Id.* at 587-88.

1. Qualified Immunity

The statute now codified at 42 U.S.C. § 1983 was originally passed in 1871. It was not until the second half of the twentieth century that the Supreme Court recognized that § 1983 admitted of an implicit doctrine, born of the common law, known as qualified immunity. See *Pierson* v. *Ray*, 386 U.S. 547, 555, 557 (1967). Since then this doctrine has grown considerably, but not without its critics. See, *e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that a "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"). Qualified immunity has outgrown its original justifications, which were "rooted in historical analogy" and "based on the existence of common-law rules in 1871."

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[16] Stoiker does not argue that there was sufficient evidence to find probable cause to prosecute Plaintiffs absent Vernon's testimony.

Wyatt v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

Responding to the many and varied suits brought under § 1983, the judiciary recrafted that limited version of the doctrine of qualified immunity in an effort to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Elder* v. *Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982)). We therefore no longer "attempt[] to locate [the qualified immunity] standard in the common law as it existed in 1871," *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring), but instead attempt to determine whether a defendant, by his conduct, "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818.

At issue in this appeal is whether, in 1975, the constitutional rights allegedly violated by Stoiker were sufficiently clearly established to deprive him of the protection of qualified immunity. It is a plaintiff's burden to show that the right at issue was clearly established. *Harris* v. *Klare*, 902 F.3d 630, 637 (6th Cir. 2018). Although the Supreme Court "do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (alteration in original) (internal quotation marks omitted) (quoting *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015)). In examining "existing precedent," "we may rely on decisions of the Supreme Court, decisions of this court and courts within this circuit, and in limited instances, on decisions of other circuits." *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999) (ci-

tations omitted); accord *Hearring* v. *Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013).

The Supreme Court has recognized "that officials can still be on notice that their conduct violates established law even in novel factual circumstances" and has "rejected a requirement that previous cases be 'fundamentally similar'" to the facts in a case to render qualified immunity inapplicable. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States* v. *Lanier*, 520 U.S. 259, 263 (1997)); see also *id.* at 753-54 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address materially similar conduct." (internal quotation marks omitted)). And we have noted that "'[g]eneral statements of the law' are capable of giving clear and fair warning to officers even where 'the very action in question has [not] previously been held unlawful.'" *Smith* v. *Cupp*, 430 F.3d 766, 776-77 (6th Cir. 2005) (second alteration in original) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)).

a. Withholding Exculpatory Evidence

In 1975, it was clearly established law that prosecutorial withholding of exculpatory evidence violates a criminal defendant's Fourteenth Amendment right to due process. See *Brady* v. *Maryland*, 373 U.S. 83, 86-87 (1963). Multiple circuits had also recognized by that time that "*Brady*-derived" claims could be based on the conduct of law-enforcement officers—as distinct from prosecutors—who had allegedly withheld exculpatory evidence. See *Clarke* v. *Burke*, 440 F.2d 853, 855 (7th Cir. 1971) ("This is not to say that there can never be a due process violation if the prosecutor does not know that the police has in its possession evidence possibly favorable to the defend-

ant . . . . It has been held . . . that knowledge of the police is knowledge of the prosecutor . . . . " (citations omitted)); *Smith* v. *Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969) ("[I]t makes no difference if the withholding is by the prosecutor or by officials other than the prosecutor." (citing *Barbee* v. *Warden*, *Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964))); *Barbee*, 331 F.2d at 846; *cf.* Jackson v. *Wainwright*, 390 F.2d 288, 295, 298 (5th Cir. 1968) (noting that "lower federal courts" applying *Brady* "ha[d] emphasized the harm to the defendant rather than the prosecutor's motive in failing to disclose exculpatory evidence" and finding a violation of the "duty to disclose . . . exculpatory statements" where "there was no evidence of the *prosecutor's* bad faith or of overreaching by the prosecution" (emphasis added)); *Curran* v. *Delaware*, 259 F.2d 707, 713 (3d Cir. 1958) (finding a violation of the Fourteenth Amendment when a police officer perjured himself at trial, regardless of whether the prosecutor was aware of the perjury).

In *Barbee*, decided the year after *Brady*, the Fourth Circuit addressed the habeas claim of a man who argued his conviction violated due process because law-enforcement officers had not disclosed the existence of ballistics and fingerprint reports that "cast grave doubt upon" his guilt. *Barbee*, 331 F.2d at 844. Responding to the state's argument that the man was required, and had failed, to show that the prosecutor knew about the reports, the court stated:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or

> negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant . . . . If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.
>
> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

Id. at 846 (footnotes omitted).

The above cases, decided prior to Plaintiffs' trials, make clear that the duty to disclose evidence falls on the state as a whole and not on one officer of the state particularly, and it was therefore clearly established by the time of those trials that Stoiker had a Fourteenth Amendment obligation to disclose exculpatory evidence.

It was also clearly established that impeachment evidence, such as the fact that a witness was coerced into making a fabricated statement, qualifies as exculpatory. See *Giglio* v. *United States*, 405 U.S. 150, 153-55 (1972) (holding that evidence that the government had procured an informant's testimony by suggesting he could escape prosecution through cooperating was "material" evidence

"affecting credibility" that should have been disclosed to the defense under *Brady*).

Stoiker argues that a Seventh Circuit case shows that it is not clearly established even now that officers are under a *Brady* obligation to disclose their own or fellow officers' fabrication of evidence. In *Saunders-El* v. *Rohde*, 778 F.3d 556, 558 (7th Cir. 2015), the plaintiff sued police officers under *Brady*, alleging that the officers failed to disclose that they had severely beaten the plaintiff and planted his blood at a crime scene. The Seventh Circuit held that the plaintiff had not alleged a violation of *Brady* because "*Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accurately disclose the circumstances of their investigations to the prosecution." *Id.* at 562.

Even if we were bound by *Saunders-El*, which we are not, it would not foreclose our holding. Because *Brady* and its progeny are concerned only with ensuring that a defendant receives a fair trial, "*Brady* is concerned only with cases in which the government possesses information which the defendant does not." *United States* v. *Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (citation omitted). And so if a defendant knows at the time of trial that the government has fabricated evidence, as in *Saunders-El*,[17] officers do not violate *Brady* by failing to tell prosecutors that evidence has been fabricated.[18] Had Plaintiffs argued that Stoiker violated *Brady* only by failing to dis-

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[17] In describing the circumstances of the alleged fabrication of crime-scene evidence underlying his *Brady* claim, the *Saunders-El* plaintiff indicated that he had known about the fabrication all along. See *Saunders-El*, 778 F.3d at 558.

[18] This does not necessarily entail that such a situation would involve no other constitutional violations, of course.

close that Vernon's statement was inaccurate, Stoiker's reliance on *Saunders-El* might be appropriate, as Plaintiffs already knew that Vernon's statement was inaccurate. But Plaintiffs did not know that Vernon's statement had been coerced, and that fact could have been used to impeach Vernon's testimony at trial. Therefore, Stoiker had an obligation to disclose that fact to Plaintiffs.

Finally, as discussed in section II(C)(1)(a), *supra*, an additional piece of exculpatory evidence that Stoiker may have possessed was the knowledge of Vernon's uncoerced statement to Terpay and Farmer that he had not seen the shooting at all. That statement was exculpatory evidence separate from the fact that Vernon's *signed* statement was false, and there is no evidence that Plaintiffs knew of Vernon's exculpatory statement. Therefore, even if *Saunders-El* were controlling, we would hold that Plaintiffs had alleged a violation of clearly established rights with regard to Stoiker's alleged withholding of exculpatory evidence of which Plaintiffs were not aware.

Stoiker is not entitled to qualified immunity on the withholding-of-evidence claims.

b. Fabricating Evidence

It is difficult to countenance any argument that a law-enforcement officer in 1975 would not be "on notice [his] conduct [was] unlawful" when coercing a witness into perjuring himself in a capital trial. *Hope*, 536 U.S. at 739 (citation omitted). The obvious injustice inherent in fabricating evidence to convict three innocent men of a capital offense put Stoiker on notice that his conduct was unlawful. *Cf. id.* at 745 (stating, in evaluating qualified immunity in the Eighth Amendment context, that "[t]he obvious cruelty inherent in [tying a prisoner to a hitching post "for an extended period of time in a position that

was painful, and under circumstances that were both degrading and dangerous"] should have provided respondents with some notice that their alleged conduct violated [the prisoner's] constitutional protection against cruel and unusual punishment").

More concretely, as far back as 1935, the Supreme Court recognized that the introduction of fabricated evidence violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (citing *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)). And in 1942, the Supreme Court held that when a witness perjures himself because of threats from police officers, the defendant suffers "a deprivation of rights guaranteed by the Federal Constitution." *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942).

The only difference between those cases and the present one is that those cases involved the use of fabricated evidence at trial, whereas this one involves the use of fabricated evidence to affect a jury in a manner other than by introducing the evidence at trial.[19] However, we have recognized that a Fourth Amendment claim based on the fabrication of evidence does not require that "false testimony [have been] given at trial." *Spurlock*, 167 F.3d at 1007. And we can see no principled distinction, for purposes of qualified immunity, between such a claim and Plaintiffs' claims here that they were deprived of their Fourteenth Amendment due process rights through the

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[19] Although we assume for the purpose of this analysis that the allegedly fabricated evidence did not affect the proceedings through being used at trial, we again note that Vernon's statement was used by defense counsel at Jackson's trial, and a reasonable jury could find that the statement was considered by Jackson's jury in some way.

use of fabricated evidence. The alleged misconduct here is the use of the falsified statement to procure testimony in conformance with it—the same type of misconduct that we have previously found supported recovery for a constitutional tort, irrespective of the stage at which the fabrication tainted the proceeding. See *id.*

As far as clearly established law in 1975 is concerned, several months before the events at issue in this case, this court stated that *Mooney* "made it clear that the Fourteenth Amendment right to due process prohibits a knowing and deliberate use by a state of perjured evidence in order to obtain a conviction." *Burks* v. *Egeler*, 512 F.2d 221, 224 (6th Cir. 1975). More recently, we have cited *Brady*, *Pyle*, and *Mooney* in finding that a defendant officer could not "seriously contend that a reasonable police officer would not know that [his] actions [including fabricating evidence] were inappropriate and performed in violation of an individual's constitutional . . . rights." *Spurlock*, 167 F.3d at 1005-06 (also citing *Albright* v. *Oliver*, 510 U.S. 266, 274 (1994)). In *Spurlock* (a malicious-prosecution case), the defendant argued that *Albright*, and the Sixth Circuit case explicitly finding that malicious prosecution violated clearly established rights, had been decided after his conduct and therefore did not put him on notice. See *Spurlock*, 167 F.3d at 1006 n.19 (discussing generally *Albright* and *Smith* v. *Williams*, 78 F.3d 585, 1996 WL 99329 (6th Cir. 1996) (unpublished table opinion)). Rejecting that argument, we stated that "the fundamental principle that an individual has a constitutional right to be free from malicious prosecution . . . was clearly established well before either of [the] cases [cited by the defendant] was decided." *Id.* The reasoning in *Spurlock* is sound, and we follow it in holding that

Stoiker was on notice in 1975 that it was unlawful for him to fabricate evidence.

Stoiker is not entitled to qualified immunity on the fabrication-of-evidence claims.

c. Malicious Prosecution

Stoiker argues that he is entitled to qualified immunity because Plaintiffs "fail to identify a pre-1975 case that would clearly establish that a police officer could be held liable for malicious prosecution where he did not actively participate in the prosecution [and] did not testify before the grand jury or at trial." Stoiker Br. at 51. Stoiker's argument admits of two interpretations, one of which is possibly valid but has false premises and the other of which has true premises but is invalid.

Stoiker might be arguing that the state of malicious prosecution law in 1975 was in flux and that it was not clear at that time that he could be liable under a malicious prosecution cause of action. That may be true, but it does not follow that he is protected by qualified immunity. Whether a defendant is protected by qualified immunity turns not on whether the defendant was on notice that his actions satisfied the elements of a particular cause of action, but instead on whether the defendant was on notice that his actions violated the laws of the United States. Recently, when presented with a similar argument to Stoiker's, we responded:

> [The defendant] spends a considerable portion of his brief illustrating why it is not clear that he should be liable for malicious prosecution, thus reasoning that he is entitled to qualified immunity. Yet, his claim that the contours of our jurisprudence concerning malicious prosecution are not entirely clear misses the point. Our inquiry is wheth-

> er [the defendant's] alleged actions—arresting and detaining [the plaintiff] based on false pretenses and then seeking an arrest warrant based on these false statements—violated [the plaintiff's] clearly established constitutional rights. We conclude that they did.

Miller v. *Maddox*, 866 F.3d 386, 395 (6th Cir. 2017), cert. denied, 138 S. Ct. 2622 (2018). In short, "the *sine qua non* of the 'clearly established' inquiry is 'fair warning,'" *Baynes* v. *Cleland*, 799 F.3d 600, 612-13 (6th Cir. 2015) (quoting *Hope*, 536 U.S. at 741), and we ask only "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *id.* at 610 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)).

Stoiker's argument may, on the other hand, be that it was not clear in 1975 that an officer who fabricated evidence but did not testify for the prosecution had violated the laws of the United States. If this were true, he would be protected by qualified immunity. It is not, and he is not.

For Plaintiffs' claims to survive summary judgment, it must have been clearly established that where an officer fabricates evidence against a defendant and then withholds exculpatory evidence from the prosecution, but does not testify at trial or a grand jury hearing, he is "influenc[ing]" the decision to initiate the prosecution in a way that violates the defendant's constitutional rights. *Mills* v. *Barnard*, 869 F.3d 473, 480 (6th Cir. 2017).

Stoiker cites no case requiring testimony as an element of a §1983 claim for malicious prosecution and no case suggesting that testifying is required in order to influence the decision to prosecute. To the contrary, this court held long before 1975 that if officers arrested a

suspect without a warrant (in violation of state law), and "subjected [that suspect] to fraudulent trial in a criminal case" that resulted in wrongful conviction, the officers caused the suspect "a deprivation of [her] liberty without due process of law." *McShane* v. *Moldovan*, 172 F.2d 1016, 1019 (6th Cir. 1949). The court in McShane made no mention of whether the officers had testified against the suspect, and with good cause: the crux of the violation is the institution of judicial processes without probable cause, which does not require a testimonial act.

In conjunction with the cases cited in section II(C)(2)(b), *supra*, *McShane* is sufficient to have clearly established before May 1975 that an officer need not testify in order to violate a defendant's right to due process. That the phrase "malicious prosecution" was not used in that case to describe the cause of action is immaterial; what matters are the actions allegedly taken by Stoiker, not the name we give to the claim used to seek redress for those actions. Stoiker is therefore not entitled to qualified immunity on the malicious-prosecution claims.

3. Conclusion

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment to Stoiker as to the Fourteenth Amendment claims for fabrication of evidence and for withholding of exculpatory evidence in violation of *Brady*, and the Fourth Amendment claims for malicious prosecution. But we **AFFIRM** the grant of summary judgment as to the conspiracy claims.

D. Cleveland's Motion for Summary Judgment

The cause of action created by § 1983 may be exercised only against a "person who . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983. The Supreme Court has interpreted the word "person" broadly, and certain polities, including municipalities, are considered persons for purposes of §1983 liability. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

Although "person" has been given a wide meaning under §1983, when the person is a municipality, liability attaches only under a narrow set of circumstances: "A municipality may not be held liable under §1983 on a respondeat superior theory—in other words, 'solely because it employs a tortfeasor.'" *D'Ambrosio* v. *Marino*, 747 F.3d 378, 388-89 (6th Cir. 2014) (quoting *Monell*, 436 U.S. at 691). Instead, a plaintiff must show that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Alman* v. *Reed*, 703 F.3d 887, 903 (6th Cir. 2013) (quoting *Bd. of Cty. Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997)). A plaintiff does this by showing that the municipality had a "policy or custom" that caused the violation of his rights. *Monell*, 436 U.S. at 694.

There are four methods of showing the municipality had such a policy or custom: the plaintiff may prove "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess* v. *Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citation omitted).

Plaintiffs argue that they have provided evidence sufficient to make out a *Monell* claim under the first theory, as GPO 19-73 caused the violation of their *Brady* rights, and the third theory, as Cleveland's failure to train its

officers in *Brady* caused the violation of their *Brady* rights. Cleveland disagrees, as did the district court.[20]

1. Official Policy

"[T]o satisfy the *Monell* requirements a plaintiff must 'identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Garner* v. *Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (quoting *Coogan* v. *City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987)).

When proceeding under the first theory of *Monell* liability, under which a plaintiff must show an official policy or legislative enactment, the plaintiff must show that

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[20] Plaintiffs also argue that they have a third *Monell* claim based on Cleveland's failure to adopt an adequate policy to prevent *Brady* violations. The district court ruled against Plaintiffs on this theory, finding that they had not established that Cleveland had failed to adopt adequate policies to train officers in *Brady*'s requirements. *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3336607, at *4 (N.D. Ohio Aug. 4, 2017). We decline to analyze this theory separately. Plaintiffs cite no Sixth Circuit or Supreme Court case in support of their theory that they have a *Monell* claim—separate from their failure-to-train claim—based on Cleveland's unconstitutional failure to adopt a policy. Instead, the relevant cases they cite are failure-to-train cases. See *City of Canton* v. *Harris*, 489 U.S. 378, 391 (1989); *Gregory* v. *City of Louisville*, 444 F.3d 725, 755 (6th Cir. 2006); *Miller* v. *Calhoun Cty.*, 408 F.3d 803, 816-17 (6th Cir. 2005). That makes sense: the harm alleged and the analysis required under the failure-to-train theory are functionally indistinguishable from the harm Plaintiffs allege and the analysis they wish us to conduct under the failure-to-adopt-a-policy theory. Indeed, the district court stated that to prevail on their failure-to-adopt theory, Plaintiffs needed to show Cleveland was deliberately indifferent to the high likelihood of violations in the absence of a policy. See *Jackson*, 2017 WL 3336607, at *4 (citing *Miller*, 408 F.3d at 816-17). As we discuss below, Plaintiffs must make the same showing for their failure-to-train claim.

there were "formal rules or understandings—*often but not always committed to writing*—that [were] intended to, and [did], establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480-81 (1986) (emphasis added).

Plaintiffs argue that GPO 19-73 reflects just such a policy: it was a formal rule; it was promulgated by Cleveland; and it was illegal because it authorized *Brady* violations. Cleveland agrees that GPO 19-73 was a policy and that it was promulgated by Cleveland but argues that GPO 19-73 is consistent with *Brady* and, therefore, could not cause *Brady* violations.[21]

GPO 19-73 read in pertinent part as follows:

> TO THE MEMBERS OF THE DEPARTMENT
>
> In a letter to this Department, County Prosecutor John T. Corrigan has defined the legal rights of defense attorneys and courts to statements, reports and other items in criminal cases. His letter, as a part of this order, shall be considered an integral part of criminal case preparations procedures and all members shall comply with its provisions.

R. 101-7, PageID 1630.

The letter from the County Prosecutor, incorporated into GPO 19-73, read in pertinent part as follows:

> The Ohio Supreme Court has recently promulgated Criminal Rules of Procedure . . . . Particularly, Rule

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[21] Cleveland also argues that Plaintiffs cannot show that GPO 19-73 caused any *Brady* violations because they cannot demonstrate any *Brady* violations to begin with. As discussed in section II(C)(1)(a), *supra*, that argument is unavailing.

16 is going to be the concern of police departments and prosecutors.

....

NO POLICE DEPARTMENT IS REQUIRED OR SHALL GIVE TO DEFENSE COUNSEL AND/OR ANY COURT ANY RECORD, PAPER, STATEMENT, REPORT OR TANGIBLE OBJECT OF A CRIMINAL CASE.

Under proper circumstances under this rule, by application to the Prosecuting Attorney and/or the court, the defense counsel may be entitled to the following:

1. Statement of a defendant or co-defendant, written, recorded, or a summary of an oral statement.
2. Defendant's prior felony record.
3. Inspection of [physical evidence] material to the preparation of the defense or intended for use by the Prosecuting Attorney as evidence.
4. Reports of results of physical or mental examinations, scientific tests or experiments.
5. Names and addresses of witnesses.
6. *Evidence favorable to the defendant.*

EXCEPTION TO THE FOREGOING:

The foregoing does not authorize the discovery or the inspection of reports, memoranda, or other internal documents made by the Prosecuting Attorney or his agents (police departments are his agents) in connection with the investigation or

> prosecution of the case, *or of statements made by witnesses or prospective witnesses to state agents.*

Id. (emphases added).

Plaintiffs argue that GPO 19-73 is appropriately read as providing that defendants are generally entitled to favorable evidence, but that the entitlement does not apply if the favorable evidence is in the form of witness statements. The individual Defendants were therefore acting in conformance with GPO 19-73 when they failed to turn over to prosecutors Vernon's un-coerced, exculpatory statement that he had not seen the shooting, even though this withholding violated Plaintiffs' *Brady* rights.

In rebuttal, Cleveland argues, first, that the language of GPO 19-73 did not permit officers to withhold exculpatory evidence from prosecutors, and, second, that even if it did, it must be read in conjunction with other rules by which officers were bound in order to determine whether Cleveland had a policy of permitting the withholding of exculpatory evidence from prosecutors.

Because a city may be liable under *Monell* for a policy of permitting constitutional violations regardless of whether the policy is written, see *Pembaur*, 475 U.S. at 480-81, we ask whether GPO 19-73 and the other rules were inconsistent with a policy of withholding evidence in violation of *Brady*. If they were not inconsistent, then a genuine issue of material fact exists as to whether Cleveland had such a policy, and summary judgment was improper on Plaintiffs' first *Monell* theory.

a. The Text of GPO 19-73

Cleveland notes that the only language in GPO 19-73 discussing officers' disclosure obligations simply made it clear that they were not permitted to give any physical evidence directly to a defendant; it did not say officers

were permitted to withhold exculpatory evidence from prosecutors. Under this reading of GPO 19-73, the purpose of the order was to ensure that officers did not give evidence directly to defendants and, perhaps as something of an addendum, let officers know what prosecutors might have to do with the evidence officers gave them. The section permitting disclosure of exculpatory witness statements, after all, argues Cleveland, was prefaced by the statement that "by application to the Prosecuting Attorney and/or the court, the defense counsel may be entitled" to various evidence, and that language appears to concern the interaction between prosecutors and defendants, not officers and prosecutors.

Cleveland's interpretation of GPO 19-73 may be plausible, but it is not the only reasonable interpretation. The incorporated letter from the County Prosecutor informed Cleveland police officers that "Rule 16 is going to be the concern of *police departments* and prosecutors," not just prosecutors. (emphasis added). The incorporated letter recreated in part the text of Rule 16, which dealt only with what sorts of evidence required disclosure, not with who would do the disclosing. That GPO 19-73 told officers that Rule 16 was their concern and provided the text of that Rule, which described which evidence must be disclosed, could suggest that GPO 19-73 was promulgated for the purpose of ensuring officers knew what particular evidence they had to disclose to prosecutors so that the prosecutors could then disclose that evidence to the defense. Under this reading, GPO 19-73 did more than simply inform officers that they should not give evidence directly to defendants; it also served as the directive to officers as to what evidence they should, and should not, give to prosecutors. Particular to the last point, the "EXCEPTION TO THE FOREGOING" provision could

be read to direct officers not to turn over to prosecutors the documents described in that provision, which included "statements made by witnesses or prospective witnesses to state agents."

Therefore, one reasonable reading of GPO 19-73 is that it (1) spoke to police officers about their disclosure obligations and (2) informed them that they did not need to disclose exculpatory witness statements to the Prosecutor's Office. Because GPO 19-73 can be read as consistent with a policy of not disclosing exculpatory witness statements, we turn to the other written rules to see whether any of those foreclosed such a policy.

b. Other Rules

Cleveland's second argument for why a reasonable jury could not read GPO 19-73 as embodying a policy of allowing officers to withhold exculpatory witness statements from prosecutors is stronger, but ultimately unavailing. Instead of looking at GPO 19-73 in a vacuum, Cleveland urges us to consider the text of GPO 19-73 in the context of other rules and regulations. These other sources fall into two groups: sections of the Division of Police's Manual of Rules and the full text of Rule 16.

i. The Manual

The Manual contained a number of rules that were applicable to all Cleveland police officers in 1975. Cleveland points to four rules as requiring, when read in conjunction with GPO 19-73, that officers disclose exculpatory witness statements to prosecutors. While all laudable, each of these policies can, however, reasonably be interpreted as consistent with a reading of GPO 19-73 that permitted officers to withhold exculpatory witness statements from prosecutors.

Rule 14

> Case Preparation and Fraud Unit
>
> ....
>
> (2) The officer in charge shall cause statements to be taken from persons brought to the Unit in the course of criminal investigations; and shall see that such statements are properly filed and preserved. These statements shall be available only to the officers and members of the Division of Police who are interested in the presentation of a particular case, to the office of the County Prosecutor or the Law Department of the City of Cleveland. Under no circumstances shall they be given or exhibited to any other person without the written consent of the Chief of Police.

R. 102-2, PageID 1910-11.

Rule 14 only applied to statements given by persons brought to the Case Preparation and Fraud Unit, and there was no requirement that all witnesses be brought to that unit when giving a statement.[22] Nor did it require officers to affirmatively disclose exculpatory statements to prosecutors; it required only that detectives make statements available. This reading is consistent with testimony that it was the practice of Cleveland detectives to withhold evidence not contained in arrest reports, witness forms, or written statements unless it was specifically requested by prosecutors.

> Rule 66 [No Title]
>
> (1) Officers and members prosecuting persons charged with a crime shall thoroughly familiarize themselves with all of the facts and details concern-

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[22] Vernon does not appear to have been brought to the Case Preparation and Fraud Unit.

> ing such case, so that all of the evidence may be properly presented to the court.

Id. at PageID 1941.

Rule 66 said nothing about disclosure of evidence to prosecutors, much less exculpatory evidence. More importantly, it only required familiarity with the facts and details of a case insofar as such familiarity was required to "properly present" those facts to a court. As discussed above, GPO 19-73 can reasonably be interpreted as not requiring officers to disclose exculpatory witness statements to prosecutors for disclosure in turn to defendants (or, presumably, to courts). Read in conjunction with GPO 19-73, then, Rule 66 can reasonably be interpreted as not applying to exculpatory witness statements.

> Rule 77 [No Title]
>
> (1) Officers and members shall report on all matters referred to or investigated by them. Such reports may be either verbal or written, as the officer in charge may direct.
>
> (2) They shall, before reporting off duty, make such written reports as may be required on all matters coming to their attention or assigned to them for investigation. If the investigation has not been completed before he reports [sic] off duty, he shall make a report stating the progress made.
>
> (3) He shall address his written reports to his superior officer and shall sign the reports, giving his full name and rank, title or number. When required, such reports shall be examined and signed by a superior officer. Written reports shall be forwarded to the commanding officer.

Id. at PageID 1945-46.

Rule 77 required that officers make reports concerning their cases. It did not require that such reports contain all exculpatory information that they may have learned. Importantly, it did not require that any reports be disclosed to prosecutors, and it allowed reports to be made verbally to a superior officer, a method well suited to the withholding of information from prosecutors.

> Rule 78 [No Title]
>
> Written and verbal reports, testimony in court and conversation of any kind affecting the Division of Police, its officers, members, employees or persons under its jurisdiction shall be truthful and unbiased.

Id. at PageID 1946.

Even read in conjunction with GPO 19-73 and the other rules discussed herein, the limitations of Rule 78 render it incapable of carrying the weight with which Cleveland burdens it. It required not that all reports be complete but only that they be truthful and unbiased.[23] Nor did it require that any reports, which may have been made verbally to a superior officer, be disclosed to prosecutors.

None of the rules contained within the Manual, taken individually or collectively, are inconsistent with an interpretation of GPO 19-73 that permits officers to with-

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[23] Consider, for example, two officers who have coerced a witness into making what they believe to be a truthful statement: a report detailing that statement but excluding the coercion would comport with Rule 78. More insidiously, consider two officers who have coerced a witness into making a statement that they know to be false and who file a report stating that the witness made that statement. That report would be both true and unbiased and therefore consistent with Rule 78: the witness did, after all, make the (false) statement contained in the report.

hold exculpatory information from prosecutors. These rules can be read by a reasonable jury as consistent with a policy of permitting the withholding of exculpatory evidence in violation of *Brady*.

ii. Ohio Rule of Criminal Procedure 16

Cleveland also argues that the full text of Rule 16 made clear that defendants were entitled to all exculpatory evidence, including witness statements. The version of Rule 16 in force in 1975 read in pertinent part as follows:

> (B) Disclosure of evidence by the prosecuting attorney.
>
> *(1) Information subject to disclosure.*
>
> . . . .
>
> (f) Disclosure of evidence favorable to defendant.
>
> [description of exculpatory evidence]
>
> (g) In camera inspection of witness' [sic] statement.
>
> [description of procedure for in camera inspection of witness statements]
>
> *(2) Information not subject to disclosure.*
>
> *Except as provided in subsections (B)(1)*(a), (b), (d), *(f), and (g)*, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

Proposed Ohio Rules of Criminal Procedure, 46 Ohio BAR 817, 849–52 (1973) (emphases added).

Unlike GPO 19-73 and the rules in the Manual, Rule 16 made it quite clear that defendants were entitled to exculpatory witness reports. Rule 16(B)(2) excepted witness statements from the general disclosure requirements, using language almost identical to that used in GPO 19-73. Unlike GPO 19-73, however, Rule 16(B)(2) included an additional clause, excepting exculpatory witness statements from the exception for witness statements generally. Rule 16(B)(2) thereby placed exculpatory witness statements back into the universe of mandatory disclosure. As a result, the full text of Rule 16 made it clear that prosecutors were obligated to disclose all exculpatory witness statements to defendants.

This fact does not, however, save Cleveland, at least not at this stage of the litigation. Cleveland has provided no evidence that Cleveland required that its officers follow the official version of the Ohio Rules of Criminal Procedure, that those rules were followed by Cleveland officers, or that Cleveland officers were even aware of those rules. There is evidence, of course, that Cleveland officers were bound by Rule 16: GPO 19-73 can reasonably be interpreted as directing that Cleveland officers follow the requirements of Rule 16. But GPO 19-73 could be read as directing Cleveland officers to follow a modified version of Rule 16—the version included in GPO 19-73.[24]

And that version differed in at least one material way from the official Rule 16. Both GPO 19-73 and the official

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[24] GPO 19-73 did not indicate that the version of Rule 16 it included was in any way different from the official Rule 16 or suggest that officers either consult the official text of Rule 16 or consult prosecutors as to the duties of officers or prosecutors under Rule 16.

Rule 16 included a paragraph excepting witness statements from the general disclosure requirements. But although, as mentioned, that paragraph in the official Rule 16 contained an additional clause in paragraph (B)(2) excepting (by reference to the requirements of (B)(1)(f) and (g)) *exculpatory* witness statements from that exception—and the paragraph in the official Rule thereby required that *exculpatory* witness statements be *disclosed*—the version of Rule 16 in GPO 19-73 *omitted* the clause in that paragraph excepting exculpatory witness statements. The paragraph in the version of Rule 16 included in GPO 19-73 merely provided:

> The foregoing [disclosure requirements] do[ ] not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the Prosecuting Attorney or his agents (police departments are his agents) in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

R. 101-7, PageID 1630. It was this modified version of Rule 16—the one that could plausibly be interpreted as allowing the withholding of exculpatory witness statements—by which a reasonable jury could find Cleveland officers were bound.

c. Conclusion

GPO 19-73 and the rules in Cleveland's police manual, read together, could be understood to authorize Cleveland officers to withhold exculpatory witness statements from prosecutors. It is for a jury to consider GPO 19-73 and the rules in the Manual in light of Cleveland's actual practices and determine whether Cleveland had a policy of permitting *Brady* violations. Because Cleveland does

not contest that it promulgated GPO 19-73 or that the individual Defendants were acting in conformance with GPO 19-73 when they withheld Vernon's exculpatory statements, a reasonable jury could find Cleveland liable under *Monell*. See *Garner*, 8 F.3d at 364-65.

Because a genuine issue of material fact exists as to whether Cleveland had a policy of permitting *Brady* violations, the district court's grant of summary judgment to Cleveland on Plaintiffs' first *Monell* theory was improper.

2. Failure to Train

Plaintiffs also argue that in 1975, Cleveland had "a policy of inadequate training or supervision" of its officers as to their obligation to disclose exculpatory evidence under *Brady*. *Burgess* v. *Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

In order to show that a municipality is liable for a failure to train its employees, a plaintiff "must establish that: 1) the City's training program was inadequate for the tasks that officers must perform; 2) the inadequacy was the result of the City's deliberate indifference; and 3) the inadequacy was closely related to or actually caused the injury." *Ciminillo* v. *Streicher*, 434 F.3d 461, 469 (6th Cir. 2006) (citing *Russo* v. *City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992)).

Cleveland argues that Plaintiffs lack evidence sufficient for a jury to find that either of the first two requirements is met. We address each requirement in turn.

a. Adequacy of Cleveland's *Brady* Training

When determining whether a municipality has adequately trained its employees, "the focus must be on adequacy of the training program in relation to the tasks the

particular officers must perform." *City of Canton* v. *Harris*, 489 U.S. 378, 390 (1989).

Plaintiffs argue that Cleveland's training program was deficient in that it failed to train officers in their *Brady* obligations and that, to the degree that those officers received training in the disclosure of evidence to prosecutors, they were trained to withhold exculpatory evidence. Cleveland disagrees, citing deposition testimony to show that officers received official training in their disclosure obligations as well as unofficial on-the-job training in their disclosure obligations. The district court agreed with Cleveland.

It is undisputed that Cleveland officers received, and were trained in, the Manual. But as discussed in section II(D)(1)(b)(i), *supra*, those rules could be read as insufficient to inform officers of their disclosure obligations, as none of the rules in the Manual explicitly mandated disclosure of exculpatory witness statements to prosecutors. The only rule from the Manual that came close to requiring disclosure of witness statements to prosecutors was Rule 14, which applied only to witness statements made to the Case Preparation and Fraud Unit, and it only required that those statements be available to prosecutors, not that they be proactively disclosed.

Cleveland presents deposition testimony that "in the police academy . . . [y]ou were told to give [exculpatory evidence] to . . . a prosecutor" and that "Cleveland police officers are trained and instructed to turn over the entire product of their investigation to the prosecutor." R. 103, PageID 3664, 3672.

Cleveland also presents evidence that officers were trained on the job to disclose evidence. One officer testified that although the rule was not always followed, "the

rule was, you should turn over all evidence acquired in an investigation to the prosecution." R. 104, PageID 3949-50. That officer also testified:

> Police officers that conduct interviews are instructed to write down the statement as close to what the witness said as possible, whether it is good or bad. But it is part of what was said, and it needs to be, the entire thing needs to be presented to the prosecutor, the entire thing, not parts of it, the entire thing.

Id. at PageID 3972.

But Plaintiffs provide testimony that conflicts with Cleveland's account of the training received, both in the academy and on the job. One former officer testified that he was not "taught anything at police academy about police officers' obligation to disclose *Brady* evidence" and that he did not remember having "ever attend[ed] any training concerning police officers' obligation to disclose exculpatory evidence to the defense." R. 114-20, PageID 5127-29.

Another former officer testified that he could not recall having ever "attend[ed] any course, or receive[d] any training in which [he] learned that officers have an obligation to disclose exculpatory evidence to criminal defendants or prosecutors." R. 114-35, PageID 5492-93.

A third former officer testified, "As far as training, I would have to say no" training was provided teaching officers they were required "to place any witness statements in the official file or otherwise make them available to criminal defendants, defense counsels, and prosecutors." R. 102, PageID 1776. He also testified that there was "[n]o specific training" requiring police detectives "to disclose exculpatory evidence." *Id.* at PageID 1777.

The district court interpreted these statements as indicating only that no official training had been provided, not that no on-the-job training had been provided. *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3336607, at *6 (N.D. Ohio Aug. 4, 2017). We think this a cramped interpretation of these statements. One officer testified that he could not recall having "receive[d] *any* training in which [he] learned that officers have an obligation to disclose exculpatory evidence." (emphasis added). Another testified that he received "*no* [training] to place any witness statements in the official file." (emphasis added). A reasonable jury could interpret this testimony as indicating that officers received no training, on-the-job or otherwise, in their *Brady* obligations generally or in their obligation to provide witness statements to prosecutors.

There is therefore a genuine issue of material fact as to whether Cleveland's training of its officers in their disclosure obligations was sufficient, and summary judgment was inappropriate as to this issue. See *Burgess*, 735 F.3d at 471.

b. Cleveland's Deliberate Indifference

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cty. Comm'rs* v. *Brown*, 520 U.S. 397, 410 (1997) (internal quotation marks omitted). "In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be 'plainly obvious.'" *Gregory* v. *City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006) (quoting *Bd. of Cty. Comm'rs*, 520 U.S. at 412).

A plaintiff may meet this standard by showing either (1) "prior instances of unconstitutional conduct demon-

strating that the City had notice that the training was deficient and likely to cause injury but ignored it" or (2) "evidence of a single violation of federal rights, accompanied by a showing that the City had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Campbell* v. *City of Springboro*, 700 F.3d 779, 794 (6th Cir. 2012) (citing *Plinton* v. *Cty. of Summit*, 540 F.3d 459, 464 (6th Cir. 2008)).

Plaintiffs do not contend that they can show Cleveland's failure to train was deliberately indifferent via the first method.[25] Instead, Plaintiffs argue that they satisfy the second method of showing deliberate indifference because the "likelihood that the situation [i.e., a situation requiring police to handle exculpatory evidence] will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights" mean that failing to train officers in their disclosure obligations demonstrates deliberate indifference to the "highly predictable consequence" that untrained officers will violate *Brady*. *Jackson Br.* at 65 (quoting *Bd. of Cty. Comm'rs*, 520 U.S. at 409-10).

Plaintiffs cite *Gregory* in support of their conclusion. In *Gregory*, the plaintiff presented evidence that the defendant municipality had failed to train its officers in the handling of exculpatory evidence. See 444 F.3d at 753-54. This court reversed a grant of summary judgment to the municipality, holding that a "custom of failing to train its officers on the handling of exculpatory materials is sufficient to establish the requisite fault on the part of the

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[25] Finding that Plaintiffs had not shown Cleveland provided inadequate training to its officers, the district court did not address whether Plaintiffs could make out the deliberate-indifference element by either method. See *Jackson*, 2017 WL 3336607, at *5.

[municipality]" for a deliberate-indifference claim. *Id.* at 754 (citing *Bd. of Cty. Comm'rs*, 520 U.S. at 407).

Cleveland attempts to distinguish *Gregory* on the ground that in *Gregory*, the plaintiff had presented evidence sufficient for a jury to find that the defendant municipality had failed to train its officers, while in this case, Cleveland argues that the "*undisputed* evidence in the record establishes that the detectives in the City's Homicide Detective Bureau received on-the-job training about the evidence that they were required to turn over to the prosecutor." Cleveland Br. at 48. But, as discussed above, the evidence is not undisputed. Plaintiffs have provided testimony sufficient for a jury to find that Cleveland did not in fact train its officers in their disclosure obligations. *Gregory* therefore controls, and there is sufficient evidence for a reasonable jury to find that Cleveland was deliberately indifferent to the risk of *Brady* violations.

3. Conclusion

Plaintiffs having shown that there are genuine issues of material fact both as to whether Cleveland had an official policy of permitting the withholding of exculpatory witness statements from prosecutors and as to whether Cleveland had a policy of failing to train its officers in their disclosure obligations, summary judgment was inappropriate on the *Monell* claims. See *Burgess*, 735 F.3d at 471.[26] We therefore **REVERSE** the district court's grant of summary judgment to Cleveland as to those claims.

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[26] A failure-to-train claim under *Monell* also requires showing that the failure to train "was closely related to or actually caused [Plaintiffs'] injury," *Ciminillo*, 434 F.3d at 469, but Cleveland does not dispute that element.

III. CONCLUSION

In 1940, then-Attorney General Robert H. Jackson admonished prosecutors: "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."[27] In the present case, by contrast, one law-enforcement officer testified that "winning the case was what it was all about. It wasn't about what was fair, it wasn't about what was honest, it was about winning." R. 104, PageID 3967-68. If that sentiment explains the circumstances of Plaintiffs' convictions, then those convictions were the result of a process that was the very antithesis of Jackson's famous admonition.

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment to Stoiker as to Plaintiffs' § 1983 claims for conspiracy to fabricate evidence and withhold exculpatory evidence. We **REVERSE** and **REMAND** the district court's (1) judgment on the pleadings for Cleveland as to Plaintiffs' indemnification claims; (2) denial of Plaintiffs' motions to amend their complaints to substitute the administrator of the estates of the deceased Defendants as a party in their place; (3) grant of summary judgment to Stoiker as to the § 1983 claims for withholding of exculpatory evidence in violation of *Brady*, fabrication of evidence, and malicious prosecution; and (4) grant of summary judgment to Cleveland as to the *Monell* claims.

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[27] Robert H. Jackson, Attorney Gen. of the U.S., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 17-3840/3843

RICKY JACKSON (17-3840); KWAME AJAMU, FKA RONNIE BRIDGEMAN, AND WILEY EDWARD BRIDGEMAN (17-3843),

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND; JEROLD ENGLEHART; KAREN LAMENDOLA, GUARDIAN AD LITEM ON BEHALF OF FRANK STOIKER; ESTATE OF EUGENE TERPAY, ADMINISTRATOR; ESTATE OF JAMES T. FARMER, ADMINISTRATOR; ESTATE OF JOHN STAIMPEL, ADMINISTRATOR,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland,

No. 1:15-cv-00989

Christopher A. Boyko, District Judge.

OPINION

Argued: **June 14, 2018**
Decided and Filed: **March 28, 2019**

ARGUED: ELIZABETH C. WANG, Loevy & Loevy, Boulder, Colorado, for all Appellants.

WILLIAM M. MENZALORA, City of Cleveland, Cleveland, Ohio, for Appellee City of Cleveland.

STEPHEN W. FUNK, Roetzel & Andress, LPA, Akron, Ohio, for Appellees Karen Lamendola and the Estates of Eugene Terpay, James Farmer, and John Staimpel.

ON BRIEF: ELIZABETH C. WANG, Loevy & Loevy, Boulder, Colorado, for Appellant Ricky Jackson.

TERRY H. GILBERT, JACQUELINE C. GREENE, Friedman & Gilbert, Cleveland, Ohio, David E. Mills, The Mills Law Office LLC, Cleveland, Ohio, for Appellants Kwame Ajamu and Wiley Bridgeman.

WILLIAM M. MENZALORA, City of Cleveland, Cleveland, Ohio, for Appellee City of Cleveland.

STEPHEN W. FUNK, Roetzel & Andress, LPA, Akron, Ohio, for Appellees Karen Lamendola and the Estates of Eugene Terpay, James Farmer, and John Staimpel.

Before

Keith, Circuit Judge

Rogers, Circuit Judge

Bush, Circuit Judge

BUSH, J., delivered the opinion of the court in which ROGERS, J., joined, and KEITH, J., joined in all except Section II(C)(2). KEITH, J., delivered a separate concurring opinion.

JOHN K. BUSH, Circuit Judge:

Appellants Ricky Jackson, Wiley Bridgeman, and Kwame Ajamu served a long time in prison for a crime they did not commit. For Jackson, it was thirty-nine years; for Bridgeman, thirty-seven years; for Ajamu, twenty-five years. They each spent close to two and a half of those years on death row.

These men cannot get back any of the time they lost or erase the things they experienced. The best they can hope for is a remedy of damages under 42 U.S.C. § 1983 and Ohio law. This appeal concerns whether their complaints state sufficient facts for certain claims not to be dismissed and whether the men have presented enough evidence for other claims to overcome summary judgment.

In 1975, Jackson, Ajamu, and Bridgeman were convicted of murder. Their convictions were based largely on the purportedly eyewitness testimony of Edward Vernon, who then was thirteen years old. In 2014, nearly forty years later, Vernon recanted, disclosing that police officers had coerced him into testifying falsely. Vernon's recantation led to the overturning of appellants' convictions.

The exonerated men filed suit in the Northern District of Ohio, alleging § 1983 claims based on alleged violations of their constitutional rights by the officers and the City of Cleveland ("Cleveland"), along with state-law claims for indemnification against Cleveland. This appeal requires us to untangle a knot of legal issues surrounding the district court's grant of appellees' motions for judgment on the pleadings and for summary judgment and its denial of appellants' motions to amend their complaints. We **AFFIRM** the district court's grant of summary judgment as to the § 1983 claims based on conspiracy, but

we **REVERSE** and **REMAND** the district court's (1) judgment on the pleadings as to the indemnification claims; (2) denial of appellants' motions to amend their complaints to substitute the administrator of the estates of the deceased officers as a party in their place; (3) summary judgment as to § 1983 claims arising from violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), fabrication of evidence, and malicious prosecution; and (4) summary judgment as to claims against Cleveland based on *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978).

I. BACKGROUND

A. Factual Background

As befits this stage of the litigation, we recite the relevant facts in the light most favorable to the plaintiffs, who are appellants here. See *Ciminillo* v. *Streicher*, 434 F.3d 461, 464 (6th Cir. 2006).

In 1973, the Cleveland Division of Police promulgated General Police Order 19-73 ("GPO 19-73"), entitled "PRETRIAL DISCOVERY RIGHTS OF DEFENSE ATTORNEYS AND COURTS IN CRIMINAL CASES." R. 101-7, PageID 1630.[1] GPO 19-73 provided that "defense counsel may be entitled" to several types of evidence, including "[e]vidence favorable to the defendant." *Id.* But it also included a section entitled "EXCEPTION TO THE FOREGOING," which contained the following provision: "The foregoing does not authorize the discovery or the inspection of . . . statements made by witnesses or prospective witnesses to state agents." *Id.* The Manual of Rules used by the Division of Police (the

[1] All record citations are citations to the record in No. 17-3840 (Jackson's suit) unless otherwise indicated. Citations to the record in Ajamu and Bridgeman's suit will be prefaced by "No. 17-3843."

"Manual") did not otherwise instruct officers in handling potentially exculpatory information and did not mention *Brady*, as the Manual's last update had occurred before *Brady* was decided.

As described later in this opinion, some testimony suggests that Cleveland police officers may have received no formal training in their *Brady* obligations, and may not have known that *Brady* imposed any obligations upon them.

Deposition testimony also reveals that, regardless of how officers understood their obligations under *Brady*, violations of those obligations were common. Although it was generally understood that anything in a detective's file that was pertinent to a case "should go to the prosecutor," it was up to individual officers whether they followed this policy, and they did not always do so. R. 103, PageID 3794. The general practice at the time, followed in "every case," was for detectives to provide prosecutors with only "arrest reports, witness forms and written statements taken by the Statement Unit," and "photos," while omitting to turn over other evidence, including potentially exculpatory evidence, unless it was specifically requested by the prosecutor. *Id.* at PageID 3672-75. Deposition testimony describes this as a "practice," which "happened more than it should," of "detectives not [turning] over all the evidence to prosecutors." R. 104, PageID 3970.

Some detectives took a more proactive role by "manipulating the evidence" before giving it to prosecutors. *Id.* at PageID 3967. This was done, one officer testified, "because winning the case was what it was all about. It wasn't about what was fair, it wasn't about what was honest, it was about winning." *Id.* at PageID 3967-68.

Against this backdrop of evidence of incomplete *Brady* knowledge and frequent *Brady* violations, the record tells the following story.

On May 19, 1975, Edward Vernon, then twelve years old, was riding the bus home from school when he heard two gunshots. Being twelve, Vernon exited the bus at the earliest opportunity and ran to where he believed the shots originated. Coming upon the scene, Vernon found a gunshot victim, but nothing to indicate who was responsible for the shooting. After police had secured the area, Vernon left and met up with a friend who told Vernon that the perpetrators were Ricky Jackson, Kwame Ajamu (then known as Ronnie Bridgeman), and Wiley Bridgeman (collectively, "Plaintiffs"). Vernon, a civic-minded youth, returned to the crime scene and told an officer that he knew who had committed the shooting, whereupon the officer recorded Vernon's contact information.

The next day, Detectives Eugene Terpay and James Farmer went to Vernon's house and requested that he go down to the station to give a statement. As Vernon later recounted, when his mother asked to accompany him to the station, the officers "told her, no, he'll be all right, he'll be all right." R. 99-1, PageID 1183. At the station, Vernon told Terpay and Farmer that Plaintiffs had committed the shooting and gave their descriptions, which he was able to do because he knew them from the neighborhood. The following day, Terpay and Farmer again went to Vernon's house and asked him for Plaintiffs' addresses.

Detective John Staimpel, along with his partner Frank Stoiker, was working the case with Terpay and Farmer. On May 25, Staimpel and another detective, whose name Vernon cannot remember, picked Vernon up at his house

to bring him to a line-up. Vernon's mother again asked to accompany him, and Vernon recalls the detectives saying, "[N]o, he'll be all right. We'll bring him back after the lineup." *Id.* at PageID 1189. The detectives brought Vernon to the line-up and, as he recollects, asked him if "I see anybody that I recognize up there," which Vernon interpreted as asking whether he had seen anyone in the line-up commit the shooting. *Id.* at PageID 1190. Vernon replied that he had not. Ricky Jackson and Wiley Bridgeman, who had been arrested earlier in the day, were in that line-up. From Vernon's point of view, he had been forthright up until this point: he had honestly told the detectives that (he thought) he knew who had committed the crime, but he had never said that he had actually witnessed the crime, and so when he was asked at the line-up whether he saw anyone whom he had seen commit the crime, he said no.

The two detectives then brought Vernon into a room, whereupon Staimpel accused Vernon of lying, threatened to send his parents to jail for perjury, banged on a table, and used racial pejoratives to describe Vernon. (Vernon and Plaintiffs are African-Americans.) After Vernon began to cry, Staimpel said, "[W]e'll fix it," and the detectives left the room. *Id.* at PageID 1191. When the detectives returned, they gave Vernon a piece of paper, explained to him that it said he had failed to identify Jackson and Bridgeman in the line-up because he had been scared of their retaliating, and told Vernon to sign it, which Vernon did.

Stoiker signed a police report dated May 25, 1975, which described Stoiker and Staimpel's picking Vernon up and taking him to the line-up, Vernon's failing to identify Jackson and Bridgeman, and Vernon's explaining

this failure as due to his being "very afraid" of Plaintiffs. R. 114-19, PageID 5113.

The day after the line-up, Terpay and Farmer again spoke with Vernon. The detectives brought Vernon to the station, where he told them that he had not witnessed the crime and that he had never said that he had witnessed the crime. Terpay was wroth, yelling at Vernon and accusing him of having lied when he had gone to the line-up and said "that this is not them." R. 99-1, PageID 1194. Terpay threatened to send Vernon's parents to jail for perjury, and Vernon agreed to testify that he had seen Plaintiffs commit the crime.

A police report dated May 28, 1975 indicates that Stoiker and Staimpel "[c]onsulted with [the prosecutor] who issued papers charging [Plaintiffs] with [homicide]." R. 114-28, PageID 5321.

Prior to Jackson's trial, Terpay coached Vernon regarding his testimony and afterwards reviewed the trial transcript with Vernon to ensure that his testimony in the trials of Bridgeman and Ajamu was consistent.

Plaintiffs were convicted at separate trials. They were sentenced to death, but their sentences were later reduced to life imprisonment.

For nearly forty years, Vernon struggled with the knowledge that his testimony had put Plaintiffs in prison. He later testified, "Through out [sic] the years this case has . . . be[en] heavy on my emotion, my everything." R. 99-2, PageID 1234. "I wanted to come forward throughout the years, but I was scared, scared to come forward and tell the truth . . . with this battle in my mind, battle in my spirit, battle in my heart . . . . I'm battling with this . . . pretty much all my life . . ." R. 99-1, PageID 1203. The years did not lessen the turmoil in Vernon's mind.

One day in 2013, Vernon finally disburdened his conscience. He was lying in a hospital bed, stricken with hypertension and kidney failure, when his pastor visited and told him that Innocence Project attorneys were seeking to exonerate Plaintiffs. Vernon testified:

> So, after he stated that and I said, okay, well, you know what—I got up out of the bed and I just broke down and I cried on his shoulder and I said, well, I'm ready to tell the truth, I'm ready to come forward and tell the truth that Ricky Jackson did not commit the crime that he went to prison for.

Id. at PageID 1203-04.

Vernon formally recanted his testimony against each of the three Plaintiffs in November 2014. After the recantation, the prosecutor for Cuyahoga County, where Cleveland is located, admitted that there was "no evidence tying any of the three convicted defendants to the crimes" and that "[t]hey have been victims of a terrible injustice." R. 116, PageID 6302-03.

B. Procedural History

On May 19, 2015, Jackson filed suit against Terpay, Farmer, Stoiker,[2] Staimpel, and Cleveland (collectively, "Defendants"), as well as others,[3] alleging a multitude of state and federal claims. Bridgeman and Ajamu filed suit against the same defendants on July 2, 2015. On October

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[2] Karen Lamendola is acting as guardian ad litem on behalf of Stoiker and is therefore the named defendant-appellee representing Stoiker's interests. We continue to refer to Stoiker as a Defendant for narrative convenience.

[3] Plaintiffs also named another former officer, Jerold Englehart, in their notices of appeal. However, in their appellate briefs, they expressly abandon their claims against Englehart. Jackson Br. at 33; Ajamu & Bridgeman Br. at 6.

1, 2015, Cleveland moved for judgment on the pleadings, under Federal Rule of Civil Procedure 12(c), as to the state-law claims in both complaints. The district court granted both motions.

In November 2015, Jackson, and Bridgeman and Ajamu in their parallel lawsuit, all moved for leave to file amended complaints substituting the administrator of the estates of the deceased Defendants (the "administrator") for those Defendants. (J. Reid Yoder is the administrator of all of the estates.) The district court denied those motions as futile, reasoning that a § 1983 claim brought in Ohio does not survive a defendant's death.

On January 27, 2017, Stoiker (the only living individual Defendant) moved for summary judgment in both lawsuits, arguing that he was not involved in any unconstitutional activity and that, even if he was, he is protected by qualified immunity. On the same date, Cleveland also moved for summary judgment as to the *Monell* claims, arguing that Plaintiffs had failed to provide evidence sufficient for a jury to find Cleveland liable. The district court granted both motions for summary judgment.

II. DISCUSSION

We review de novo a judgment on the pleadings under Federal Rule of Civil Procedure 12(c), applying the same standard we apply to review the grant of a motion to dismiss under Rule 12(b)(6). *Warrior Sports, Inc.* v. *Nat'l Collegiate Athletic Ass'n*, 623 F.3d 281, 284 (6th Cir. 2010). We therefore "construe the complaint in the light most favorable to the plaintiff and accept all allegations as true" to determine whether the "complaint . . . contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Doe* v. *Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018) (citations and internal quotation marks omitted).

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend "should [be] freely give[n] . . . when justice so requires." "We review a district court's order denying a Rule 15(a) motion to amend for an abuse of discretion." *Rose* v. *Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Gen. Elec. Co.* v. *Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990)). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, uses an erroneous legal standard, or improperly applies the law." *United States* v. *Arny*, 831 F.3d 725, 730 (6th Cir. 2016) (citation and internal quotation marks omitted).

"We review a district court's grant of summary judgment de novo." *Adair* v. *Charter Cty. of Wayne*, 452 F.3d 482, 486 (6th Cir. 2006) (quoting *Allen* v. *Mich. Dep't of Corr.*, 165 F.3d 405, 409 (6th Cir. 1999)). Summary judgment is appropriate when "no genuine dispute as to any material fact" exists and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine dispute of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Peffer* v. *Stephens*, 880 F.3d 256, 262 (6th Cir. 2018) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). At the summary judgment stage, "the evidence is construed and all reasonable inferences are drawn in favor of the nonmoving party." *Burgess* v. *Fischer*, 735 F.3d 462, 471 (6th Cir. 2013) (citing *Hawkins* v. *Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008)).

Numerous decisions by the district court are now on appeal: (1) the district court's dismissal, with prejudice, of Plaintiffs' claims against Cleveland for indemnification under state law; (2) the district court's denial of Plaintiffs' motions to substitute the administrator of the deceased

Defendants' estates as a defendant; (3) the district court's grant of summary judgment to Stoiker on the § 1983 claims; and (4) the district court's grant of summary judgment to Cleveland on the *Monell* claims. We address each issue in turn.

A. Indemnification Claims

The claims against Cleveland under Ohio Revised Code § 2744.07(B)[4] seek indemnification for damages based on the alleged torts of the individual Defendants, who are former employees of Cleveland. Section 2744.07(B) provides that "a political subdivision shall indemnify and hold harmless an employee" found liable for that employee's acts, so long as the employee was "acting in good faith" and "within the scope of employment."[5] The district court granted Cleveland's motions for judgment on the pleadings, reasoning that § 2744.07(B) provides only a tortfeasor employee, and not a tort victim, with the right to bring a claim of indemnification against the tortfeasor's employer.

Plaintiffs argue that the district court erred in dismissing their indemnification claims with prejudice be-

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[4] At the time of the district court's opinion, the relevant language appeared in § 2744.07(A)(2), so the district court cited that provision. See *Jackson* v. *City of Cleveland*, No. 1:15CV989, 2016 WL 3952117, at *2 (N.D. Ohio July 20, 2016). Because the Ohio Revised Code has since been amended, we cite the subsection in which the relevant language now appears, subsection (B). The language has not been changed in any way that would affect the district court's, or our, analysis.

[5] Cleveland's brief does not address whether the defendant officers were acting "in good faith" and within the scope of their employment for purposes of the indemnification claims, and the district court did not consider those issues. We will not address unargued principles of Ohio law on which the district court did not rule.

cause the claims were not yet ripe and unripe claims, if they are to be dismissed, should only be dismissed without prejudice.

Generally, a claim may not be adjudicated on its merits unless it is ripe. See *Nat'l Rifle Ass'n of Am.* v. *Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). A claim is unripe when it "is anchored in future events that may not occur as anticipated, or at all." *Id.* (citing *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200-01 (1983); *Dames & Moore* v. *Regan*, 453 U.S. 654, 689 (1981)). This prohibition comes both from the case or controversy requirement of Article III and from prudential considerations. See *Brown* v. *Ferro Corp.*, 763 F.2d 798, 801 (6th Cir. 1985) (noting that a ripeness analysis includes a discretionary determination beyond the Article III standing considerations).

The ripeness doctrine exists "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967)). Application of this doctrine "requires that the court exercise its discretion to determine if judicial resolution would be desirable under all of the circumstances." *Brown*, 763 F.2d at 801. Of primary importance is "whether the issues tendered are appropriate for judicial resolution," and, if so, the degree of "hardship to the parties if judicial relief is denied" before the claim is allowed to ripen further. *Young* v. *Klutznick*, 652 F.2d 617, 625 (6th Cir. 1981) (quoting *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 162 (1967)).

Indemnification claims are frequently brought while unripe, depending as they often do on the favorable adjudication of underlying tort claims. Because of this, as a

general matter, a claim for indemnification for damages that may be awarded on an underlying tort claim should not be adjudicated on the merits until the underlying claim is adjudicated. See, *e.g.*, *Safety Nat'l Cas. Corp.* v. *Am. Special Risk Ins. Co.*, 99 F. App'x 41, 43 (6th Cir. 2004) (finding unripe a claim of indemnification for fraudulent conveyance because, among other reasons, the underlying claim for fraudulent conveyance had not yet been adjudicated); see also *Armstrong* v. *Ala. Power Co.*, 667 F.2d 1385, 1388-89 (11th Cir. 1982) (affirming dismissal of indemnity suits as premature prior to entry of judgment in underlying lawsuit); *A/S J. Ludwig Mowinckles Rederi* v. *Tidewater Constr. Co.*, 559 F.2d 928, 932 (4th Cir. 1977) (holding indemnification issue not ripe prior to adjudication of underlying claims).

Because the ripeness doctrine is discretionary, courts sometimes apply an exception for indemnification claims that have no possibility of success, regardless of the merits of the underlying claims. See, *e.g.*, *Cincinnati Ins. Co.* v. *Grand Pointe, LLC*, No. 1:05-CV-161, 2006 WL 1806014, at *9 (E.D. Tenn. June 29, 2006) (collecting cases in support of the proposition that "a court may grant summary judgment on the issue of indemnification if it can determine the allegations in the complaint could under no circumstances lead to a result which would trigger the duty to indemnify" (citations and internal quotation marks omitted)).

The Sixth Circuit has not analyzed the propriety of this exception, and we need not do so now because, even if it is permissible for district courts to adjudicate indemnification claims with no possibility of success prior to the adjudication of underlying tort claims, this is not such a case.

If Plaintiffs' indemnification claims have no possibility of success, that would be because Ohio law provides that only the tortfeasor employees, and not the parties injured by them, may bring claims under Ohio Revised Code §2744.07(B). The district court did an admirable job analyzing Ohio court cases before holding that Ohio law does so provide. See *Jackson* v. *City of Cleveland*, No. 1:15CV989, 2016 WL 3952117, at *2 (N.D. Ohio July 20, 2016). But the only cases available to the district court were from the Ohio courts of appeal, as the Ohio Supreme Court had yet to opine on the issue.

The judgments of Ohio appellate courts not being binding on the Ohio Supreme Court, there remains a possibility that Plaintiffs' indemnification claims could succeed: Plaintiffs would need to win their underlying tort action and, while that action was pending, the Ohio Supreme Court would need to adopt their interpretation of Ohio Revised Code §2744.07(B). Although the latter eventuality may seem remote, it is far from impossible and, as it happens, the Ohio Supreme Court has accepted an appeal addressing this very issue. See *Ayers* v. *Cleveland*, 106 N.E.3d 65 (Ohio 2018) (Table).

Because it is not impossible for Plaintiffs to prevail on their indemnification claims, those claims are not ripe for adjudication. As discussed above, in evaluating whether a claim is ripe, courts should determine (1) whether a matter is "appropriate for judicial resolution" and (2) whether the parties would undergo hardship "if judicial relief is denied" on their claim before it ripens further. *Young*, 652 F.2d at 625. Neither factor supports finding the indemnification claims are ripe here.

First, interpreting Ohio Revised Code §2744.07(B) is best avoided unless necessary. Federal courts generally avoid interpreting unsettled state law because state

"courts are in the better position to apply and interpret" their own jurisdiction's law. *Travelers Indem. Co.* v. *Bowling Green Prof'l Assocs., PLC*, 495 F.3d 266, 272 (6th Cir. 2007). As the Supreme Court said in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941) and repeated in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959):

> Had we or they (the lower court judges) no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of [state] law. But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination.

Thibodaux, 360 U.S. at 27 (quoting *Pullman*, 312 U.S. at 499). Where, as here, adjudicating an issue of state law is unnecessary because the litigation is in its early stages, and state law is unsettled, the inappropriateness of deciding the issue in federal court weighs in favor of finding the claim unripe for adjudication in federal court.

Second, that no harm will befall Cleveland if "judicial relief is denied" for the time being also weighs in favor of finding the indemnification claims unripe. *Young*, 652 F.2d at 625. The district court's grant of Cleveland's motions for judgment on the pleadings as to Plaintiffs' indemnification claims did not release Cleveland from the litigation, as Plaintiffs still have *Monell* claims outstanding against Cleveland. The only effect that denying Cleveland's motions, or holding them in abeyance, would have on the litigation would be to delay adjudication of the indemnification claims until a later stage in the litigation. At that point, the district court may be able to avoid interpreting Ohio Revised Code § 2744.07(B), because the Ohio Supreme Court may already have done so. The dis-

trict court should interpret Ohio law only if the Ohio Supreme Court has not done so by the time the underlying § 1983 claims have been properly adjudicated on remand, and if those claims are found to have merit.

The ripeness doctrine therefore requires that the indemnification claims not be adjudicated on the merits at the pleading stage, given the unsettled condition of state law. Because "a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits," the district court erred in dismissing those claims with prejudice. *Mich. Surgery Inv., LLC* v. *Arman*, 627 F.3d 572, 575 (6th Cir. 2010) (quoting *United States* v. *One Tract of Real Prop.*, 95 F.3d 422, 425-26 (6th Cir. 1996)).

B. Plaintiffs' Motions to Substitute

Plaintiffs sought leave to amend their complaints to substitute the administrator of the estates of Defendants Terpay, Staimpel, and Farmer as a party in place of those Defendants, as they are now deceased. District courts "should freely give leave" to amend a complaint pre-trial "when justice so requires." Fed. R. Civ. P. 15(a)(2). One permissible reason to deny leave is the "futility of [the] amendment[s]." *Foman* v. *Davis*, 371 U.S. 178, 182 (1962).

The district court denied leave to amend, reasoning that § 1983 claims brought in Ohio do not survive the deaths of the tortfeasors, and, therefore, the requested amendments would be futile.[6] On appeal, Defendants argue that the district court was correct, but also suggest an alternative ground for affirming—that Plaintiffs did

[6] The district court also denied leave to amend on futility grounds with regard to Plaintiffs' state-law claims against the deceased Defendants, but Plaintiffs do not appeal that ruling.

not timely present their claims to the estates of the deceased Defendants. We address the survivability and timeliness arguments in turn.

1. Survival of § 1983 Claims

Defendants first argue that the denial of Plaintiffs' motions to amend should be affirmed because § 1983 claims do not survive the death of the tortfeasor in Ohio.

42 U.S.C. § 1988(a) provides that in actions to protect civil rights, where "the laws of the United States . . . are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held," shall be applied, "so far as the same is not inconsistent with the Constitution and laws of the United States."

The Supreme Court has interpreted this statutory language as requiring a three-step process for determining which jurisdiction's procedural law, such as provisions concerning statutes of limitations or the abatement of claims, is used in § 1983 suits. See *Robertson* v. *Wegmann*, 436 U.S. 584, 588-89 (1978). First, a district court must determine whether there is an applicable federal law that covers the issue, and, if there is, apply it. See *id.* Second, if there is no relevant federal law, then the district court must determine what the appropriate rule is in the state where the district court sits. See *id.* at 588. Third, the district court must determine whether the law of that state is "inconsistent with the Constitution and laws of the United States;" if there is no inconsistency, the state law is used, but if inconsistency exists, a federal common-law rule is used. *Id.* at 588-89.

Because "[n]o federal statute or rule says anything about the survivorship of § 1983 claims," *Crabbs* v. *Scott*, 880 F.3d 292, 294 (6th Cir. 2018), we turn to the relevant Ohio law, which provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.

Ohio Rev. Code § 2305.21 (West 2019). Plaintiffs argued before the district court that their claims fall within "injuries to the person," while Defendants argued that "injuries to the person" encompasses only physical injuries, and not the violation of rights alleged in this case.

The district court agreed with Defendants, citing a district court case holding that under Ohio law, § 1983 claims similar to those brought by Plaintiffs did not involve "injuries to the person." *Tinney* v. *Richland Cty.*, No. 1:14 CV 703, 2014 WL 6896256, at *2 (N.D. Ohio Dec. 8, 2014), aff'd, 678 F. App'x 362 (6th Cir. 2017).

After the district court's judgment, however, *Tinney* was superseded by a published opinion of this circuit holding precisely the opposite. *Crabbs* expressly rejected the holding in *Tinney,* deciding instead that § 1983 claims are subject to the procedural rules of the state where they are brought that relate to personal injury actions, regardless of the specific type of injury alleged in the suit. See 880 F.3d at 296.

When hearing a direct appeal, this court evaluates the merits of the case based on current law, not the law existing when the district court entered its judgment. See *Chaz Concrete Co., LLC* v. *Codell*, 545 F.3d 407, 409 (6th

Cir. 2008). After *Crabbs*, all claims brought under § 1983 are to be treated as actions sounding in personal injury tort. Because Ohio Revised Code § 2305.21 provides that actions for personal injury survive the deaths of the tortfeasors, and that statute does not conflict with the laws of the United States, see *Crabbs*, 880 F.3d at 295, § 1983 actions brought in Ohio survive the deaths of the tortfeasors.

Therefore, through no fault of its own, the district court was in error as to its grounds for finding that the proposed amendments, substituting the administrator of the estates of Terpay, Staimpel, and Farmer for those Defendants, would be futile.

2. Timeliness of Plaintiffs' Claims Against the Estates

Defendants argue that we should affirm the district court on alternative grounds—namely, that the claims against the estates were not timely brought. Proper adjudication of this issue requires analysis of both Ohio and federal law. Defendants argue that Ohio estate law regarding the timely filing of claims defines which entities have the capacity to be sued, while Plaintiffs argue that those provisions are merely statutes of limitations. See Ohio Rev. Code §§ 2117.06, 2117.37.

The points of contention do not end there, however. If Plaintiffs are correct that Ohio estate law merely establishes statutes of limitations, the parties also dispute whether those statutes or the general Ohio statute of limitations applies to § 1983 suits. On the other hand, if Defendants are correct that Ohio estate law defines which entities have the capacity to be sued, the parties also disagree over whether federal courts hearing § 1983 actions are bound by that definition, as well as whether an excep-

tion to that definition, provided in Ohio Revised Code § 2117.06(G), applies to the facts of this case.

The district court did not address these issues, instead relying on its holding that the § 1983 claims did not survive the deaths of the deceased Defendants.[7] "It is the general rule that a federal appellate court does not consider an issue not passed upon below." *Lindsay* v. *Yates*, 498 F.3d 434, 441 (6th Cir. 2007) (quoting *United States* v. *Henry*, 429 F.3d 603, 618 (6th Cir. 2005)). This directive is not jurisdictional, however, and "a departure from this general rule may be warranted when 'the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of this already protracted litigation.'" *Katt* v. *Dykhouse*, 983 F.2d 690, 695 (6th Cir. 1992) (quoting *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988)).

We will follow the general rule and decline to address these issues in the first instance. These are thorny issues of first impression in this circuit, and because the district court has not yet addressed them, we do not believe they are "presented with sufficient clarity and completeness" for our review. *Id.*

3. Conclusion

The district court erred in finding that Plaintiffs' proposed amendments would be futile on the ground that

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[7] The district court did address timeliness with regard to Plaintiffs' state-law claims, but Plaintiffs do not challenge that analysis on appeal. The timeliness analysis required for the § 1983 claims differs from that required for the state-law claims: the former involves a three-step analysis to determine the applicable law, as described in section II(B)(1), *supra*. See *Robertson*, 436 U.S. at 588-89. The district court did not conduct this analysis.

§ 1983 claims brought in Ohio do not survive the deaths of the tortfeasors, and we decline to address whether Defendants have presented an alternative ground on which the district court's denial of Plaintiffs' motions to amend could be affirmed. Because applying the wrong legal standard constitutes reversible error on abuse of discretion review, *United States* v. *Arny*, 831 F.3d 725, 730 (6th Cir. 2016), the district court's denial of the motions to file amended complaints is **REVERSED** and **REMANDED** for further proceedings.

C. Stoiker's Motion for Summary Judgment

We next address the district court's grant of summary judgment to Stoiker on the § 1983 claims that Stoiker violated Plaintiffs' Fourteenth Amendment right to due process by withholding exculpatory evidence, fabricating evidence, and conspiring to do the same, and Plaintiffs' Fourth Amendment right to be free of malicious prosecution.

If a police officer violates the Constitution, "42 U.S.C. § 1983 provides a civil remedy for those" injured by the violation. *Peffer* v. *Stephens*, 880 F.3d 256, 263 (6th Cir. 2018). But officers sued under the aegis of § 1983 are protected from liability by the doctrine of qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity does not apply if (1) "on the plaintiff's facts," a constitutional violation occurred, and (2) the alleged violation was of "clearly established constitutional rights of which a reasonable person would have known." *Hoover* v. *Radabaugh*, 307 F.3d 460, 465 (6th Cir. 2002) (quoting *Dickerson* v. *McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1996)).

The district court found that there was insufficient evidence for a reasonable jury to find that Stoiker had committed any of the alleged constitutional violations. We address each of the appealed determinations in turn.

1. Constitutional Violations

a. Withholding Exculpatory Evidence

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Prosecutors are not the only state actors bound by *Brady*, and "police can commit a constitutional deprivation analogous to that recognized in *Brady* by withholding or suppressing exculpatory material." *Moldowan* v. *City of Warren*, 578 F.3d 351, 379 (6th Cir. 2009).

Brady claims have three elements: "[1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler* v. *Greene*, 527 U.S. 263, 281-82 (1999).

The district court granted summary judgment to Stoiker on the ground that Plaintiffs had failed to present evidence sufficient for a reasonable jury to find the second element—that Stoiker had suppressed evidence. It did so for two reasons. First, it held that there was insuf-

ficient evidence for a jury to find that Stoiker was involved with the unconstitutional activity at all, noting that Vernon had never identified Stoiker as one of the officers involved.[8] Second, even if Stoiker were involved, the district court held, there was insufficient evidence that he was aware of any exculpatory evidence, and an officer unaware of exculpatory evidence cannot suppress that evidence.

We disagree with the district court's reasoning. Given the evidence in the record, although a jury might ultimately find that Stoiker did not suppress evidence, it would not be unreasonable in finding that he had.

Consider the following evidence. Vernon testified that Staimpel and another officer led him into a room after he failed to identify Plaintiffs at a line-up and coerced him into signing a false statement about that line-up. Staimpel testified at trial that (1) Stoiker was his partner and (2) Stoiker was present for the line-up. Based on Staimpel's testimony, a reasonable jury could infer that (3) Stoiker was present during the post-line-up interview of Vernon and (4) Stoiker was present when Vernon signed his false statement explaining his "fear" of Plaintiffs.

In addition, the record contains a police report, signed by Stoiker and dated the day that Vernon testified he was coerced into signing a false statement by two detectives, detailing the version of the line-up and subsequent

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[8] "The only evidence that points to Stoiker's involvement are the signatures on the statement and the report. However, even if those are Stoiker's signatures, Plaintiff has not cited to any policy, practice, or procedure about the meaning or effect of signature [sic]. Therefore, the Court is left to speculate as to what the signature meant." *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3380456, at *3 (N.D. Ohio Aug. 4, 2017).

interview that Vernon alleges were fabricated. The district court is correct that the report does not say that Stoiker was involved in that line-up and interview, but a jury is "allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them," *Galloway* v. *United States*, 319 U.S. 372, 396 (1943), and it is reasonable to infer that a detective who signs a report was involved in the events recounted in that report.

Because of this proof, a reasonable jury could find that Stoiker was present when Vernon was coerced into signing the allegedly false statement, in which he claimed that he had failed to identify Jackson and Bridgeman in the line-up because he was afraid of them. And if Stoiker was present when Vernon was coerced into signing the allegedly false statement, he knew that Vernon had not given fear of Plaintiffs as his true reason for not identifying them—in other words, that the statement was false. That knowledge was exculpatory evidence. See *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*'s disclosure] rule." (citation and internal quotation marks omitted)). If Stoiker was present, he also knew that detectives coerced Vernon's statement, which was a related, but separate, piece of exculpatory evidence. See *id.*

In addition, a reasonable jury could find that Stoiker was aware of a third piece of exculpatory evidence. While his possible awareness of this evidence is less clear-cut than of the above-mentioned pieces of exculpatory evidence, it would not be unreasonable for a jury to infer that Stoiker knew Vernon had said he had not seen Plaintiffs commit the crime with which they were

charged. Whether or not Stoiker was told by other officers that Vernon had not seen Plaintiffs commit the murder, Vernon stated that he was asked at the line-up "if I could recognize anyone there who was at the shooting" and that he answered that question in the negative.[9] R. 99-3, PageID 1236.

Stoiker and the district court interpret that question as asking whether Vernon recognized anyone in the line-up. Vernon interpreted it as asking whether he had seen anyone in the line-up commit the crime.[10] If Vernon's interpretation is correct, then the officers present—which a reasonable jury could find included Stoiker—knew that Vernon was claiming he had not seen Plaintiffs commit the crime when he answered "No" to their question. A reasonable jury could find that Vernon, the only witness to the events who has testified to the contents of that conversation, interpreted the question correctly.

As Stoiker did not disclose any of this evidence to prosecutors, a reasonable jury could find that Stoiker suppressed exculpatory evidence in violation of *Brady*.

As to the third element of a *Brady* claim, a reasonable jury could find that Plaintiffs suffered prejudice as a result of the alleged suppression. To show prejudice, Plaintiffs must show that the allegedly suppressed evidence was "material;" in other words, "that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 280, 281. Because Vernon's coerced statement formed the

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[9] As mentioned in section I(A), *supra*, Vernon alternatively recalled that he may have been asked if "I see anybody that I recognize up there." R. 99-1, PageID 1190.

[10] Vernon later explained that he answered in the negative because "I didn't seen happen [sic] on May 19, 1975." R. 99-2, PageID 1233.

core of the prosecution's case, there is a reasonable likelihood that, had the juries in Plaintiffs' trials known that that statement was fabricated and coerced, or that Vernon had orally stated that he had not seen the shooting, the juries would not have convicted Plaintiffs. Therefore, a reasonable jury could find all three elements of a *Brady* claim satisfied.

b. Fabricating Evidence

The Due Process Clause of the Fourteenth Amendment is also "violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury." *Gregory* v. *City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006) (citing *Stemler* v. *City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997)).

Stoiker presents two arguments for why summary judgment was appropriate on this issue. First, he contends there was insufficient evidence that he was involved in the fabrication of Vernon's statement. Second, Stoiker argues there was insufficient evidence that the fabricated statement affected the decision of the jury. The district court agreed with both of Stoiker's arguments.

Turning to the first argument, a reasonable jury could find, as discussed in section II(C)(1)(a), *supra*, that Stoiker was in the room when Vernon was initially intimidated, left the room with Staimpel, and then returned to the room with Staimpel, at which point Staimpel coerced Vernon into signing the statement. This does not necessarily entail that Stoiker participated in the creation of the false statement, but a reasonable jury could infer that Stoiker either drafted, or assisted Staimpel in drafting, the false statement. If Stoiker was actively involved in

the fabrication of the false statement, he knowingly fabricated evidence.

As for the second argument, there is, in fact, sufficient evidence for a reasonable jury to conclude that the false statement influenced the juries at Plaintiffs' trials. True, as the district court noted, although the statement was introduced in evidence by the defense at Jackson's trial, it was used only by defense counsel in an attempt to impeach Vernon's testimony and "it is unclear whether the jury in the Jackson trial had the statement while they were deliberating."[11] *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3380456, at *3 (N.D. Ohio Aug. 4, 2017). Also, the statement was not admitted in evidence at Bridgeman's or Ajamu's trial at all. And it is fair to conclude, as the district court reasoned, that "Vernon's live testimony," not the statement, "led to the conviction[s] in all three trials." *Id.*

But the relevant question is not whether the fabricated evidence was shown to the jury; it is whether the statement affected the decision of the jury. For example, a fabricated search warrant affidavit, used to obtain evidence later shown to the jury, can form the basis for a fabrication-of-evidence suit. See *Webb* v. *United States*, 789 F.3d 647, 670 (6th Cir. 2015). And fabricated evidence that "is used as [the] basis for a criminal charge" can form the basis for a § 1983 claim because, absent that evidence, there would have been no jury. *Halsey* v. *Pfeiffer*, 750 F.3d 273, 294 n.19 (3d Cir. 2014).

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[11] Although the possibility is ultimately unnecessary to our holding on the fabrication-of-evidence claims, we note that because Vernon's statement was introduced in evidence at Jackson's trial, a reasonable jury could infer that the jury that convicted Jackson had access to the statement at some point in their deliberations.

A reasonable jury in the present case could find that the fabricated statement impacted the juries' decisions in the criminal trials in at least two ways. First, the prosecutor testified that his understanding of Vernon's statement was based on the copy in the police report and that, if he had known what had actually happened on the day of the line-up, he would have declined to prosecute: he does not, as he put it, "believe in prosecuting innocent people." R. 114-29, PageID 5350. The prosecutor did not speak to Vernon prior to bringing charges, and so the false statement constituted the entire basis for his understanding of Vernon's involvement. If Staimpel and Stoiker had not fabricated Vernon's statement, therefore, charges would not have been brought, and, of course, a jury that is never empaneled is a jury that does not return a guilty verdict.

A jury in the present case also could find that the falsified statement caused the criminal verdicts because the statement coerced Vernon to testify in conformance with it. Unlike Staimpel's baseless threat to prosecute Vernon's parents if Vernon failed to sign a statement saying that he had seen Plaintiffs commit the crime, Vernon would have faced a real threat of prosecution for perjury had his testimony conflicted with his earlier signed statement. See *Osburn* v. *State*, 7 Ohio 212, 214-15 (1835) (admitting as evidence of perjury a paper signed by the defendant).

A reasonable jury could therefore find both that Stoiker participated in the fabrication of Vernon's statement and that there is a reasonable probability the statement affected the juries at Plaintiffs' trials.

c. Conspiracy to Withhold and Fabricate Evidence

To make out a claim for conspiracy to deprive them of their due process rights, Plaintiffs must show "that (1) a single plan existed, (2) the conspirators shared a conspiratorial objective to deprive the plaintiffs of their constitutional rights, and (3) an overt act was committed in furtherance of the conspiracy that caused the injury." *Robertson* v. *Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (internal quotation marks omitted) (quoting *Revis* v. *Meldrum*, 489 F.3d 273, 290 (6th Cir. 2007)).

For the reasons discussed above, a reasonable jury could find that Stoiker and Staimpel planned to draft a false statement and coerce Vernon into signing that statement and that they committed an overt act in furtherance of that plan. Further supporting the conspiracy claim, it would not be unreasonable for a jury to infer that the detectives planned to withhold the existence of their acts from prosecutors for the purpose of tipping the scales against Plaintiffs, as informing prosecutors of the coercion would have rendered their actions meaningless.

However, the inquiry does not end there. We must also determine whether an individual can be held liable for conspiracy when the alleged conspiracy was undertaken by agreement with another individual or individuals employed by the same entity as the defendant.

The intracorporate conspiracy doctrine, which states that if "all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy," has been applied to 42 U.S.C. §1985(3) by this court. *Johnson* v. *Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839-40 (6th Cir. 1994) (quoting *Hull* v. *Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of*

Educ., 926 F.2d 505, 510 (6th Cir. 1991)). Section 1985(3) creates a cause of action for a conspiracy between two or more persons to deprive another of the equal protection of the laws.

We have also held that the doctrine applies in § 1985(2) suits. *Doherty* v. *Am. Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984). 42 U.S.C. § 1985(2) creates a cause of action for a conspiracy to, among other actions, obstruct justice or to intimidate a party, witness, or juror.

But this circuit has never decided whether the intracorporate conspiracy doctrine also applies to suits under § 1983. See *DiLuzio* v. *Vill. of Yorkville*, 796 F.3d 604, 615 (6th Cir. 2015) (noting that "the Sixth Circuit has never held that the intracorporate conspiracy doctrine applies to municipal government officials in a § 1983 action and the district courts within our circuit are split on this question"). To determine whether there is a genuine dispute of material fact as to whether Stoiker conspired to violate Plaintiffs' constitutional rights, therefore, we must resolve this issue of first impression.

We are aware of only one circuit, the Eleventh, that has squarely addressed the issue and has determined that the intracorporate conspiracy doctrine applies in § 1983 actions as in § 1985 actions. See *Grider* v. *City of Auburn*, 618 F.3d 1240, 1261 (11th Cir. 2010); *Rehberg* v. *Paulk*, 611 F.3d 828, 854 (11th Cir. 2010). By contrast, we are aware of no circuit that has applied the doctrine in § 1985 actions but declined to apply it in § 1983 actions.[12]

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[12] Some courts have held that the doctrine does not apply in the civil rights context at all. See, *e.g.*, *Brever* v. *Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994).

We join the Eleventh Circuit and hold that the intracorporate conspiracy doctrine applies in § 1983 suits to bar conspiracy claims where two or more employees of the same entity are alleged to have been acting within the scope of their employment when they allegedly conspired together to deprive the plaintiff of his rights. See *Grider*, 618 F.3d at 1261-62; *cf. Johnson*, 40 F.3d at 841 ("[W]hen employees act outside the course of their employment, they and the corporation may form a conspiracy under 42 U.S.C. § 1985(3)."). We so hold because the considerations that support applying the intracorporate conspiracy doctrine in § 1985 suits pertain equally to the § 1983 context, and we discern no logical distinction upon which to treat § 1983 conspiracy claims differently. *Cf. Hull*, 926 F.2d at 509-10 (holding that the intracorporate conspiracy doctrine applies to § 1985(3) claims and stating "that this court's opinion in Doherty [which applied the doctrine to *§ 1985(2)*—not § 1985(3)—claims] is dispositive of this issue"). Recognizing that district courts within this circuit have split on the question,[13] we will explain why

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[13] Compare *Vaduva* v. *City of Xenia*, No. 3:17-cv-41, 2017 WL 4773076, at *3 (S.D. Ohio Oct. 23, 2017) (applying the intracorporate conspiracy doctrine in § 1983 suit); *Gillespie* v. *City of Battle Creek*, 100 F. Supp. 3d 623, 631-32 (W.D. Mich. 2015) (same); *Wright* v. *Bloomfield Twp.*, No. 12-15379, 2014 WL 5499278, at *15-16 (E.D. Mich. Oct. 30, 2014) (same); *Pardi* v. *Cty. of Wayne*, No. 12-12063, 2013 WL 1011280, at *14-15 (E.D. Mich. Mar. 14, 2013) (same); *Audio Visual Equip. & Supplies, Inc.* v. *Cty. of Wayne*, No. 06-10904, 2007 WL 4180974, at *5-6 (E.D. Mich. Nov. 27, 2007) (same); *Adcock* v. *City of Memphis*, No. 06-2109, 2007 WL 784344, at *4-5 (W.D. Tenn. Mar. 13, 2007) (same); *Turner* v. *Viviano*, No. 04-CV-70509-DT, 2005 WL 1678895, at *13 (E.D. Mich. July 15, 2005) (same), with *Tinney* v. *Richland Cty.*, No. 1:14 CV 703, 2015 WL 542415, at *12 (N.D. Ohio Feb. 10, 2015) (declining to apply the doctrine in a § 1983 suit), aff'd on other grounds, 678 F. App'x 362 (6th Cir. 2017); *Kin-*

the reasons for applying the doctrine to § 1983 outweigh the reasons for not doing so.

The intracorporate conspiracy doctrine was recognized in antitrust and civil rights cases based on the legal notion of corporations as "persons." See *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 769 n.15 (1984); *Doherty*, 728 F.2d at 339. When employees of a corporation act to further the purposes of that "person," principles from the law of agency dictate that those employees be treated not as separate "persons" but as part of the same "person." See *Hull*, 926 F.2d at 509-10; *Doherty*, 728 F.2d at 339. We have recognized the relevance of these principles to suits against employees of local government entities as well as against employees of private corporations. See *Hull*, 926 F.2d at 509-10. Furthermore, the Supreme Court has made clear that municipalities are "persons" for purposes of § 1983. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

Because the intracorporate conspiracy doctrine follows from the legal definition of "person," which includes local governments, the doctrine has been developed to deal with the question whether there are two separate persons to form a conspiracy. See *Hull*, 926 F.2d at 510. The doctrine's application to other civil rights statutes has not been premised upon any factor unique to those statutes. We therefore see no reason to decline to apply the doctrine to § 1983. Section 1983 creates a cause of action against any "person" who deprives a plaintiff of his rights, just like § 1985. Therefore, if § 1985 cannot be violated by an alleged conspiracy where the alleged con-

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kus v. *Vill. of Yorkville*, 476 F. Supp. 2d 829, 839-40 (S.D. Ohio 2007) (same), rev'd on other grounds, 289 F. App'x 86 (6th Cir. 2008).

spirators are all employees of the same entity acting within the scope of their employment, neither can § 1983.

Furthermore, we decline to adopt the rationale that because "[§]1985 is in its essence a conspiracy statute[,] [while] [§]1983 is not," the intracorporate conspiracy doctrine applies to the former but not the latter. *Kinkus* v. *Vill. of Yorkville*, 476 F. Supp. 2d 829, 840 (S.D. Ohio 2007). Although § 1983 does not expressly contemplate a cause of action for conspiracy, once we have recognized such a cause of action—which we have, see, *e.g.*, *DiLuzio*, 796 F.3d at 615-16—the question whether a conspiracy can exist where all alleged conspirators work for the same entity, and are alleged to have been acting in the scope of their employment, naturally arises. That inquiry is identical under § 1983 and § 1985. After all, we did not apply the intracorporate conspiracy doctrine in § 1985 actions on a theory that the text of that particular statutory provision demanded it. Instead, we simply adopted a conspiracy jurisprudence that developed outside the civil rights context. See *Hull*, 926 F.2d at 509.

Nor do we see any reason to limit application of the doctrine to cases in which a municipality is alleged to have conspired with one or more of its employees, in contrast to cases in which two or more employees are alleged only to have conspired with each other. We have made clear that "members of the same legal entity cannot conspire *with one another* as long as their alleged acts were within the scope of their employment." *Jackson* v. *City of Columbus*, 194 F.3d 737, 753 (6th Cir. 1999) (emphasis added) (citing *Johnson*, 40 F.3d at 840), abrogated on other grounds by *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506 (2002); accord *Hull*, 926 F.2d at 510. In *Hull*, we applied the doctrine to bar the plaintiff's § 1985(3) claim alleging conspiracy against "a school district superinten-

dent, the executive director of the district, and a school administrator, all of whom [were] employees or agents of the Board [of Education]." 926 F.2d at 510. The plaintiff did not allege that the school board itself was a conspirator, but we noted that "[s]ince all of the defendants [were] members of the same collective entity, there [were] not two separate 'people' to form a conspiracy." *Id.*

Finally, we have recognized an exception to the intracorporate conspiracy doctrine in § 1985(3) suits where the defendants were alleged to have been acting outside the scope of their employment, see *Johnson*, 40 F.3d at 841, and we have indicated that the exception would apply equally in the § 1983 context were we to apply the doctrine in § 1983 suits, see *DiLuzio*, 796 F.3d at 616. Accordingly, the intracorporate conspiracy doctrine applies to § 1983, and we assume that adopting the doctrine entails adopting the exception. *Cf. DiLuzio*, 796 F.3d at 616. But the scope-of-employment exception is unsupported by the record here because Plaintiffs have alleged that Stoiker and the other individual Defendants were acting "within the scope of their employment." R. 86, PageID 1018; No. 17-3843, R. 53, PageID 707.

Therefore, as a matter of law, Stoiker cannot be liable for conspiracy in violation of § 1983 where he is alleged to have conspired with other employees of the same government entity, in the scope of their employment, to violate Plaintiffs' rights. The district court's grant of summary judgment to Stoiker on the conspiracy claims is **AFFIRMED**.

d. Malicious Prosecution

The Fourth Amendment begins: "The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Amongst other protections, this guarantee affords people the right to be free of unjust prosecution. See *Mills* v. *Barnard*, 869 F.3d 473, 479-80 (6th Cir. 2017).[14]

A malicious-prosecution claim has four elements: "(1) that a criminal prosecution was initiated against the plaintiff and that the defendant ma[d]e, influence[d], or participate[d] in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty . . . apart from the initial seizure; and (4) that the criminal proceeding must have been resolved in the plaintiff's favor."[15] *Id.* at 480

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[14] Although we now analyze constitutional claims for malicious prosecution under the Fourth Amendment, "[p]rior to January 1994 . . . this circuit analyzed [such claims] as accruing under the Fourteenth rather than the Fourth Amendment." *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999) (citations omitted). We ceased doing so after the Supreme Court held in *Albright* v. *Oliver*, 510 U.S. 266, 271, 273-75 (1994) that malicious-prosecution claims must be asserted under the Fourth Amendment rather than the Fourteenth. In so holding, the *Albright* Court recognized "the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* at 274 (citing *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975)).

[15] There are two types of § 1983 claims, both sounding in the Fourth Amendment, that are sometimes referred to as "malicious prosecution" claims. One is for the wrongful institution of legal process (which is the type most properly called a "malicious prosecution" claim) and the other is for continued detention without probable cause. See *Cleary* v. *Cty. of Macomb*, 409 F. App'x 890, 898 (6th Cir. 2011); see also *Gregory*, 444 F.3d at 747-49 (stating that claims for continued detention without probable cause are not properly considered "malicious prosecution" claims, but recognizing that courts' use of terminology varies). Although Plaintiffs are not always clear as to

(alterations in original) (internal quotation marks omitted) (quoting *Sykes* v. *Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010)).

There being no dispute that Plaintiffs suffered a deprivation of liberty or that the criminal proceedings were resolved in their favor, we need only address the first two elements.

i. Stoiker Influenced or Participated in the Decision to Prosecute

The first element of the malicious-prosecution claim is met when an officer "could reasonably foresee that his misconduct would contribute to an independent decision that results in a deprivation of liberty" and the misconduct actually does so. *Sykes*, 625 F.3d at 316 (quoting *Higazy* v. *Templeton*, 505 F.3d 161, 177 (2d Cir. 2007)). This element is met when an officer includes "misstatements and falsehoods in his investigatory materials" and those materials influence a prosecutor's decision to bring charges. *Id.*

A reasonable jury could find that Stoiker's misconduct influenced the decision to bring charges against Plaintiffs for two reasons. First, Stoiker and Staimpel "[c]onsulted with [the prosecutor] who issued papers charging [Plaintiffs] with [homicide]." R. 114-28, PageID 5321. Although the record does not indicate the contents of that consultation, it is reasonable to infer that it involved false statements about Vernon's identification of Plaintiffs and that this consultation influenced the prosecutor's decision to bring charges against Plaintiffs.

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their intended theory of liability, they and Stoiker state the test for, and perform their analysis under, the wrongful institution of legal process theory, and we will do the same.

Second, the prosecutor's only knowledge of Vernon's involvement when deciding to bring charges was based on Vernon's statement, a statement that a jury could reasonably find to have been fabricated by Stoiker. And the prosecutor later testified that had he known about what actually happened on the day of the line-up—because Stoiker and Staimpel had told him during conversation, or because they had drafted an accurate statement for Vernon, or because Stoiker had drafted an accurate report concerning that day's events—the prosecutor would not have proceeded to trial.

ii. There Was a Lack of Probable Cause for the Criminal Prosecution

When a grand jury returns an indictment against a defendant, this creates a "presumption of probable cause," which is rebuttable by showing that:

> (1) [A] law-enforcement officer, in the course of setting a prosecution in motion, either knowingly or recklessly ma[de] false statements (such as in affidavits or investigative reports) or falsifie[d] or fabricate[d] evidence; (2) the false statements and evidence, together with any concomitant misleading omissions, [we]re material to the ultimate prosecution of the plaintiff; and (3) the false statements, evidence, and omissions d[id] not consist solely of grand-jury testimony or preparation for that testimony (where preparation has a meaning broad enough to encompass conspiring to commit perjury before the grand jury).

King v. *Harwood*, 852 F.3d 568, 587-88 (6th Cir. 2017).

As discussed above, a reasonable jury could find that Stoiker falsified or fabricated evidence, and that the evidence did not consist solely of grand-jury testimony or

preparation for that testimony. Stoiker argues, however, that even if he fabricated Vernon's false statement, that statement could not have been material to the grand jury's determination of probable cause, as it was not presented to the grand jury. Although Vernon may have testified to the grand jury in conformance with his fabricated statement, Stoiker argues, it was Vernon's testimony, not the earlier statement, that impacted the grand jury's decision.

But a careful reading of *King* shows that fabricated evidence can be material to a grand jury's determination of probable cause without being presented to the grand jury. If only evidence presented to a grand jury could be material to that grand jury's decision, plaintiffs would be faced with the Scylla and Charybdis of either admitting that the fabricated evidence was not material or claiming that it was material because it was presented to the grand jury, thereby gracing the fabricator with the absolute immunity afforded to grand jury testimony. See *id.* at 589.

Instead, plaintiffs can show that a fabrication was material to the grand jury's determination by showing "that the officer has made knowing or reckless false statements or has falsified or fabricated evidence in the course of setting a prosecution in motion." *Id.* Here, according to the prosecutor, had Stoiker not fabricated Vernon's statement, there would have been no grand jury. But even had there been one, Vernon would not have testified falsely before it. Stoiker's fabrication was therefore material to the grand jury's determination because it "was

material to the ultimate prosecution" of Plaintiffs.[16] *Id.* at 587-88.

2. Qualified Immunity

The statute now codified at 42 U.S.C. § 1983 was originally passed in 1871. It was not until the second half of the twentieth century that the Supreme Court recognized that § 1983 admitted of an implicit doctrine, born of the common law, known as qualified immunity. See *Pierson* v. *Ray*, 386 U.S. 547, 555, 557 (1967). Since then this doctrine has grown considerably, but not without its critics. See, *e.g.*, *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (arguing that a "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"). Qualified immunity has outgrown its original justifications, which were "rooted in historical analogy" and "based on the existence of common-law rules in 1871." *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

Responding to the many and varied suits brought under § 1983, the judiciary recrafted that limited version of the doctrine of qualified immunity in an effort to protect public officials "from undue interference with their duties and from potentially disabling threats of liability." *Elder* v. *Holloway*, 510 U.S. 510, 514 (1994) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982)). We therefore no longer "attempt[] to locate [the qualified immunity] standard in the common law as it existed in 1871," *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring), but instead attempt to determine whether a de-

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[16] Stoiker does not argue that there was sufficient evidence to find probable cause to prosecute Plaintiffs absent Vernon's testimony.

fendant, by his conduct, "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818.

At issue in this appeal is whether, in 1975, the constitutional rights allegedly violated by Stoiker were sufficiently clearly established to deprive him of the protection of qualified immunity. It is a plaintiff's burden to show that the right at issue was clearly established. *Harris* v. *Klare*, 902 F.3d 630, 637 (6th Cir. 2018). Although the Supreme Court "do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (alteration in original) (internal quotation marks omitted) (quoting *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015)). In examining "existing precedent," "we may rely on decisions of the Supreme Court, decisions of this court and courts within this circuit, and in limited instances, on decisions of other circuits." *Spurlock* v. *Satterfield*, 167 F.3d 995, 1006 (6th Cir. 1999) (citations omitted); accord *Hearring* v. *Sliwowski*, 712 F.3d 275, 280 (6th Cir. 2013).

The Supreme Court has recognized "that officials can still be on notice that their conduct violates established law even in novel factual circumstances" and has "rejected a requirement that previous cases be 'fundamentally similar'" to the facts in a case to render qualified immunity inapplicable. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States* v. *Lanier*, 520 U.S. 259, 263 (1997)); see also *id.* at 753-54 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address materially similar conduct." (internal quotation marks omitted)).

And we have noted that "'[g]eneral statements of the law' are capable of giving clear and fair warning to officers even where 'the very action in question has [not] previously been held unlawful.'" *Smith* v. *Cupp*, 430 F.3d 766, 776-77 (6th Cir. 2005) (second alteration in original) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)).

a. Withholding Exculpatory Evidence

In 1975, it was clearly established law that prosecutorial withholding of exculpatory evidence violates a criminal defendant's Fourteenth Amendment right to due process. See *Brady* v. *Maryland*, 373 U.S. 83, 86-87 (1963). Multiple circuits had also recognized by that time that "*Brady*-derived" claims could be based on the conduct of law-enforcement officers—as distinct from prosecutors—who had allegedly withheld exculpatory evidence. See *Clarke* v. *Burke*, 440 F.2d 853, 855 (7th Cir. 1971) ("This is not to say that there can never be a due process violation if the prosecutor does not know that the police has in its possession evidence possibly favorable to the defendant . . . . It has been held . . . that knowledge of the police is knowledge of the prosecutor . . . . " (citations omitted)); *Smith* v. *Florida*, 410 F.2d 1349, 1351 (5th Cir. 1969) ("[I]t makes no difference if the withholding is by the prosecutor or by officials other than the prosecutor." (citing *Barbee* v. *Warden, Md. Penitentiary*, 331 F.2d 842 (4th Cir. 1964))); *Barbee*, 331 F.2d at 846; *cf.* Jackson v. *Wainwright*, 390 F.2d 288, 295, 298 (5th Cir. 1968) (noting that "lower federal courts" applying *Brady* "ha[d] emphasized the harm to the defendant rather than the prosecutor's motive in failing to disclose exculpatory evidence" and finding a violation of the "duty to disclose . . . exculpatory statements" where "there was no evidence of the *prosecutor's* bad faith or of overreaching by the pros-

ecution" (emphasis added)); *Curran* v. *Delaware*, 259 F.2d 707, 713 (3d Cir. 1958) (finding a violation of the Fourteenth Amendment when a police officer perjured himself at trial, regardless of whether the prosecutor was aware of the perjury).

In *Barbee*, decided the year after *Brady*, the Fourth Circuit addressed the habeas claim of a man who argued his conviction violated due process because law-enforcement officers had not disclosed the existence of ballistics and fingerprint reports that "cast grave doubt upon" his guilt. *Barbee*, 331 F.2d at 844. Responding to the state's argument that the man was required, and had failed, to show that the prosecutor knew about the reports, the court stated:

> Nor is the effect of the nondisclosure neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant . . . . If the police silence as to the existence of the reports resulted from negligence rather than guile, the deception is no less damaging.

> The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused.

Id. at 846 (footnotes omitted).

The above cases, decided prior to Plaintiffs' trials, make clear that the duty to disclose evidence falls on the state as a whole and not on one officer of the state particularly, and it was therefore clearly established by the time of those trials that Stoiker had a Fourteenth Amendment obligation to disclose exculpatory evidence.

It was also clearly established that impeachment evidence, such as the fact that a witness was coerced into making a fabricated statement, qualifies as exculpatory. See *Giglio* v. *United States*, 405 U.S. 150, 153-55 (1972) (holding that evidence that the government had procured an informant's testimony by suggesting he could escape prosecution through cooperating was "material" evidence "affecting credibility" that should have been disclosed to the defense under *Brady*).

Stoiker argues that a Seventh Circuit case shows that it is not clearly established even now that officers are under a *Brady* obligation to disclose their own or fellow officers' fabrication of evidence. In *Saunders-El* v. *Rohde*, 778 F.3d 556, 558 (7th Cir. 2015), the plaintiff sued police officers under *Brady*, alleging that the officers failed to disclose that they had severely beaten the plaintiff and planted his blood at a crime scene. The Seventh Circuit held that the plaintiff had not alleged a violation of *Brady* because "*Brady* does not require the creation of exculpatory evidence, nor does it compel police officers to accu-

rately disclose the circumstances of their investigations to the prosecution." *Id.* at 562.

Even if we were bound by *Saunders-El*, which we are not, it would not foreclose our holding. Because *Brady* and its progeny are concerned only with ensuring that a defendant receives a fair trial, "*Brady* is concerned only with cases in which the government possesses information which the defendant does not." *United States* v. *Graham*, 484 F.3d 413, 417 (6th Cir. 2007) (citation omitted). And so if a defendant knows at the time of trial that the government has fabricated evidence, as in *Saunders-El*,[17] officers do not violate *Brady* by failing to tell prosecutors that evidence has been fabricated.[18] Had Plaintiffs argued that Stoiker violated *Brady* only by failing to disclose that Vernon's statement was inaccurate, Stoiker's reliance on *Saunders-El* might be appropriate, as Plaintiffs already knew that Vernon's statement was inaccurate. But Plaintiffs did not know that Vernon's statement had been coerced, and that fact could have been used to impeach Vernon's testimony at trial. Therefore, Stoiker had an obligation to disclose that fact to Plaintiffs.

Finally, as discussed in section II(C)(1)(a), *supra*, an additional piece of exculpatory evidence that Stoiker may have possessed was the knowledge of Vernon's uncoerced statement to Terpay and Farmer that he had not seen the shooting at all. That statement was exculpatory evidence separate from the fact that Vernon's *signed*

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[17] In describing the circumstances of the alleged fabrication of crime-scene evidence underlying his *Brady* claim, the *Saunders-El* plaintiff indicated that he had known about the fabrication all along. See *Saunders-El*, 778 F.3d at 558.

[18] This does not necessarily entail that such a situation would involve no other constitutional violations, of course.

statement was false, and there is no evidence that Plaintiffs knew of Vernon's exculpatory statement. Therefore, even if *Saunders-El* were controlling, we would hold that Plaintiffs had alleged a violation of clearly established rights with regard to Stoiker's alleged withholding of exculpatory evidence of which Plaintiffs were not aware.

Stoiker is not entitled to qualified immunity on the withholding-of-evidence claims.

b. Fabricating Evidence

It is difficult to countenance any argument that a law-enforcement officer in 1975 would not be "on notice [his] conduct [was] unlawful" when coercing a witness into perjuring himself in a capital trial. *Hope*, 536 U.S. at 739 (citation omitted). The obvious injustice inherent in fabricating evidence to convict three innocent men of a capital offense put Stoiker on notice that his conduct was unlawful. *Cf. id.* at 745 (stating, in evaluating qualified immunity in the Eighth Amendment context, that "[t]he obvious cruelty inherent in [tying a prisoner to a hitching post "for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous"] should have provided respondents with some notice that their alleged conduct violated [the prisoner's] constitutional protection against cruel and unusual punishment").

More concretely, as far back as 1935, the Supreme Court recognized that the introduction of fabricated evidence violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) (citing *Hebert* v. *Louisiana*, 272 U.S. 312, 316 (1926)). And in 1942, the Supreme Court held that when a witness perjures himself because of threats from police officers, the

defendant suffers "a deprivation of rights guaranteed by the Federal Constitution." *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942).

The only difference between those cases and the present one is that those cases involved the use of fabricated evidence at trial, whereas this one involves the use of fabricated evidence to affect a jury in a manner other than by introducing the evidence at trial.[19] However, we have recognized that a Fourth Amendment claim based on the fabrication of evidence does not require that "false testimony [have been] given at trial." *Spurlock*, 167 F.3d at 1007. And we can see no principled distinction, for purposes of qualified immunity, between such a claim and Plaintiffs' claims here that they were deprived of their Fourteenth Amendment due process rights through the use of fabricated evidence. The alleged misconduct here is the use of the falsified statement to procure testimony in conformance with it—the same type of misconduct that we have previously found supported recovery for a constitutional tort, irrespective of the stage at which the fabrication tainted the proceeding. See *id.*

As far as clearly established law in 1975 is concerned, several months before the events at issue in this case, this court stated that *Mooney* "made it clear that the Fourteenth Amendment right to due process prohibits a knowing and deliberate use by a state of perjured evidence in order to obtain a conviction." *Burks* v. *Egeler*, 512 F.2d 221, 224 (6th Cir. 1975). More recently, we have

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[19] Although we assume for the purpose of this analysis that the allegedly fabricated evidence did not affect the proceedings through being used at trial, we again note that Vernon's statement was used by defense counsel at Jackson's trial, and a reasonable jury could find that the statement was considered by Jackson's jury in some way.

cited *Brady*, *Pyle*, and *Mooney* in finding that a defendant officer could not "seriously contend that a reasonable police officer would not know that [his] actions [including fabricating evidence] were inappropriate and performed in violation of an individual's constitutional . . . rights." *Spurlock*, 167 F.3d at 1005-06 (also citing *Albright* v. *Oliver*, 510 U.S. 266, 274 (1994)). In *Spurlock* (a malicious-prosecution case), the defendant argued that *Albright*, and the Sixth Circuit case explicitly finding that malicious prosecution violated clearly established rights, had been decided after his conduct and therefore did not put him on notice. See *Spurlock*, 167 F.3d at 1006 n.19 (discussing generally *Albright* and *Smith* v. *Williams*, 78 F.3d 585, 1996 WL 99329 (6th Cir. 1996) (unpublished table opinion)). Rejecting that argument, we stated that "the fundamental principle that an individual has a constitutional right to be free from malicious prosecution . . . was clearly established well before either of [the] cases [cited by the defendant] was decided." *Id.* The reasoning in *Spurlock* is sound, and we follow it in holding that Stoiker was on notice in 1975 that it was unlawful for him to fabricate evidence.

Stoiker is not entitled to qualified immunity on the fabrication-of-evidence claims.

c. Malicious Prosecution

Stoiker argues that he is entitled to qualified immunity because Plaintiffs "fail to identify a pre-1975 case that would clearly establish that a police officer could be held liable for malicious prosecution where he did not actively participate in the prosecution [and] did not testify before the grand jury or at trial." Stoiker Br. at 51. Stoiker's argument admits of two interpretations, one of which is possibly valid but has false premises and the other of which has true premises but is invalid.

Stoiker might be arguing that the state of malicious prosecution law in 1975 was in flux and that it was not clear at that time that he could be liable under a malicious prosecution cause of action. That may be true, but it does not follow that he is protected by qualified immunity. Whether a defendant is protected by qualified immunity turns not on whether the defendant was on notice that his actions satisfied the elements of a particular cause of action, but instead on whether the defendant was on notice that his actions violated the laws of the United States. Recently, when presented with a similar argument to Stoiker's, we responded:

> [The defendant] spends a considerable portion of his brief illustrating why it is not clear that he should be liable for malicious prosecution, thus reasoning that he is entitled to qualified immunity. Yet, his claim that the contours of our jurisprudence concerning malicious prosecution are not entirely clear misses the point. Our inquiry is whether [the defendant's] alleged actions—arresting and detaining [the plaintiff] based on false pretenses and then seeking an arrest warrant based on these false statements—violated [the plaintiff's] clearly established constitutional rights. We conclude that they did.

Miller v. *Maddox*, 866 F.3d 386, 395 (6th Cir. 2017), cert. denied, 138 S. Ct. 2622 (2018). In short, "the *sine qua non* of the 'clearly established' inquiry is 'fair warning,'" *Baynes* v. *Cleland*, 799 F.3d 600, 612-13 (6th Cir. 2015) (quoting *Hope*, 536 U.S. at 741), and we ask only "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *id.* at 610 (quoting *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001)).

Stoiker's argument may, on the other hand, be that it was not clear in 1975 that an officer who fabricated evidence but did not testify for the prosecution had violated the laws of the United States. If this were true, he would be protected by qualified immunity. It is not, and he is not.

For Plaintiffs' claims to survive summary judgment, it must have been clearly established that where an officer fabricates evidence against a defendant and then withholds exculpatory evidence from the prosecution, but does not testify at trial or a grand jury hearing, he is "influenc[ing]" the decision to initiate the prosecution in a way that violates the defendant's constitutional rights. *Mills* v. *Barnard*, 869 F.3d 473, 480 (6th Cir. 2017).

Stoiker cites no case requiring testimony as an element of a §1983 claim for malicious prosecution and no case suggesting that testifying is required in order to influence the decision to prosecute. To the contrary, this court held long before 1975 that if officers arrested a suspect without a warrant (in violation of state law), and "subjected [that suspect] to fraudulent trial in a criminal case" that resulted in wrongful conviction, the officers caused the suspect "a deprivation of [her] liberty without due process of law." *McShane* v. *Moldovan*, 172 F.2d 1016, 1019 (6th Cir. 1949). The court in McShane made no mention of whether the officers had testified against the suspect, and with good cause: the crux of the violation is the institution of judicial processes without probable cause, which does not require a testimonial act.

In conjunction with the cases cited in section II(C)(2)(b), *supra*, *McShane* is sufficient to have clearly established before May 1975 that an officer need not testify in order to violate a defendant's right to due process. That the phrase "malicious prosecution" was not used in

that case to describe the cause of action is immaterial; what matters are the actions allegedly taken by Stoiker, not the name we give to the claim used to seek redress for those actions. Stoiker is therefore not entitled to qualified immunity on the malicious-prosecution claims.

3. Conclusion

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment to Stoiker as to the Fourteenth Amendment claims for fabrication of evidence and for withholding of exculpatory evidence in violation of *Brady*, and the Fourth Amendment claims for malicious prosecution.[20] But we **AFFIRM** the grant of summary judgment as to the conspiracy claims.

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[20] The concurring opinion argues that we should not reach the qualified immunity question at this stage because "[t]his case fits into the narrow category of fact intensive cases where it is appropriate for the jury to decide the issue of qualified immunity only after they decide which party they believe." Concurring Opinion at 53. We respectfully disagree. Although it is true that a genuine dispute of material fact exists as to whether Stoiker was "present and involved in" withholding exculpatory evidence, fabricating evidence, or initiating a malicious prosecution, Concurring Opinion at 54, it is also true that if the jury finds he was involved, the only question remaining will be a purely legal one: whether Plaintiffs' rights were clearly established. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (recognizing that "whether the conduct of which the plaintiff complains violate[s] clearly established law" is an "essentially legal question"); see also *Brandenburg* v. *Cureton*, 882 F.2d 211, 215 (6th Cir. 1989) (noting that the question whether a defendant's conduct violates clearly established rights "is a legal question to be decided by the court" (citation omitted)). Indeed, the concurring opinion appears to agree that "the law of withholding exculpatory evidence, fabricating evidence, and malicious prosecution was clearly established in this context as of 1975." Concurring Opinion at 54. Because the legal question whether Plaintiffs' rights were clearly established in 1975 has been answered, and because if the evidence is viewed in the light most

D. Cleveland's Motion for Summary Judgment

The cause of action created by § 1983 may be exercised only against a "person who . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Supreme Court has interpreted the word "person" broadly, and certain polities, including municipalities, are considered persons for purposes of § 1983 liability. *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978).

Although "person" has been given a wide meaning under § 1983, when the person is a municipality, liability attaches only under a narrow set of circumstances: "A municipality may not be held liable under § 1983 on a *respondeat superior* theory—in other words, 'solely because it employs a tortfeasor.'" *D'Ambrosio* v. *Marino*, 747 F.3d 378, 388-89 (6th Cir. 2014) (quoting *Monell*, 436 U.S. at 691). Instead, a plaintiff must show that "through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Alman* v. *Reed*, 703 F.3d 887, 903 (6th Cir. 2013) (quoting *Bd. of Cty. Comm'rs* v. *Brown*, 520 U.S. 397, 404 (1997)). A plaintiff does this by showing that the municipality had a "policy or custom" that caused the violation of his rights. *Monell*, 436 U.S. at 694.

There are four methods of showing the municipality had such a policy or custom: the plaintiff may prove "(1) the existence of an illegal official policy or legislative en-

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favorable to Plaintiffs, Stoiker violated those rights, it is appropriate for this court to deny Stoiker qualified immunity at this stage of the litigation. See *Harlow*, 457 U.S. at 816 n.26, 818-19; *Heflin* v. *Stewart Cty.*, 958 F.2d 709, 717 (6th Cir. 1992).

actment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess* v. *Fischer*, 735 F.3d 462, 478 (6th Cir. 2013) (citation omitted).

Plaintiffs argue that they have provided evidence sufficient to make out a *Monell* claim under the first theory, as GPO 19-73 caused the violation of their *Brady* rights, and the third theory, as Cleveland's failure to train its officers in *Brady* caused the violation of their *Brady* rights. Cleveland disagrees, as did the district court.[21]

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[21] Plaintiffs also argue that they have a third *Monell* claim based on Cleveland's failure to adopt an adequate policy to prevent *Brady* violations. The district court ruled against Plaintiffs on this theory, finding that they had not established that Cleveland had failed to adopt adequate policies to train officers in *Brady*'s requirements. *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3336607, at *4 (N.D. Ohio Aug. 4, 2017). We decline to analyze this theory separately. Plaintiffs cite no Sixth Circuit or Supreme Court case in support of their theory that they have a *Monell* claim—separate from their failure-to-train claim—based on Cleveland's unconstitutional failure to adopt a policy. Instead, the relevant cases they cite are failure-to-train cases. See *City of Canton* v. *Harris*, 489 U.S. 378, 391 (1989); *Gregory* v. *City of Louisville*, 444 F.3d 725, 755 (6th Cir. 2006); *Miller* v. *Calhoun Cty.*, 408 F.3d 803, 816-17 (6th Cir. 2005). That makes sense: the harm alleged and the analysis required under the failure-to-train theory are functionally indistinguishable from the harm Plaintiffs allege and the analysis they wish us to conduct under the failure-to-adopt-a-policy theory. Indeed, the district court stated that to prevail on their failure-to-adopt theory, Plaintiffs needed to show Cleveland was deliberately indifferent to the high likelihood of violations in the absence of a policy. See *Jackson*, 2017 WL 3336607, at *4 (citing *Miller*, 408 F.3d at 816-17). As we discuss below, Plaintiffs must make the same showing for their failure-to-train claim.

1. Official Policy

"[T]o satisfy the *Monell* requirements a plaintiff must 'identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy.'" *Garner* v. *Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (quoting *Coogan* v. *City of Wixom*, 820 F.2d 170, 176 (6th Cir. 1987)).

When proceeding under the first theory of *Monell* liability, under which a plaintiff must show an official policy or legislative enactment, the plaintiff must show that there were "formal rules or understandings—*often but not always committed to writing*—that [were] intended to, and [did], establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480-81 (1986) (emphasis added).

Plaintiffs argue that GPO 19-73 reflects just such a policy: it was a formal rule; it was promulgated by Cleveland; and it was illegal because it authorized *Brady* violations. Cleveland agrees that GPO 19-73 was a policy and that it was promulgated by Cleveland but argues that GPO 19-73 is consistent with *Brady* and, therefore, could not cause *Brady* violations.[22]

GPO 19-73 read in pertinent part as follows:

> TO THE MEMBERS OF THE DEPARTMENT
>
> In a letter to this Department, County Prosecutor John T. Corrigan has defined the legal rights of defense attorneys and courts to statements, reports

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[22] Cleveland also argues that Plaintiffs cannot show that GPO 19-73 caused any *Brady* violations because they cannot demonstrate any *Brady* violations to begin with. As discussed in section II(C)(1)(a), *supra*, that argument is unavailing.

> and other items in criminal cases. His letter, as a part of this order, shall be considered an integral part of criminal case preparations procedures and all members shall comply with its provisions.

R. 101-7, PageID 1630.

The letter from the County Prosecutor, incorporated into GPO 19-73, read in pertinent part as follows:

> The Ohio Supreme Court has recently promulgated Criminal Rules of Procedure . . . . Particularly, Rule 16 is going to be the concern of police departments and prosecutors.
>
> ....
>
> NO POLICE DEPARTMENT IS REQUIRED OR SHALL GIVE TO DEFENSE COUNSEL AND/OR ANY COURT ANY RECORD, PAPER, STATEMENT, REPORT OR TANGIBLE OBJECT OF A CRIMINAL CASE.
>
> Under proper circumstances under this rule, by application to the Prosecuting Attorney and/or the court, the defense counsel may be entitled to the following:
>
> 1. Statement of a defendant or co-defendant, written, recorded, or a summary of an oral statement.
> 2. Defendant's prior felony record.
> 3. Inspection of [physical evidence] material to the preparation of the defense or intended for use by the Prosecuting Attorney as evidence.
> 4. Reports of results of physical or mental examinations, scientific tests or experiments.
> 5. Names and addresses of witnesses.

> 6. Evidence favorable to the defendant.
>
> EXCEPTION TO THE FOREGOING:
>
> The foregoing does not authorize the discovery or the inspection of reports, memoranda, or other internal documents made by the Prosecuting Attorney or his agents (police departments are his agents) in connection with the investigation or prosecution of the case, *or of statements made by witnesses or prospective witnesses to state agents.*

Id. (emphases added).

Plaintiffs argue that GPO 19-73 is appropriately read as providing that defendants are generally entitled to favorable evidence, but that the entitlement does not apply if the favorable evidence is in the form of witness statements. The individual Defendants were therefore acting in conformance with GPO 19-73 when they failed to turn over to prosecutors Vernon's un-coerced, exculpatory statement that he had not seen the shooting, even though this withholding violated Plaintiffs' *Brady* rights.

In rebuttal, Cleveland argues, first, that the language of GPO 19-73 did not permit officers to withhold exculpatory evidence from prosecutors, and, second, that even if it did, it must be read in conjunction with other rules by which officers were bound in order to determine whether Cleveland had a policy of permitting the withholding of exculpatory evidence from prosecutors.

Because a city may be liable under *Monell* for a policy of permitting constitutional violations regardless of whether the policy is written, see *Pembaur*, 475 U.S. at 480-81, we ask whether GPO 19-73 and the other rules were inconsistent with a policy of withholding evidence in violation of *Brady*. If they were not inconsistent, then a genuine issue of material fact exists as to whether Cleve-

land had such a policy, and summary judgment was improper on Plaintiffs' first *Monell* theory.

a. The Text of GPO 19-73

Cleveland notes that the only language in GPO 19-73 discussing officers' disclosure obligations simply made it clear that they were not permitted to give any physical evidence directly to a defendant; it did not say officers were permitted to withhold exculpatory evidence from prosecutors. Under this reading of GPO 19-73, the purpose of the order was to ensure that officers did not give evidence directly to defendants and, perhaps as something of an addendum, let officers know what prosecutors might have to do with the evidence officers gave them. The section permitting disclosure of exculpatory witness statements, after all, argues Cleveland, was prefaced by the statement that "by application to the Prosecuting Attorney and/or the court, the defense counsel may be entitled" to various evidence, and that language appears to concern the interaction between prosecutors and defendants, not officers and prosecutors.

Cleveland's interpretation of GPO 19-73 may be plausible, but it is not the only reasonable interpretation. The incorporated letter from the County Prosecutor informed Cleveland police officers that "Rule 16 is going to be the concern of *police departments* and prosecutors," not just prosecutors. (emphasis added). The incorporated letter recreated in part the text of Rule 16, which dealt only with what sorts of evidence required disclosure, not with who would do the disclosing. That GPO 19-73 told officers that Rule 16 was their concern and provided the text of that Rule, which described which evidence must be disclosed, could suggest that GPO 19-73 was promulgated for the purpose of ensuring officers knew what particular evidence they had to disclose to prosecutors so that the

prosecutors could then disclose that evidence to the defense. Under this reading, GPO 19-73 did more than simply inform officers that they should not give evidence directly to defendants; it also served as the directive to officers as to what evidence they should, and should not, give to prosecutors. Particular to the last point, the "EXCEPTION TO THE FOREGOING" provision could be read to direct officers not to turn over to prosecutors the documents described in that provision, which included "statements made by witnesses or prospective witnesses to state agents."

Therefore, one reasonable reading of GPO 19-73 is that it (1) spoke to police officers about their disclosure obligations and (2) informed them that they did not need to disclose exculpatory witness statements to the Prosecutor's Office. Because GPO 19-73 can be read as consistent with a policy of not disclosing exculpatory witness statements, we turn to the other written rules to see whether any of those foreclosed such a policy.

b. Other Rules

Cleveland's second argument for why a reasonable jury could not read GPO 19-73 as embodying a policy of allowing officers to withhold exculpatory witness statements from prosecutors is stronger, but ultimately unavailing. Instead of looking at GPO 19-73 in a vacuum, Cleveland urges us to consider the text of GPO 19-73 in the context of other rules and regulations. These other sources fall into two groups: sections of the Division of Police's Manual of Rules and the full text of Rule 16.

i. The Manual

The Manual contained a number of rules that were applicable to all Cleveland police officers in 1975. Cleveland points to four rules as requiring, when read in con-

junction with GPO 19-73, that officers disclose exculpatory witness statements to prosecutors. While all laudable, each of these policies can, however, reasonably be interpreted as consistent with a reading of GPO 19-73 that permitted officers to withhold exculpatory witness statements from prosecutors.

> Rule 14
>
> Case Preparation and Fraud Unit
>
> ....
>
> (2) The officer in charge shall cause statements to be taken from persons brought to the Unit in the course of criminal investigations; and shall see that such statements are properly filed and preserved. These statements shall be available only to the officers and members of the Division of Police who are interested in the presentation of a particular case, to the office of the County Prosecutor or the Law Department of the City of Cleveland. Under no circumstances shall they be given or exhibited to any other person without the written consent of the Chief of Police.

R. 102-2, PageID 1910-11.

Rule 14 only applied to statements given by persons brought to the Case Preparation and Fraud Unit, and there was no requirement that all witnesses be brought to that unit when giving a statement.[23] Nor did it require officers to affirmatively disclose exculpatory statements to prosecutors; it required only that detectives make statements available. This reading is consistent with testimony that it was the practice of Cleveland detectives to

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[23] Vernon does not appear to have been brought to the Case Preparation and Fraud Unit.

withhold evidence not contained in arrest reports, witness forms, or written statements unless it was specifically requested by prosecutors.

> Rule 66 [No Title]
>
> (1) Officers and members prosecuting persons charged with a crime shall thoroughly familiarize themselves with all of the facts and details concerning such case, so that all of the evidence may be properly presented to the court.

Id. at PageID 1941.

Rule 66 said nothing about disclosure of evidence to prosecutors, much less exculpatory evidence. More importantly, it only required familiarity with the facts and details of a case insofar as such familiarity was required to "properly present" those facts to a court. As discussed above, GPO 19-73 can reasonably be interpreted as not requiring officers to disclose exculpatory witness statements to prosecutors for disclosure in turn to defendants (or, presumably, to courts). Read in conjunction with GPO 19-73, then, Rule 66 can reasonably be interpreted as not applying to exculpatory witness statements.

> Rule 77 [No Title]
>
> (1) Officers and members shall report on all matters referred to or investigated by them. Such reports may be either verbal or written, as the officer in charge may direct.
>
> (2) They shall, before reporting off duty, make such written reports as may be required on all matters coming to their attention or assigned to them for investigation. If the investigation has not been completed before he reports [sic] off duty, he shall make a report stating the progress made.

> (3) He shall address his written reports to his superior officer and shall sign the reports, giving his full name and rank, title or number. When required, such reports shall be examined and signed by a superior officer. Written reports shall be forwarded to the commanding officer.

Id. at PageID 1945-46.

Rule 77 required that officers make reports concerning their cases. It did not require that such reports contain all exculpatory information that they may have learned. Importantly, it did not require that any reports be disclosed to prosecutors, and it allowed reports to be made verbally to a superior officer, a method well suited to the withholding of information from prosecutors.

> Rule 78 [No Title]
>
> Written and verbal reports, testimony in court and conversation of any kind affecting the Division of Police, its officers, members, employees or persons under its jurisdiction shall be truthful and unbiased.

Id. at PageID 1946.

Even read in conjunction with GPO 19-73 and the other rules discussed herein, the limitations of Rule 78 render it incapable of carrying the weight with which Cleveland burdens it. It required not that all reports be complete but only that they be truthful and unbiased.[24] Nor

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[24] Consider, for example, two officers who have coerced a witness into making what they believe to be a truthful statement: a report detailing that statement but excluding the coercion would comport with Rule 78. More insidiously, consider two officers who have coerced a witness into making a statement that they know to be false and who file a report stating that the witness made that statement. That report would be both true and unbiased and therefore con-

did it require that any reports, which may have been made verbally to a superior officer, be disclosed to prosecutors.

None of the rules contained within the Manual, taken individually or collectively, are inconsistent with an interpretation of GPO 19-73 that permits officers to withhold exculpatory information from prosecutors. These rules can be read by a reasonable jury as consistent with a policy of permitting the withholding of exculpatory evidence in violation of *Brady*.

ii. Ohio Rule of Criminal Procedure 16

Cleveland also argues that the full text of Rule 16 made clear that defendants were entitled to all exculpatory evidence, including witness statements. The version of Rule 16 in force in 1975 read in pertinent part as follows:

> (B) Disclosure of evidence by the prosecuting attorney.
>
> *(1) Information subject to disclosure.*
>
> . . . .
>
> (f) Disclosure of evidence favorable to defendant.
>
> [description of exculpatory evidence]
>
> (g) In camera inspection of witness' [sic] statement.
>
> [description of procedure for in camera inspection of witness statements]
>
> *(2) Information not subject to disclosure.*

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sistent with Rule 78: the witness did, after all, make the (false) statement contained in the report.

> *Except as provided in subsections (B)(1)*(a), (b), (d), *(f), and (g)*, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

Proposed Ohio Rules of Criminal Procedure, 46 Ohio BAR 817, 849–52 (1973) (emphases added).

Unlike GPO 19-73 and the rules in the Manual, Rule 16 made it quite clear that defendants were entitled to exculpatory witness reports. Rule 16(B)(2) excepted witness statements from the general disclosure requirements, using language almost identical to that used in GPO 19-73. Unlike GPO 19-73, however, Rule 16(B)(2) included an additional clause, excepting exculpatory witness statements from the exception for witness statements generally. Rule 16(B)(2) thereby placed exculpatory witness statements back into the universe of mandatory disclosure. As a result, the full text of Rule 16 made it clear that prosecutors were obligated to disclose all exculpatory witness statements to defendants.

This fact does not, however, save Cleveland, at least not at this stage of the litigation. Cleveland has provided no evidence that Cleveland required that its officers follow the official version of the Ohio Rules of Criminal Procedure, that those rules were followed by Cleveland officers, or that Cleveland officers were even aware of those rules. There is evidence, of course, that Cleveland officers were bound by Rule 16: GPO 19-73 can reasonably be interpreted as directing that Cleveland officers follow the requirements of Rule 16. But GPO 19-73 could be read

as directing Cleveland officers to follow a modified version of Rule 16—the version included in GPO 19-73.[25]

And that version differed in at least one material way from the official Rule 16. Both GPO 19-73 and the official Rule 16 included a paragraph excepting witness statements from the general disclosure requirements. But although, as mentioned, that paragraph in the official Rule 16 contained an additional clause in paragraph (B)(2) excepting (by reference to the requirements of (B)(1)(f) and (g)) *exculpatory* witness statements from that exception—and the paragraph in the official Rule thereby required that *exculpatory* witness statements be *disclosed*—the version of Rule 16 in GPO 19-73 *omitted* the clause in that paragraph excepting exculpatory witness statements. The paragraph in the version of Rule 16 included in GPO 19-73 merely provided:

> The foregoing [disclosure requirements] do[ ] not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the Prosecuting Attorney or his agents (police departments are his agents) in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

R. 101-7, PageID 1630. It was this modified version of Rule 16—the one that could plausibly be interpreted as allowing the withholding of exculpatory witness statements—by which a reasonable jury could find Cleveland officers were bound.

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[25] GPO 19-73 did not indicate that the version of Rule 16 it included was in any way different from the official Rule 16 or suggest that officers either consult the official text of Rule 16 or consult prosecutors as to the duties of officers or prosecutors under Rule 16.

c. Conclusion

GPO 19-73 and the rules in Cleveland's police manual, read together, could be understood to authorize Cleveland officers to withhold exculpatory witness statements from prosecutors. It is for a jury to consider GPO 19-73 and the rules in the Manual in light of Cleveland's actual practices and determine whether Cleveland had a policy of permitting *Brady* violations. Because Cleveland does not contest that it promulgated GPO 19-73 or that the individual Defendants were acting in conformance with GPO 19-73 when they withheld Vernon's exculpatory statements, a reasonable jury could find Cleveland liable under *Monell*. See *Garner*, 8 F.3d at 364-65.

Because a genuine issue of material fact exists as to whether Cleveland had a policy of permitting *Brady* violations, the district court's grant of summary judgment to Cleveland on Plaintiffs' first *Monell* theory was improper.

2. Failure to Train

Plaintiffs also argue that in 1975, Cleveland had "a policy of inadequate training or supervision" of its officers as to their obligation to disclose exculpatory evidence under *Brady*. *Burgess* v. *Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

In order to show that a municipality is liable for a failure to train its employees, a plaintiff "must establish that: 1) the City's training program was inadequate for the tasks that officers must perform; 2) the inadequacy was the result of the City's deliberate indifference; and 3) the inadequacy was closely related to or actually caused the injury." *Ciminillo* v. *Streicher*, 434 F.3d 461, 469 (6th Cir. 2006) (citing *Russo* v. *City of Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992)).

Cleveland argues that Plaintiffs lack evidence sufficient for a jury to find that either of the first two requirements is met. We address each requirement in turn.

a. Adequacy of Cleveland's *Brady* Training

When determining whether a municipality has adequately trained its employees, "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." *City of Canton* v. *Harris*, 489 U.S. 378, 390 (1989).

Plaintiffs argue that Cleveland's training program was deficient in that it failed to train officers in their *Brady* obligations and that, to the degree that those officers received training in the disclosure of evidence to prosecutors, they were trained to withhold exculpatory evidence. Cleveland disagrees, citing deposition testimony to show that officers received official training in their disclosure obligations as well as unofficial on-the-job training in their disclosure obligations. The district court agreed with Cleveland.

It is undisputed that Cleveland officers received, and were trained in, the Manual. But as discussed in section II(D)(1)(b)(i), *supra*, those rules could be read as insufficient to inform officers of their disclosure obligations, as none of the rules in the Manual explicitly mandated disclosure of exculpatory witness statements to prosecutors. The only rule from the Manual that came close to requiring disclosure of witness statements to prosecutors was Rule 14, which applied only to witness statements made to the Case Preparation and Fraud Unit, and it only required that those statements be available to prosecutors, not that they be proactively disclosed.

Cleveland presents deposition testimony that "in the police academy . . . [y]ou were told to give [exculpatory evidence] to . . . a prosecutor" and that "Cleveland police officers are trained and instructed to turn over the entire product of their investigation to the prosecutor." R. 103, PageID 3664, 3672.

Cleveland also presents evidence that officers were trained on the job to disclose evidence. One officer testified that although the rule was not always followed, "the rule was, you should turn over all evidence acquired in an investigation to the prosecution." R. 104, PageID 3949-50. That officer also testified:

> Police officers that conduct interviews are instructed to write down the statement as close to what the witness said as possible, whether it is good or bad. But it is part of what was said, and it needs to be, the entire thing needs to be presented to the prosecutor, the entire thing, not parts of it, the entire thing.

Id. at PageID 3972.

But Plaintiffs provide testimony that conflicts with Cleveland's account of the training received, both in the academy and on the job. One former officer testified that he was not "taught anything at police academy about police officers' obligation to disclose *Brady* evidence" and that he did not remember having "ever attend[ed] any training concerning police officers' obligation to disclose exculpatory evidence to the defense." R. 114-20, PageID 5127-29.

Another former officer testified that he could not recall having ever "attend[ed] any course, or receive[d] any training in which [he] learned that officers have an obli-

gation to disclose exculpatory evidence to criminal defendants or prosecutors." R. 114-35, PageID 5492-93.

A third former officer testified, "As far as training, I would have to say no" training was provided teaching officers they were required "to place any witness statements in the official file or otherwise make them available to criminal defendants, defense counsels, and prosecutors." R. 102, PageID 1776. He also testified that there was "[n]o specific training" requiring police detectives "to disclose exculpatory evidence." *Id*. at PageID 1777.

The district court interpreted these statements as indicating only that no official training had been provided, not that no on-the-job training had been provided. *Jackson* v. *City of Cleveland*, CASE NO. 1:15CV989, 2017 WL 3336607, at *6 (N.D. Ohio Aug. 4, 2017). We think this a cramped interpretation of these statements. One officer testified that he could not recall having "receive[d] *any* training in which [he] learned that officers have an obligation to disclose exculpatory evidence." (emphasis added). Another testified that he received "*no* [training] to place any witness statements in the official file." (emphasis added). A reasonable jury could interpret this testimony as indicating that officers received no training, on-the-job or otherwise, in their *Brady* obligations generally or in their obligation to provide witness statements to prosecutors.

There is therefore a genuine issue of material fact as to whether Cleveland's training of its officers in their disclosure obligations was sufficient, and summary judgment was inappropriate as to this issue. See *Burgess*, 735 F.3d at 471.

b. Cleveland's Deliberate Indifference

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of Cty. Comm'rs* v. *Brown*, 520 U.S. 397, 410 (1997) (internal quotation marks omitted). "In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be 'plainly obvious.'" *Gregory* v. *City of Louisville*, 444 F.3d 725, 752 (6th Cir. 2006) (quoting *Bd. of Cty. Comm'rs*, 520 U.S. at 412).

A plaintiff may meet this standard by showing either (1) "prior instances of unconstitutional conduct demonstrating that the City had notice that the training was deficient and likely to cause injury but ignored it" or (2) "evidence of a single violation of federal rights, accompanied by a showing that the City had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation." *Campbell* v. *City of Springboro*, 700 F.3d 779, 794 (6th Cir. 2012) (citing *Plinton* v. *Cty. of Summit*, 540 F.3d 459, 464 (6th Cir. 2008)).

Plaintiffs do not contend that they can show Cleveland's failure to train was deliberately indifferent via the first method.[26] Instead, Plaintiffs argue that they satisfy the second method of showing deliberate indifference because the "likelihood that the situation [i.e., a situation requiring police to handle exculpatory evidence] will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights"

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[26] Finding that Plaintiffs had not shown Cleveland provided inadequate training to its officers, the district court did not address whether Plaintiffs could make out the deliberate-indifference element by either method. See *Jackson*, 2017 WL 3336607, at *5.

mean that failing to train officers in their disclosure obligations demonstrates deliberate indifference to the "highly predictable consequence" that untrained officers will violate *Brady*. *Jackson Br.* at 65 (quoting *Bd. of Cty. Comm'rs*, 520 U.S. at 409-10).

Plaintiffs cite *Gregory* in support of their conclusion. In *Gregory*, the plaintiff presented evidence that the defendant municipality had failed to train its officers in the handling of exculpatory evidence. See 444 F.3d at 753-54. This court reversed a grant of summary judgment to the municipality, holding that a "custom of failing to train its officers on the handling of exculpatory materials is sufficient to establish the requisite fault on the part of the [municipality]" for a deliberate-indifference claim. *Id.* at 754 (citing *Bd. of Cty. Comm'rs*, 520 U.S. at 407).

Cleveland attempts to distinguish *Gregory* on the ground that in *Gregory*, the plaintiff had presented evidence sufficient for a jury to find that the defendant municipality had failed to train its officers, while in this case, Cleveland argues that the "*undisputed* evidence in the record establishes that the detectives in the City's Homicide Detective Bureau received on-the-job training about the evidence that they were required to turn over to the prosecutor." Cleveland Br. at 48. But, as discussed above, the evidence is not undisputed. Plaintiffs have provided testimony sufficient for a jury to find that Cleveland did not in fact train its officers in their disclosure obligations. *Gregory* therefore controls, and there is sufficient evidence for a reasonable jury to find that Cleveland was deliberately indifferent to the risk of *Brady* violations.

3. Conclusion

Plaintiffs having shown that there are genuine issues of material fact both as to whether Cleveland had an official policy of permitting the withholding of exculpatory witness statements from prosecutors and as to whether Cleveland had a policy of failing to train its officers in their disclosure obligations, summary judgment was inappropriate on the *Monell* claims. See *Burgess*, 735 F.3d at 471.[27] We therefore **REVERSE** the district court's grant of summary judgment to Cleveland as to those claims.

III. CONCLUSION

In 1940, then-Attorney General Robert H. Jackson admonished prosecutors: "Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done."[28] In the present case, by contrast, one law-enforcement officer testified that "winning the case was what it was all about. It wasn't about what was fair, it wasn't about what was honest, it was about winning." R. 104, PageID 3967-68. If that sentiment explains the circumstances of Plaintiffs' convictions, then those convictions were the result of a process that was the very antithesis of Jackson's famous admonition.

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[27] A failure-to-train claim under *Monell* also requires showing that the failure to train "was closely related to or actually caused [Plaintiffs'] injury," *Ciminillo*, 434 F.3d at 469, but Cleveland does not dispute that element.

[28] Robert H. Jackson, Attorney Gen. of the U.S., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940).

For the foregoing reasons, we **AFFIRM** the district court's grant of summary judgment to Stoiker as to Plaintiffs' § 1983 claims for conspiracy to fabricate evidence and withhold exculpatory evidence. We **REVERSE** and **REMAND** the district court's (1) judgment on the pleadings for Cleveland as to Plaintiffs' indemnification claims; (2) denial of Plaintiffs' motions to amend their complaints to substitute the administrator of the estates of the deceased Defendants as a party in their place; (3) grant of summary judgment to Stoiker as to the § 1983 claims for withholding of exculpatory evidence in violation of *Brady*, fabrication of evidence, and malicious prosecution; and (4) grant of summary judgment to Cleveland as to the *Monell* claims.

CONCURRENCE

KEITH, Circuit Judge, concurring. I concur in the Court's opinion, except for Section II(C)(2) regarding Officer Stoiker's entitlement to qualified immunity. This case presents many factual disputes, and we are sending it back to the district court for trial to determine whether Officer Stoiker committed constitutional violations. Our circuit has been clear that the issue of qualified immunity may be submitted to a jury only if "the legal question of immunity is completely dependent upon which view of the [disputed] facts is accepted by the jury." *Miller* v. *Sanilac Cty.*, 606 F.3d 240, 247 (6th Cir. 2010) (quoting *Humphrey* v. *Mabry*, 482 F.3d 840, 846 (6th Cir. 2007)); see *Brandenburg* v. *Cureton*, 882 F.2d 211, 216 (6th Cir. 1989) (vacating and remanding for a new trial and leaving the issue of qualified immunity to be decided by the jury,

even though the appellant raised the issue of qualified immunity on appeal). In *Brandenburg*, the court stated:

> [T]he jury becomes the final arbiter of appellant Sharp's claim of immunity, since the legal question of immunity is completely dependent upon which view of the facts is accepted by the jury. If the jury determines that Sharp fired on Brandenburg without a belief that someone was in danger of serious bodily injury, then as a legal matter no reasonable officer could believe that such gunfire would not violate another's constitutional rights. On the other hand, if the jury believes detective Sharp's version of the facts, he will be entitled to qualified immunity.

882 F.2d at 216; see also *McKenna* v. *Edgell*, 617 F.3d 432, 437 (6th Cir. 2010) ("[W]here the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability." (quoting *Champion* v. *Outlook Nashville, Inc.*, 380 F. 3d 893, 899 (6th Cir. 2004)).

This case fits into the narrow category of fact intensive cases where it is appropriate for the jury to decide the issue of qualified immunity only after they decide which party they believe. The circumstances surrounding Officer Stoiker's *alleged* involvement in the witness statement and related police report of then twelve-year-old Vernon fall squarely into this category because Officer Stoiker's liability is completely dependent upon the jury finding that there is sufficient evidence that he was *present* and involved in Vernon's coercion. Because the law of withholding exculpatory evidence, fabrication of evidence, and malicious prosecution was clearly established in this context as of 1975, and we are already sending this case back to the district court, instead of the

analysis this court provided in Section II(C)(2) above, a jury instruction on immunity could have resolved this issue at trial.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

October 20, 2015

CHRISTOPHER A. BOKYO, J.:

This matter comes before the Court upon the Motion (ECF DKT #37) to Dismiss All Claims Against Estate of Eugene Terpay, Estate of James Farmer, Estate of John Staimpel and Estate of Peter Comodeca in Plaintiff's First Amended Complaint. For the following reasons, the Motion is granted and the First Amended Complaint is dismissed against the Estate Defendants without prejudice.

I. FACTUAL BACKGROUND

The captioned case was brought under 42 U.S.C. § 1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were

allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiff, Ricky Jackson. Jackson was originally sentenced to death; but in 1978, his sentence was commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Jackson, Kwame Ajamu (formerly Ronnie Bridgeman) and Wiley Bridgeman. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Jackson initiated the within lawsuit on May 19, 2015, claiming *Brady* violations; fabrication of evidence; malicious prosecution; failure to intervene; conspiracy to deprive Plaintiff of his Constitutional rights; supervisory liability; unconstitutional line-up procedures; intentional infliction of emotional distress; civil conspiracy; *respondeat superior* liability; indemnification; and negligent, willful, wanton and/or reckless conduct.

The Complaint named the Estate of Eugene Terpay, a detective who died on May 14, 2001. No probate estate was opened at that time because the decedent had no assets or property that required probate administration.

The Complaint also named the Estate of James T. Farmer, a detective who died on January 12, 2001. There was a final distribution of assets on February 24, 2003.

Another named Defendant is the Estate of John Staimpel, a detective who died on May 2, 1979. His Estate was closed on November 16, 1981.

Jackson also sued the Estate of Peter F. Comodeca, a sergeant who died on October 18, 2013. The Estate was granted relief from administration on December 13, 2013.

The First Amended Complaint was filed on August 13, 2015; and that pleading named the Estates again, and not any fiduciaries.

On August 20, 2015, the Estate Defendants filed their Motion to Dismiss (ECF DKT #37), arguing that all of the claims alleged against the "Estates" must be dismissed for insufficiency of service of process and for failure to state a claim. They argue that an estate is not a legal entity with the capacity to be sued under federal and state law. Since none of the Estates are open, none has an administrator or executor with the capacity to be sued or the authority to accept service of process.

II. LAW AND ANALYSIS

Standard of Review

Fed.R.Civ.P. 8 (a) requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Hensley Mfg*. v. *Pro-Pride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009). In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must accept as true all of the factual allegations contained in the complaint. *Erickson* v. *Pardus*, 551 U.S. 89, 93-94 (2007). The court need not, however, accept conclusions of law as true:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [*Bell Atlantic* v.] *Twombly*, 550 U.S. 544, 127 S.Ct. 1955 [(2007)], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands

> more than an unadorned, the-Defendant-unlawfully-harmed-me accusation. *Id.* at 555. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

To survive a motion to dismiss, "the plaintiff must allege facts that, if accepted as true, are sufficient to raise a right to relief above the speculative level . . ." and must do more than allege the elements of a cause of action and come to legal conclusions. *Id.* Additionally, the plaintiff must "state a claim to relief that is plausible on its face." *Id.* To state a claim that is plausible on its face, the plaintiff must plead facts that would allow the court to reasonably infer that the defendant is liable for the conduct the plaintiff alleges. In determining whether this standard is met, the court must accept the factual allegations as true, but need not accept legal conclusions. *Id.*

Normally, the Court is restricted to the "four corners" of the pleading; but the Sixth Circuit permits consideration of public records (such as relevant probate court proceedings) or other materials that are appropriate for the taking of judicial notice. See *New England Health Care Employees Pension Fund* v. *Ernst & Young, LLP*, 336 F.3d 495, 501 (6th Cir. 2003).

The question of whether a defendant is a proper party, with the capacity to be sued in federal court, is governed by "the law of the state where the court is located." *Medlen* v. *Estate of Meyers*, 273 F.App'x 464, 470 (6th Cir. 2008) ("[t]o determine whether the Estate was a proper party with the capacity to be sued, we must look to Ohio law . . ."); Fed.R.Civ.P. 17(b)(3). See also, *Ward* v. *City of*

Norwalk, Case No. 3:13CV2210, 2014 WL 7175223 (N.D.Ohio July 3, 2014).

"An estate cannot sue or be sued; any action for or against it must be brought by or against the executor or personal representative of the decedent. *West* v. *West*, Case No. 96APE11-1587, 1997 WL 559477 at *5 (Ohio App. 10th Sept. 2, 1997).

In the within case, the Estates of Terpay, Farmer, Staimpel and Comodeca are closed, or were never opened. There are no executors or administrators with the capacity to be sued. Because the status of the Estates is a matter of public record, Plaintiff was on notice at the time the original Complaint was filed on May 19, 2015. When the First Amended Complaint was filed, on August 13, 2015, Plaintiff again named the Estates and not any fiduciary representatives. By Plaintiff's own admission, he did not file the Applications to Reopen Farmer's, Staimpel's and Comodeca's Estates nor the Application to Appoint an Administrator for Terpay's Estate until September 1, 2015. The Cuyahoga County Probate Court has scheduled a hearing; but no decision on those applications has yet been made.

III. CONCLUSION

The four named Estate Defendants are not entities with the capacity to be sued under Ohio law. Therefore, the Motion (ECF DKT #37) to Dismiss All Claims Against Estate of Eugene Terpay, Estate of James Farmer, Estate of John Staimpel and Estate of Peter Comodeca in Plaintiff's First Amended Complaint is granted and the First Amended Complaint is dismissed against the Estate Defendants without prejudice.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: October 20, 2015

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

June 30, 2016

CHRISTOPHER A. BOKYO, J.:

This matter comes before the Court upon the Motion (ECF DKT #68) of Plaintiff, Ricky Jackson, for Leave to File a Second Amended Complaint. For the following reasons, the Motion is denied because the amendment would be futile.

I. BACKGROUND

This case was brought under 42 U.S.C. § 1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiff, Ricky Jackson. Jackson was originally sentenced to

death; but in 1978, his sentence was commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Jackson, Kwame Ajamu (formerly Ronnie Bridgeman) and Wiley Bridgeman. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Jackson initiated this lawsuit on May 19, 2015, claiming *Brady* violations; fabrication of evidence; malicious prosecution; failure to intervene; conspiracy to deprive Plaintiff of his constitutional rights; supervisor liability; unconstitutional line-up procedures; intentional infliction of emotional distress; civil conspiracy; respondeat superior liability; indemnification; and negligent, willful, wanton and/or reckless conduct. The Complaint listed City of Cleveland, the Estate of Eugene Terpay, the Estate of James T. Farmer, the Estate of John Staimpel, the Estate of Peter F. Comodeca, as well as several other former Cleveland police officers. Plaintiff filed the First Amended Complaint on August 13, 2015 and this Complaint again listed the Estates of the deceased police officers, not their fiduciaries.

On August 20, 2015, the Estate Defendants filed their Motion to Dismiss, arguing that all claims alleged against the "Estates" must be dismissed for insufficiency of process and for failure to state a claim. They argued that an estate is not a legal entity with the capacity to be sued under state or federal law. Since none of the Estates were open, none of them had an administrator or executor with the capacity to be sued or the authority to accept

service of process. On October 20, 2015, this Court granted Estate Defendants' Motion to Dismiss without prejudice.

On November 19, 2015, Plaintiff submitted a Motion for Leave to File a Second Amended Complaint. (ECF DKT #68). Specifically, Plaintiff seeks to add J. Reid Yoder, Esq., who was recently appointed Administrator of the Estates of Eugene Terpay, Peter F. Comodeca, John T. Staimpel and James T. Farmer, as a defendant for the purpose of accepting service of process in this lawsuit. On October 21, 2015, Plaintiff had submitted a motion to the Probate Court of Cuyahoga County, seeking to reopen the above Estates and appoint an administrator. On November 17, 2015, the Probate Court signed an order appointing J. Reid Yoder, Esq. as Administrator of the Estates for the limited purpose of accepting service of process in this lawsuit and *Ajamu* v *City of Cleveland, et al.*, 1:15 CV 1320, and receiving the claims of Plaintiff, Kwame Ajamu and Wiley Bridgeman against the Estates in relation to these lawsuits.

Defendants argue that leave to amend a second time should not be granted because such amendment would be futile on the grounds that Plaintiff did not file his claims against the Estates within the proper statutory deadline. Plaintiff argues that an exception to the statutory deadline applies when a judgment can be satisfied by something other than the assets of the estate.

II. LAW AND ANALYSIS

A. Standard of Review

Rule 15(a) of the Federal Rules of Civil Procedure provides that when a party, not entitled to amend as a matter of course, seeks leave to amend their complaint, the court should give leave freely when justice so re-

quires. In *Foman* v *Davis*, the Supreme Court further held that if a plaintiff's claims rest upon facts that may be a proper subject for relief, then he should be given the chance to test his claims on the merits. 371 U.S. 178, 182 (1962). Further, the Court held that "in the absence of any apparent or declared reason -such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, be freely given." *Id.* The court in *Williams* v *City of Cleveland* held that when a court denies a motion to amend on the ground that the amendment would be futile, the basis for its denial is the purely legal conclusion that the proposed amendment would be unable to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. 771 F. 3d 945, 949 (6th Cir. 2014). The *Williams* court further held that the dispositive question is whether the plaintiff's second amended complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible upon its face. *Id.*

B. Survival Statutes

Ohio Revised Code § 2305.21 provides that "in addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto." In *Tinney* v *Richland County*, the court held that the plaintiff's § 1983 claims involved violations of the plaintiff's personal rights, not physical injuries; as such, the individual capacity § 1983 claims did not survive the defendant's death

under Ohio law. No. 1:14 CV 703, 2014 WL 6896256, at *2 (N.D. Ohio Dec. 8, 2014). Similarly, the court in *Murray* v. *State* held that a claim for wrongful imprisonment did not qualify as injuries to the person, rather the injury is the violation of one's personal rights. 2002-Ohio-664, 2002 WL 337732, *3 (Ohio App. 8 Dist. 2002).

Similarly, the court in *State ex rel. Crow* v *Weygandt* held that claims for malicious prosecution do not survive death. 170 Ohio St. 81, 84, 162 N.E.2d 845, 848 (1959).

i. Plaintiff's §1983 and Malicious Prosecution Claims

Plaintiff alleges a number of §1983 claims and a malicious prosecution claim against a number of defendants and in this motion, Plaintiff seeks to name the Administrator as a defendant for these claims. Plaintiff alleges that these §1983 violations of his personal rights resulted in physical and emotional injury, however, as the *Tinney* and *Murray* courts held, violations of Plaintiff's personal rights do not qualify as injuries to the person. Plaintiff's claims arise from violations of his personal rights, not from harm to his person, and as such, they do not survive the death of the decedent officers. Because these claims do not survive, the Court finds that Plaintiff's amendment to assert §1983 claims against the Estates is futile and denies leave to amend. Similarly, the Court finds that Plaintiff's malicious prosecution claims do not survive the death of the decedent officers and denies leave to amend.

C. Statute of Limitations

Ohio Revised Code §2117.06(B) provides that all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administra-

tor is appointed during that six-month period. §2117.06(G) provides that

> "Nothing in this section or in §2117.07 shall be construed to reduce the periods of limitations or periods prior to repose in §2125.02 or Chapter 2305 of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117 of the Revised Code."

Ohio Revised Code §2117.37 provides that

> "if a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues on the claim, it shall be presented to the executor, in the same manner as other claims, before the expiration of six months after the date of death of the decedent, or before the expiration of two months after the cause of action accrues, whichever is later."

The court in *Meinberg* v *Glaser* explained that the part of the paragraph before the word 'provided' unmistakably specifies that nothing in §2117.06 or §2117.07 is intended to reduce the two-year time within which a personal injury action might be brought. 14 Ohio St. 2d 193, 197, 237 N.E. 2d 605, 608 (1968). Further, the court explained that the provision limits the application of the amendment so that 'no portion of any recovery on a claim' for injury to person or property is to 'come from the assets of the estate'. *Id.* The court later defined 'assets of the estate' as assets

> "which 'may lawfully' be 'paid out or distributed' by the executor or administrator; from which 'payment or distribution' may be made to 'creditors, legatees,

> and distributees' or to a surviving spouse; or which may be lawfully sold or otherwise encumbered or disposed of by the executor or administrator." *Id.* at 609.

In *Meinberg*, the plaintiff sought to recover against the decedent's automobile liability insurance policy due to injuries stemming from an automobile accident with the decedent prior to his demise. The court found that an automobile insurance policy might, to the extent required to satisfy the claim, constitute an 'asset of the estate' if the claim were presented within the four-month time period specified by §2117.06 or the nine-month period specified by §2117.07. *Id.* Because the plaintiff presented the claim beyond the nine-month time period, the court found that the policy was not an 'asset of the estate' within the meaning of §2117. The court also held that a plaintiff

> "who seeks to avoid the claim requirements and the four- and nine-month time limitations of §2117.06 and §2117.07 must allege and prove that there is something other than an asset of the estate, such as liability insurance, against which any judgment in his favor may be enforced." *Id.*

The court in *In re George's Estate* held that actions for personal injury may be brought against an estate within two years, so long as recovery from the action will not subject the assets of the estate to any liability. 24 Ohio St. 2d 18, 20, 262 N.E. 2d 872, 873 (1907). Further, the court held that this provides an injured plaintiff a method of proceeding against the decedent's estate to the extent that there is a policy of liability insurance in force from which recovery may be had, even though the claim has not been presented to the administrator within the time limit set forth in §2117.06. *Id.*

D. Indemnification

Ohio Revised Code § 2744.07(A)(2) provides that:

> "except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of foreign jurisdiction and that is for damages from injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities."

The court in *Piro* v *Franklin Twp.* held that this section does not remove a political subdivision's immunity; rather, it obligates the political subdivision to indemnify its employees if they are found liable for a good faith act that is related to a governmental or proprietary function. 102 Ohio App. 3d 130, 141, 656 N.E. 2d 1035, 1042 (1995). The court further held that "requiring the subdivision to indemnify its employees is entirely different from imposing direct liability on the subdivision. *Id.* Similarly, the court in *Maruschak* v *City of Cleveland* held that "the right of indemnification is the right of the employee; it does not create a cause of action or any enforceable right against the city in favor of a Plaintiff who sues a municipal employee." No. 1:09 CV 1680, 2010 WL 2232669, at *6, fn. 8 (N.D. Ohio May 28, 2010).

ii. Plaintiff's Civil Conspiracy and Intentional Infliction of Emotional Distress Claims

Plaintiff alleges two state law tort claims and in this motion, Plaintiff seeks to amend these claims to name the Administrator as a defendant. Plaintiff alleges his cause of action arose on November 21, 2014. Plaintiff presented his claims to the Administrator on November 19, 2015. Typically, Plaintiff would have needed to present his claims within six months of the death of each of the decedent officers. However, the Court finds that because Plaintiff's claims are contingent, arising after the death of the officers involved, Plaintiff should have instead presented his claims within two months of the accrual of his cause of action, by January 21, 2015. R.C. 2117.37 Plaintiff argues that he should be allowed to file within two years of the accrual of his cause of action under the rule articulated in *Meinberg*, alleging that a judgment in his favor can be satisfied against the City of Cleveland's obligation to indemnify its employees. The Court finds that Plaintiff's argument fails, as the City's obligation to indemnify its employees is not the same thing as a policy of liability insurance. Rather, as the court in *Maruschak* held, the right to indemnification is a right of the employee; it does not create a separate cause of action for a plaintiff who sues a municipal employee. Moreover, the Cuyahoga County Probate Court specifically declined to decide whether a claim for indemnification would be considered an "asset" of the Estates. Because Plaintiff cannot establish that there is something other than an asset of the estate against which any judgment in his favor may be enforced, the Court finds that his amendment would be futile and denies leave to amend.

III. CONCLUSION

Plaintiff seeks to amend to add the Administrator for the decedent officers' Estates as a Defendant in his Second Amended Complaint. The Court finds that Plaintiff's proposed amendment would be futile, in part because his § 1983 claims do not survive the death of the decedent officers and in part because he has not filed his remaining state law claims within the appropriate statutory time line. Because Plaintiff's amendments would be futile, the Court denies Plaintiff leave to amend his Complaint.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: June 30, 2016

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

July 20, 2016

CHRISTOPHER A. BOKYO, J.:

This matter comes before the Court upon the Motion (ECF DKT #60) of Defendant, City of Cleveland, for Judgment on the Pleadings on Counts VII through XI of the First Amended Complaint. For the following reasons, the Motion is granted.

I. BACKGROUND

The captioned case was originally brought under 42 U.S.C. §1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiff, Ricky Jackson. Jackson was sentenced to

death; but in 1978, his sentence was commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Jackson, Kwame Ajamu (formerly Ronnie Bridgeman) and Wiley Bridgeman. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Plaintiff filed this lawsuit on May 19, 2015. On October 1, 2015, Defendant City of Cleveland moved for dismissal of Counts VII through XI of Plaintiff's First Amended Complaint pursuant to Fed.R.Civ.P. 12(c). Those Counts are:

Count VII: Ohio State Law – Malicious Prosecution

Count VIII: Ohio State Law – Intentional Infliction of Emotional Distress

Count IX: Ohio State Law – Civil Conspiracy

Count X: Ohio State Law – *Respondeat Superior*

Count XI: Ohio State Law – Indemnification

Defendant City argues that all these claims fail as a matter of law. The Motion has been fully briefed and is ripe for decision.

II. LAW AND ANALYSIS

Motion for Judgment on the Pleadings

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed.R.Civ.P. 12(c). In this jurisdiction, "[t]he standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Federal

Rule of Civil Procedure 12(b)(6) . . . . We 'construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.'" *Roger Miller Music, Inc.* v. *Sony/ATV Publishing, LLC*, 477 F.3d 383, 389 (6th Cir.2007) (citations omitted). The court's decision "rests primarily upon the allegations of the complaint;" however, "'exhibits attached to the complaint[] also may be taken into account.'" *Barany-Snyder* v *Weiner*, 539 F.3d 327, 332 (6th Cir.2008) (citation omitted) (brackets in the original). Lastly, a Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan* v. *City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir.1991).

With regard to the state law claims of malicious prosecution, intentional infliction of emotional distress and civil conspiracy, Plaintiff contends that he pled these claims against the individual Defendants only and "did not intend to assert these claims directly against the City, but only under *respondeat superior*." (Plaintiff's Response Brief, ECF DKT #66 at 1). Therefore, the Motion for Judgment on the Pleadings is granted as to Counts VII, VIII and IX as unopposed.

Defendant argues that Chapter 2744 of the Ohio Revised Code provides the City with immunity from *respondeat superior* liability for its employees' actions with respect to Plaintiff's state law claims. Moreover, as the Ohio Supreme Court has held, "there are no exceptions for intentional torts" such as malicious prosecution, intentional infliction of emotional distress and civil conspiracy in R.C. §2744.02(B). *Wilson* v. *Stark Cnty. Dept. of*

Human Svcs., 70 Ohio St.3d 450, 452 (1994). In light of existing Ohio case law, Plaintiff does not oppose dismissal of his *respondeat superior* claim (Count X). (Plaintiff's Response Brief, ECF DKT #66 at 2).

Defendant lastly moves for dismissal of Plaintiff's indemnification claim (Count XI). R.C. § 2744.07(A)(2) provides:

> Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages from injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.

In *Piro* v *Franklin Twp.*, the court held that the foregoing section does not remove a political subdivision's immunity; rather, it obligates the political subdivision to indemnify its employees if they are found liable for a good faith act that is related to a governmental or proprietary function. 102 Ohio App. 3d 130, 141 (9th Dist.1995). The *Piro* court further held that "requiring the subdivision to indemnify its employees is entirely different from imposing direct liability on the subdivision." *Id.* Similarly, the court in *Maruschak* v *City of Cleveland* held that "the right of indemnification is the right of the employee; it does not create a cause of action or any enforceable right against the city in favor of a plaintiff who sues a municipal employee." No. 1:09 CV 1680, 2010 WL

2232669, at *6, fn. 8 (N.D. Ohio May 28, 2010). Also, R.C. §2744.07(A)(2) "does not provide [plaintiff] with a cause of action against the City or anyone . . . " *Shoup* v. *Doyle*, 974 F.Supp.2d 1058, 1093 (S.D. Ohio 2013).

When faced with the question of whether Plaintiff could amend his Complaint a second time and assert an indemnification claim against the Estates of the deceased Defendant officers, the Court ruled that the amendment would be futile. (Opinion and Order, ECF DKT #82). Consistent with the Court's prior rationale, and in accordance with Ohio federal and state case law, Plaintiff's Count XI for Indemnification asserted against the City of Cleveland fails.

III. CONCLUSION

For all these reasons, the Motion (ECF DKT #60) of Defendant, City of Cleveland, for Judgment on the Pleadings is granted as to Counts VII through XI of the First Amended Complaint. Accordingly, Plaintiff shall file an amended complaint within fourteen (14) days of this Order reflecting the dismissal of Counts VII through XI, as well as the voluntary dismissal of Defendant Michael Cummings and Defendant James White (ECF DKT ##79 & 80) and the substitution of Karen Lamendola, Guardian ad Litem for Defendant Frank Stoiker (Non-document Order of 8/25/2015).

IT IS SO ORDERED.

DATE: July 20, 2016

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

November 10, 2016

CHRISTOPHER A. BOKYO, J.:

This matter comes before the Court upon the Motion (ECF DKT #85) of Plaintiff, Ricky Jackson, for Reconsideration, or in the alternative, to Certify Interlocutory Appeal or Final Judgment under Rule 54(b) on Claims against Administrator of Estates. For the following reasons, the Motion is denied.

I. BACKGROUND

The instant case was brought under 42 U.S.C. §1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiff, Ricky Jackson. Jackson was originally sentenced to

death; but in 1978, his sentence was commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Jackson, Kwame Ajamu (formerly Ronnie Bridgeman) and Wiley Bridgeman. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Jackson initiated this lawsuit on May 19, 2015, claiming *Brady* violations; fabrication of evidence; malicious prosecution; failure to intervene; conspiracy to deprive Plaintiff of his constitutional rights; supervisor liability; unconstitutional line-up procedures; intentional infliction of emotional distress; civil conspiracy; *respondeat superior* liability; indemnification; and negligent, willful, wanton and/or reckless conduct. On November 19, 2015, Jackson submitted a Motion for Leave to File a Second Amended Complaint (ECF DKT #68), seeking to add J. Reid Yoder, Esq., who was recently appointed Administrator of the Estates of Defendants, Eugene Terpay, Peter F. Comodeca, John T. Staimpel and James T. Farmer.

In its June 30, 2016 Opinion and Order (ECF DKT #82), the Court denied Plaintiff leave to add the Administrator of the Estates on the § 1983 and malicious prosecution claims because the injuries alleged were not physical injuries and the causes of action did not survive under R.C. § 2305.21. R.C.§ 2305.21 provides in pertinent part that, "in addition to the causes of action which survive at common law, causes of action for mesne profits, or *injuries to the person* or property, or for deceit or fraud, also

shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto." (Emphasis added).

In his current Motion, Jackson asserts that it was a clear error of law to find that Plaintiff's federal claims against the deceased Defendants did not survive their deaths. Jackson argues that allowing these claims to abate is contrary to the purpose of §1983 and is inconsistent with the federal policy underlying the cause of action. The Court disagrees.

II. LAW AND ANALYSIS

Reconsideration

"District courts possess the authority and discretion to reconsider and modify interlocutory judgments any time before final judgment." *Rodriguez* v. *Tenn. Laborers Health & Welfare Fund*, 89 F.App'x 949, 952 (6th Cir.2004). See also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S.1, 12 (1983) ("every order short of a final decree is subject to reopening at the discretion of the district judge"). "District courts have authority both under common law and Rule 54(b) to reconsider interlocutory orders and to reopen any part of a case before entry of final judgment." *Rodriguez*, 89 F.App'x at 959.

"Traditionally, courts will find justification for reconsidering interlocutory orders when there is (1) an intervening change of controlling law; (2) new evidence available; or, (3) a need to correct a clear error or prevent manifest injustice." *Id.* (citing *Reich* v. *Hall Holding Co.*, 990 F.Supp. 955, 965 (N.D.Ohio 1998)). However, as announced in *Davie* v. *Mitchell*, 291 F. Supp. 2d 573 (N.D. Ohio 2003): "Motions for reconsideration are disfavored, and a motion for reconsideration is unfounded unless it

either calls . . . attention to an argument or controlling authority that was overlooked or disregarded in the original ruling, presents evidence or argument that could not previously have been submitted, or successfully points out a manifest error of fact or law." *Id*. at 634.

At the outset, it is important to note that Jackson's argument was never raised before and that new matters are inappropriately addressed for the first time on a motion for reconsideration. See *Robinson* v. *Select Portfolio Servicing, Inc.*, 522 F.App'x 309, 313 (6th Cir. 2013). Nevertheless, after carefully reviewing the briefs submitted and the authorities cited, the Court finds that its determination that the federal claims against the deceased Defendants, Terpay, Farmer, Staimpel and Comodeca, do not survive pursuant to R.C. §2305.21 was not erroneous.

By its clear language, 42 U.S.C. §1983 does not provide for the survival of civil rights actions. "Indeed, the Supreme Court has definitively held that §1983 is deficient in not providing for survivorship." *Estate of Gilliam ex rel. Waldroup* v. *City of Prattville*, 639 F.3d 1041, 1045 (11th Cir. 2011), citing *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978). Where federal law is "deficient," the state law of the forum applies as long as it is "not inconsistent with the Constitution and the laws of the United States." 42 U.S.C. §1988(a); *Robertson*, 436 U.S. at 588-89.

In order to determine whether R.C. §2305.21 is inconsistent with federal law in the context of §1988(a), the Court must look at the federal statute at issue and the policies underlying it. "Two important policies underlying §1983 include 'compensation of persons injured by deprivation of federal rights and prevention of abuses of

power by those acting under color of state law.'" *Gilliam*, 639 F.3d at 1046-47; *Robertson*, 436 U.S. at 590.

> A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. . . . § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. *Id.* at 593.

Furthermore, there is "nothing in [§ 1983] to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of absolute survivorship." *Id.* at 590.

The very unique facts of the instant case involve police conduct that occurred forty years ago and Defendant police detectives or sergeants who have long since died. This Court believes that applying R.C. § 2305.21 in the great majority of § 1983 cases will adequately provide compensation for constitutional injuries and deter state actors who violate the Constitution.

Jackson contends that he did, indeed, suffer physical injury; and claims for physical injuries do survive the death of the defendant. However, violation of personal rights is not a physical injury. *Tinney* v. *Richland County*, No. 1:14CV703, 2014 WL 6896256 at *2 (N.D. Ohio Dec. 8, 2014); *Witcher* v. *Fairlawn*, 113 Ohio App.3d 214 (1996); *Murray* v. *State*, 2002-Ohio-664, 2002 WL 337732, *3 (Ohio App. 8 Dist. 2002). Allegations of physical or emotional harm, even due to egregiously long wrongful incarceration, do not convert civil rights violations into the type of tort causes of actions that are not abated by defendant's death.

Simply because application of the Ohio statute on survival of actions, in this unusual instance, defeats Plaintiff's claim against the Estates of the deceased Defendants does not mean that the Ohio law is "inconsistent" with federal law.

The Court finds there is no "need to correct a clear error or prevent manifest injustice." Plaintiff's Motion for Reconsideration is therefore denied.

Interlocutory Appeal

Under 28 U.S.C. §1292(b), a district judge has discretion to certify a non-final order for an interlocutory appeal if the judge believes the petitioner has adequately shown that:

> (1) the question involved is one of law; (2) the question is controlling; (3) there is substantial ground for difference of opinion respecting the correctness of the district court's decision; and (4) an immediate appeal would materially advance the ultimate termination of litigation.

In re Allstate Ins. Co., 2010 U.S. App. LEXIS 27325, *1 (6th Cir. 2010) (citing 28 U.S.C. §1292(b) and *Cardwell* v. *Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974)) (quotations omitted).

Although discretionary, "review under §1292(b) should be sparingly granted and then only in exceptional cases." *In re Allstate*, 2010 U.S. App. LEXIS at *2 (citing *Kraus* v. *Bd. of County Rd. Comm'rs for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966)). Thus, "doubts regarding appealability . . . [should be] resolved in favor of finding that the interlocutory order is not appealable." *United States* v. *Stone*, 53 F.3d 141, 143-44 (6th Cir.1995) (citation omitted).

Plaintiff contends that there is substantial ground for difference of opinion as to the survival of his § 1983 claims. He points to the Supreme Court's decision in *Robertson* v. *Wegmann*, but that case dealt with Louisiana survivorship statutes. Moreover, in contrast with Plaintiff's position, the *Robertson* Court held:

> Our holding today is a narrow one, limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions and in which the particular application of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983.

Plaintiff also asks this Court to look to the case of *Jaco* v. *Bloechle*, 739 F.2d 239 (6th Cir. 1984). However, quite distinct from the instant fact pattern, in *Jaco*, the plaintiff's son (decedent) was shot by police officers and killed instantaneously. The Sixth Circuit was critical of the Ohio survival statute because it would have permitted survival of the civil rights cause of action if the death had not been instantaneous.

To show a substantial ground for difference of opinion under 28 U.S.C. § 1292(b), Jackson must illustrate that:

> (1) the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions; (2) the question is difficult and of first impression; (3) a difference of opinion exists within the controlling circuit; or (4) the circuits are split on the question.

In re Miedzianowski, 735 F.3d 383, 384 (6th Cir. 2013) (citation omitted). "The 'substantial ground' requirement has been characterized as a genuine doubt or conflicting

precedent as to the correct legal standard." *Hurley* v. *Deutsche Bank Trust Co. Americas*, No. 1:08cv361, 2009 U.S. Dist. LEXIS 33654 at *11-12 (W.D. Mich. April 21, 2009) (citation omitted).

Jackson has cited no precedent which calls into question this Court's interpretation of the Ohio statute on survival of actions. Further, Jackson has demonstrated no difference of opinion within this Circuit nor any split among the circuits on this issue.

Also, when applying the 28 U.S.C. § 1292(b) factors, an immediate appeal is said to advance the ultimate termination of litigation if it would "appreciably shorten the time, effort, and expense exhausted between the filing of a lawsuit and its termination." *Trimble* v. *Bobby*, No. 5:10cv14, 2011 U.S. Dist. LEXIS 54142 at *6 (N.D. Ohio May 20, 2011) (citing *Berry* v. *Sch. Dist. of City of Benton Harbor*, 467 F. Supp. 721, 727 (W.D. Mich. 1978)). However, "when litigation will be conducted in substantially the same manner regardless of [the Court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002).

Certainly, in the within matter, allowing an interlocutory appeal will not shorten the litigation. The remaining Defendants represent that they stand ready to file motions for summary judgment whether or not an appeal is permitted. An interlocutory appeal, in the instant case, will not minimize the time, effort or expense of the litigation.

Plaintiff's Motion to Certify an Interlocutory Appeal under 28 U.S.C. § 1292(b) is denied.

Fed.R.Civ.P. 54(b)

Fed.R.Civ.P. 54(b) states in pertinent part:

> When an action presents more than one claim for relief–whether as a claim, counterclaim, crossclaim, or third-party claim–or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties, only if the court expressly determines that there is no just reason for delay.

The Sixth Circuit has outlined a number of factors a district court must consider before entering an order of final judgment permitting appeal of fewer than all the claims in a multi-claim action. These factors include:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

Corrosioneering, Inc. v. *Thyssen Environmental Systems, Inc.* 807 F.2d 1279, 1283 (6th Cir.1986).

Rule 54(b) facilitates the entry of judgment, "where the parties demonstrate[ ] a need for making review available on some of the claims or parties before entry of final judgment as to all." *Id.* at 1282. However, *Callahan*

v. *Alexander*, 810 F. Supp. 884, 886 (E.D.Mich. 1993) instructs:

> The Sixth Circuit has mandated that certification under Fed.R.Civ.P. 54(b) be a rare and extraordinary event. It is available only in unique situations where the moving party illustrates that, but for the certification, he would suffer some extreme hardship.

After consideration of these factors and the arguments of the parties, the Court disagrees with Plaintiff and declines to find that there is no just reason for delay. Federal courts do not favor piecemeal appeals. Thus, the Court finds that this is not the extreme, rare, extraordinary or unique harsh case where an interlocutory appeal would be appropriate.

III. CONCLUSION

For the foregoing reasons, the Motion (ECF DKT #85) of Plaintiff, Ricky Jackson, for Reconsideration, or in the alternative, to Certify Interlocutory Appeal or Final Judgment under Rule 54(b) on Claims against Administrator of Estates is denied.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: November 10, 2016

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J:

The matter comes before the Court upon the Motion of Karen Lamendola (ECF DKT #99) for Summary Judgment on Plaintiff's claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED, in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Ricky Jackson filed his original Complaint on May 19, 2015 against Frank Stoiker, as well as several other former detectives and the City of Cleveland, alleging constitutional violations by the detectives caused by the City's unconstitutional policies and lack of training. Plaintiff filed his Second Amended Complaint on August 13, 2016. On January 27, 2017, Defendant Karen

Lamendola, Guardian ad Litem for Frank Stoiker, filed a Motion for Summary Judgment on all claims against him.

In 1975, Ricky Jackson, Kwame Ajamu and Wiley Bridgeman were arrested and imprisoned for the murder of Harold Franks. They were found guilty based on the testimony of then-twelve-year-old Edward Vernon, who claimed to have witnessed the crime. Nearly forty years later, after many of the detectives involved in the case were deceased, Vernon recanted his testimony, claiming he had been coerced by Cleveland police officers into saying that he had witnessed the crime. The State of Ohio dismissed the charges against Plaintiff and he filed suit against the City of Cleveland, several former detectives and the estates of several deceased detectives. The cases against the estates were dismissed, leaving only the claims against the City of Cleveland and former Detectives Frank Stoiker and Jerold Englehart. However, Stoiker has Alzheimer's-type Dementia and is represented by Guardian ad Litem Karen Lamendola.

On May 25, 1975, Vernon was taken to a police lineup by two detectives. The lineup was conducted by a third police officer. When asked if he recognized anyone in the lineup, Vernon said no. Vernon had previously identified Ricky Jackson and Wiley Bridgeman, who were both in the lineup. After the lineup, two detectives took Vernon to another room. Vernon later identified one of the detectives as Detective John Staimpel, but Vernon was unable to identify the other detective. Vernon says that Staimpel got angry, beat the table and yelled at Vernon for lying. Then Staimpel told Vernon that he would "fix this" and both detectives left the room for a while. When they returned, Staimpel gave Vernon a statement to sign, which said that Vernon recognized Jackson and Bridgeman in the lineup and that Vernon hadn't identified them

because Vernon was afraid of them. Vernon never told those detectives that he was afraid and never told them any of the details of the crime.

In 1975, Frank Stoiker was partnered with John Staimpel in the Homicide Unit of the Cleveland Police Department. Stoiker and Staimpel were assigned to the Franks homicide investigation. Detectives Eugene Terpay and James Farmer were the lead detectives on the case and Stoiker and Staimpel worked the second shift on the case. Vernon's only alleged interaction with Staimpel was on May 25, 1975, and Vernon never alleged that he met Detective Stoiker and did not recognize Stoiker's name or photograph. However, Stoiker signed a statement dated May 25, 1975, which was also signed by Staimpel and Vernon.[1] Dkt 82-31. This statement contained a series of questions that Vernon was supposedly asked, along with Vernon's answers. The statement covers both the details of the crime and the May 25 lineup.

Stoiker also signed a report dated May 25, 1975, in which Stoiker said that he and Staimpel picked up Vernon and another witness to review the lineup, where Vernon did not identify anyone in the lineup. Dkt. 82-25.[2] The report states that Vernon, outside the lineup room, identified Jackson and Bridgeman and told Stoiker that Vernon was afraid of the men in the lineup. Stoiker's

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[1] Defendant argues that Lamendola was not able to authenticate Stoiker's signatures. However, as Lamendola also testified that the signature on the police report resembles Stoiker's, this creates an issue of fact for the jury to determine their authenticity.

[2] Defendant objects to this report as hearsay in her Reply Brief. However, this report would not be offered for the truth of the matter asserted, as Plaintiffs allege that the statements within are, in fact, false.

name is on another report, dated May 28, 1975, which states that he and Staimpel consulted with "Police Prosecutor A. Johnson who issued papers charging the two arrested males . . . " Dkt. 82-34. This report is unsigned, but has Stoiker's name printed on it.

Plaintiff filed suit alleging seven counts under 42 U.S.C. § 1983 against Defendant for withholding exculpatory evidence, fabrication of evidence, malicious prosecution, failure to intervene to prevent a constitutional violation, conspiracy to violate Plaintiffs' constitutional rights, supervisory liability improper lineup procedure and three state law claims for negligence, malicious prosecution and conspiracy. Defendant moves for summary judgment on all counts.

Plaintiff argues that Stoiker's signatures show that he was present at the lineup and present when Detective Staimpel threatened Vernon. Plaintiff argues that Stoiker left the room, created or helped create the false statement and forced Vernon to sign it. Defendant argues that there is insufficient evidence to place Stoiker in the room with Vernon after the lineup and, even if Stoiker were present, Stoiker did not fabricate or withhold any evidence. Defendant also argues that Stoiker is entitled to qualified immunity on all counts.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Ciminillo* v. *Striecher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on

facts on which a reasonable jury could find for the nonmoving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). A fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiff's plight, the Court is still under an obligation to apply the law to the evidence Plaintiff submits. Neither time nor death abrogates Plaintiff's obligation to support his claims.

II. Standard for Qualified Immunity

Officials who perform discretionary functions are generally entitled to qualified immunity from individual liability for civil damages unless they violate clearly established rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982). The Sixth Circuit, in determining whether an official is entitled to qualified immunity, applies a three-part test: 1) whether the plaintiff's constitutional right was violated; 2) whether that right was clearly established at the time such that a reasonable official would have understood that he was violating that right; and 3) whether the official's action was objectively unreasonable in light of the clearly established rights. *Sample* v. *Bailey*, 409 F.3d 689, 696-97 (6th Cir. 2005). "The contours

of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ciminillo* v. *Streicher*, 434 F.3d 461, 468 (6th Cir. 2006). The legal right cannot be framed in general terms to encompass an expansive area of law. *Bills* v. *Aseltine*, 52 F.3d 596. 602 (6th Cir. 1995). However, the exact circumstances of the particular case need not have been previously held illegal for the right to be "clearly established," but the right must be clear in a particularized way to put the official on notice that his conduct is illegal. See *Scicluna* v. *Wells*, 345 F.3d 441, 446 (6th Cir. 2003); *Bell* v. *Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

To determine if a right is clearly established, the Court looks first to Supreme Court decisions, then decisions from the Sixth Circuit Court of Appeals, then to other courts within this circuit, and finally to decisions from other circuits. *Buckner* v. *Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994). Decisions from other circuits must point unmistakably to the unconstitutionality of the act and be so clearly foreshadowed by direct authority as to leave no doubt in a reasonable person's mind that the act is unconstitutional. *Gean* v. *Hattaway*, 330 F.3d 758, 767-78 (6th Cir. 2003).

Once the defense of qualified immunity has been raised, plaintiffs have the burden of demonstrating the defendant is not entitled to qualified immunity. *Rodriquez* v. *Passinault*, 637 F.3d 675, 689 (6th Cir. 2011).

III. Plaintiff's §1983 Claims Against Frank Stoiker Fail Because There is No Evidence Stoiker Committed Constitutional Violations.

A. Fabrication of Evidence

Plaintiff alleges that Stoiker fabricated evidence by coercing Vernon into signing a false statement and by

submitting a false report to his superiors about the lineup. Defendant contends that Stoiker was not involved in any coercion and there is no evidence that he knowingly made any false statements.

The Sixth Circuit has held that "[a]n officer violates a person's constitutional rights when he knowingly fabricates evidence against them and a reasonable likelihood exists that the false evidence would have affected the jury's decision." *France* v. *Lucas*, 836 F.3d 612, 629 (6th Cir. 2016). Furthermore, in 1936, the Supreme Court held that prisoners' constitutional rights were violated when police officers coerced confessions used against them in trial. *Brown* v. *Mississippi*, 297 U.S. 278, 286 (1936).

Plaintiff fails to show that Stoiker fabricated evidence by creating the written statement. Vernon could not identify Stoiker and did not allege that Stoiker engaged in any wrongdoing, or was even involved in the investigation. The only evidence that points to Stoiker's involvement are the signatures on the statement and the report. However, even if those are Stoiker's signatures, Plaintiff has not cited to any policy, practice, or procedure about the meaning or effect of signature. Therefore, the Court is left to speculate as to what the signature meant.

Even assuming that Stoiker fabricated the statement and report, he still did not commit a constitutional violation. The second requirement for a fabrication of evidence claim is that a reasonable likelihood exists that the false evidence influenced the jury's decision. It is clear that the statement and the report did not influence the jury's decision in the 1975 trials. Plaintiff cites no evidence that Stoiker's report was ever even mentioned in any trial. Furthermore, while parties attempted to introduce the statement in both Bridgeman's and Ajamu's

trials, it was objected to and kept out in both. Dkt 114-17 at J2035; Dkt. 114-18 at J3760. In the Jackson trial, Vernon was asked a series of questions about the statement. Dkt. 114-6 at J1014-16; J1029-39. The questions concerned inconsistencies between Vernon's testimony at trial and the statement, such as whether the victim was leaving the store or going into the store at the time of the murder. However, it is unclear whether the jury in the Jackson trial had the statement while they were deliberating.

In all three trials, there is not a reasonable likelihood that any false evidence that Stoiker may have created affected the jury's decision. Vernon's live testimony led to the conviction in all three trials. Vernon testified at the trial as to what he saw and Stoiker had no part in compelling any testimony at trial. In the Bridgeman and Ajamu trials, the statement was kept out by objections, so the jury did not even hear about its contents. In the Jackson trial, the statement was used by the defense to point out inconsistencies. Because of this, it appears that the jury convicted Jackson in spite of, rather than because of, the statement.

Because there is no evidence that Stoiker committed a constitutional violation, Plaintiff's claim of fabrication of evidence against Stoiker fails. Furthermore, because there is no evidence that Stoiker committed or knew of a constitutional violation, there is no evidence that Stoiker conspired to commit such a violation. Therefore, Plaintiff's conspiracy claim also fails.

B. Withholding Exculpatory Evidence

Plaintiff alleges that Stoiker violated his *Brady* obligations to disclose exculpatory evidence by not disclosing how Vernon's signed statement was prepared.

In 1963, the Supreme Court held that the prosecutor has a constitutional obligation to disclose exculpatory evidence to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Defendant asserts that the Supreme Court did not extend this duty to police officers until 1995, while Plaintiffs argue that the Sixth Circuit held a police officer liable for failure to disclose exculpatory evidence in 1975. See *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995); *Hillard* v. *Williams*, 516 F.2d 1344, 1349-50 (6th Cir. 1975), vacated in part, 424 U.S. 961 (1976).

In order to be liable for a *Brady* violation, Stoiker must have been in possession of some exculpatory evidence which he did not disclose. Plaintiff alleges that Stoiker knew that Vernon did not witness the crime because Vernon told police that he did not know anybody in the lineup involved in the murder. However, that is not what Vernon actually said. Vernon explained that he thought the police were asking him whether he saw anyone in the lineup that had committed the crime. What the police actually asked Vernon was whether he knew anyone in the lineup and Vernon said no. Dkt. 82-11 at J6452. Vernon's personal, unspoken meaning cannot prove what Stoiker understood or knew. Furthermore, the officers knew that Vernon had previously identified the men and had led Detectives Terpay and Farmer to their houses.

Plaintiff's other allegation of withholding exculpatory evidence is that Stoiker did not disclose how the statement was prepared. However, as discussed above, there is no evidence Stoiker fabricated the statement or knew that it was fabricated. Plaintiff cannot demonstrate by a preponderance of evidence that Stoiker had any exculpatory evidence to disclose.

Furthermore, even if Stoiker had exculpatory evidence which he did not disclose, he would be entitled to qualified immunity against the *Brady* claim. Defendant argues that evidence of an officer's wrongdoing is not exculpatory evidence, citing a recent Seventh Circuit decision, *Saunders-El* v. *Rohde*, 778 F.3d 556 (7th Cir. 2015), in which the court held that *Brady* does not require police officers to disclose the circumstances of their investigations. However, as Plaintiff points out, the Seventh Circuit has also recently held that police violate *Brady* when they withhold the pressure tactics employed to threaten witnesses. *Avery* v. *City of Milwaukee*, 847 F.3d 433, 443 (7th Cir. 2017). These cases are difficult to reconcile, but neither constitute binding precedent and neither indicate that the law was clearly established in 1975 as to whether evidence of police misconduct is exculpatory or impeachment evidence. A reasonable official would not be aware that failure to disclose a constitutional violation would itself be a second constitutional violation. Without case law clearly establishing a defendant's right to have police misconduct disclosed to him before trial, police would not be on notice of such a right. Plaintiff has not pointed to any case law suggesting that this principle was clearly established in 1975.

Plaintiff cannot show that Stoiker had exculpatory evidence to disclose, or that it was clearly established in 1975 that *Brady* required police officers to disclose evidence of their own misconduct. Therefore, Plaintiff's *Brady* claims fails.

C. Malicious Prosecution

A person's constitutional rights are violated if they are maliciously prosecuted without probable cause. *Gregory* v. *City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006). To prove Stoiker liable for malicious prosecution, Plaintiffs

must show that Stoiker influenced Plaintiffs' arrest or continued detention and that the influence was based on knowing misstatements or "pressure or influence" over the prosecutor or someone who testified at the initial hearing. *Sykes* v. *Anderson*, 625 F.3d 294, 316. Plaintiffs must also show a lack of probable cause for the prosecution. *Id*. at 308-09.

As discussed above, Plaintiff cannot show that Stoiker made knowing misstatements. Furthermore, there is no evidence that Stoiker influenced the prosecutor or any witness. Prosecutor Del Balso interviewed Vernon and found him to be a credible witness. While Stoiker's report does indicate that he spoke to a prosecutor, the report does not have the content of that conversation and it is not a reasonable inference that Stoiker influenced the prosecutor, especially since Vernon was available to give live testimony.

Plaintiff also cannot show a lack of probable cause. An indictment by a grand jury is sufficient to show probable cause, unless the indictment was the result of police officers knowingly presenting false evidence or testimony. *France*, 836 F.3d at 626. Plaintiff was indicted by the grand jury and there is no evidence to suggest that Stoiker testified to the grand jury, or that his report was used to obtain the indictment. The indictment was obtained from Vernon's live testimony about witnessing the crime. While Vernon says that he was coerced into testifying that he saw the crime, Stoiker played no part in that coercion. Vernon alleges that only Detectives Terpay and Farmer compelled Vernon's live testimony. There is no evidence to suggest that Stoiker influenced Vernon's live testimony at all. Furthermore, as discussed above, there is no evidence to suggest that Stoiker knew that Vernon's testimony was false.

Because Plaintiff was indicted by a grand jury and because Stoiker did not testify or present knowing misstatements to the prosecution, Plaintiff's claim of malicious prosecution fails.

D. Plaintiff's Remaining § 1983 Claims

There is no evidence to suggest that Stoiker committed supervisory misconduct, improperly influenced the lineup procedure, or failed to intervene. Furthermore, Plaintiff did not argue any of these claims in their Opposition Brief. Therefore, Plaintiff's other § 1983 claims are dismissed.

IV. Plaintiff's State Law Claims Are Dismissed Without Prejudice.

The Court declines to exercise its supplemental jurisdiction over Plaintiff's state law claims and dismisses them without prejudice.

CONCLUSION

Because Plaintiff failed to show that Stoiker fabricated evidence, or knew or should have known that other officers fabricated evidence, Defendant's Motion for Summary Judgment is GRANTED, in part.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX H

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J:

This matter comes before the Court upon the Motion of Defendant Jerold Englehart (ECF DKT #100) for Summary Judgment on Plaintiff's claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED, in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Ricky Jackson filed his original Complaint on May 19, 2015 against Defendant Jerold Englehart, as well as several other former detectives and the City of Cleveland, alleging constitutional violations by the detectives caused by the City's unconstitutional policies and lack of training. Plaintiff filed his Second Amended Complaint on August 3, 2016. On January 27, 2017, De-

fendant Jerold Englehart filed a Motion for Summary Judgment on all claims against him.

In 1975, Ricky Jackson, Kwame Ajamu and Wiley Bridgeman were arrested and imprisoned for the murder of Harold Franks. They were found guilty based on the testimony of then-twelve-year-old Edward Vernon, who claimed to have witnessed the crime. Nearly forty years later, after many of the detectives involved in the case were deceased, Vernon recanted his testimony, claiming he had been coerced by Cleveland police officers into saying that he had witnessed the crime. The State of Ohio dismissed the charges against Plaintiff and he filed suit against the City of Cleveland, several former detectives and the estates of several deceased detectives. The cases against the estates were dismissed, leaving only the claims against the City of Cleveland and former Detectives Frank Stoiker and Jerold Englehart.

In 1975, Jerold Englehart worked in the Criminal Statement Unit of the Cleveland Police Department. His duties involved taking typed statements from victims, witnesses and defendants. Englehart testified that he did not remember taking statements relating to the murder of Harold Franks and that he did not remember taking Vernon's statement. Englehart testified that he never typed the statement of a witness who was not present at the time. Englehart did not investigate Franks' murder.

On May 25, 1975, Vernon was taken to the police station to review a lineup. After the lineup, Plaintiff alleges that Detectives Frank Stoiker and John Staimpel gave Vernon a prepared statement about the lineup ("Statement") to sign and that the Statement contained false claims. Dkt. 82-31. Plaintiff alleges that Vernon was coerced into signing it. The Statement had Englehart's last

name and badge number typed at the bottom. This is the only piece of evidence connecting Englehart to this case. Vernon never met Englehart and does not remember hearing his name during the investigation. Englehart did not sign the Statement.

Plaintiff filed suit alleging seven counts under 42 U.S.C. § 1983 against Defendant for withholding exculpatory evidence, fabrication of evidence, malicious prosecution, failure to intervene to prevent a constitutional violation, conspiracy to violate Plaintiff's constitutional rights, supervisory liability, improper lineup procedure and three state law claims for negligence, malicious prosecution and conspiracy. Defendant moves for summary judgment on all counts.

Plaintiff alleges that Defendant's name on the Statement indicates that Defendant typed the Statement and that Defendant prepared it without Vernon present. Plaintiff further alleges that Defendant conspired with Detectives Stoiker and Staimpel to prepare a false statement for Vernon to sign, or that Defendant at least knew or should have known that the Statement was false, since Staimpel had Defendant create the Statement without the witness present. Defendant argues that Englehart's typed name is insufficient evidence to show that Englehart prepared the Statement and that even if he did prepare the Statement, it is not the same statement that Vernon signed after the lineup, and thus, there is no evidence about how the Statement was prepared. Defendant also argues that Englehart is entitled to qualified immunity on all counts.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Ciminillo* v. *Striecher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the nonmoving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). A fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiff's plight, the Court is still under an obligation to apply the law to the evidence Plaintiff submits. Neither time nor death abrogates Plaintiff's obligation to support his claims.

II. There Is Insufficient Evidence To Show That Defendant Was Involved In Fabricating Or Withholding Evidence.

Defendant argues that Englehart's name on the Statement is insufficient evidence to support Plaintiffs' claim that Defendant prepared the statement. However, Englehart testified that normally, when he prepared a statement, he typed his name and badge number at the bottom. This supports a reasonable inference that Englehart prepared it. Englehart's statement that he does not recall preparing this statement at most creates an issue of fact. Taking the evidence and drawing all reasonable inferences in favor of the non-moving party, there is enough evidence that a jury could conclude that Englehart typed the Statement.

Englehart further contends that the evidence shows that the Statement is not the one that Detectives Stoiker and Staimpel forced Vernon to sign. Vernon testified in his deposition that the statement he signed after viewing the lineup only stated that Vernon was too scared to pick someone out of the lineup, while the Statement also contains information about the crime itself. Dkt. 64-1 at 85-86. However, in Vernon's declaration, Vernon states that the Statement was shown to him at Plaintiff's trial and that Vernon recalled only signing one statement. Dkt. 82-31. Furthermore, the Statement is dated May 25, 1975, the day of the lineup. This creates an issue of fact as to how the Statement was prepared and whether Vernon signed it right after the lineup. Once again, viewing all evidence in the light most favorable to Plaintiffs, there are issues of fact concerning whether the representations in the Statement accurately reflect what Vernon told the investigating officers.

However, even though there are genuine issues of fact, these issues are not material, as even taking the evidence in the light most favorable to Plaintiff and drawing reasonable inferences in his favor, there is not enough evidence to show that Englehart committed a constitutional violation. The Court must draw reasonable inferences in favor of the non-moving party, but "[t]his standard . . . does not allow, much less require, that we draw strained and *unreasonable* inferences in favor of the nonmovant." *Willis* v. *Roche Biomedical Laboratories*, *Inc.*, 21 F.3d 1368, 1380 (5th Cir.1994)(emphasis in original). While the inferences that Englehart prepared the Statement and that the Statement were made the day of the lineup are reasonable, Plaintiff also asks the Court to infer that because Englehart prepared the Statement without Vernon present, Englehart knew or should have known that the Statement was false. This inference is unreasonable. Plaintiff cites no case law to suggest that Englehart committed a constitutional violation by preparing the statement without Vernon present and cites no facts in the record to indicate what Englehart knew when preparing the Statement. Instead, Plaintiff asserts that because the Statement is false and because Englehart prepared it without the witness present, Englehart knew or should have known that it was false. This goes beyond reasonable inferences. There is no evidence to suggest that Englehart conspired with any other police officers, that Englehart knew that the information in the Statement was false, or that Englehart had any reason to know that the information was false.

Even assuming that Englehart knew the Statement contained false information, Plaintiff failed to establish the elements required for fabrication of evidence. The Sixth Circuit has held that "[a]n officer violates a per-

son's constitutional rights when he knowingly fabricates evidence against them and a reasonable likelihood exists that the false evidence would have affected the jury's decision." *France* v. *Lucas*, 836 F.3d 612, 629 (6th Cir. 2016). Vernon testified live before the grand jury and at all three trials. Plaintiff was convicted based on that live testimony, not Vernon's prior written statements. The Statement could not have been used to obtain Plaintiff's convictions and therefore, the Statement could not have affected the jury's decision.

Because Plaintiff has not demonstrated that Englehart knew the Statement contained false information, all of Plaintiff's federal claims against Englehart fail.

III. Plaintiff's State Law Claims Are Dismissed Without Prejudice.

The Court declines to exercise its supplemental jurisdiction over Plaintiff's state law claims and dismisses them without prejudice.

CONCLUSION

Because Plaintiff has not alleged any facts connecting Defendant to the Franks murder investigation or to the fabrication of Vernon's statements, Defendant's Motion for Summary Judgment is GRANTED, in part.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J:

This matter comes before the Court upon the Motion of the City of Cleveland for Summary Judgment (ECF DKT # 101) on Plaintiffs' claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Ricky Jackson filed his original Complaint on May 19, 2015, against Defendant City of Cleveland and several individual former detectives, alleging constitutional violations by the detectives caused by unconstitutional policies and inadequate training by the City. Plaintiff filed his Second Amended Complaint on August 3, 2016, against Defendants City of Cleveland, former De-

tective Jarold Englehart and Karen Lamendola, Guardian ad Litem on behalf of Frank Stoiker. On January 27, 2017, Defendant City of Cleveland filed a Motion for Summary Judgment on all claims against the City.

In 1975, Plaintiff was convicted of murdering Harold Frank. His conviction was based on the eyewitness testimony of twelve-year old Eddie Vernon. However, nearly forty years later, in 2014, Vernon recanted his testimony, claiming that he never witnessed the crime and that he had been coerced into testifying. After being released, Plaintiff brought suit against the Investigative Officers in the Frank murder investigation and the City of Cleveland. Many of the detectives involved in the investigation were deceased by the time Plaintiff filed his claims and the Court dismissed the claims against the deceased detectives' estates. Plaintiff's remaining claims are against Karen Lamendola, Detective Jerold Englehart and the City of Cleveland.

The Cleveland Police Department in the 1970's had two forms of written rules: the Manual of Rules of Conduct and Discipline for Officers, Members, and Employees of the Division of Police ("Manual"), and General Police Orders ("GPOs"). Defendant cites several rules in the Manual that Defendant alleges relate to the requirement to disclose exculpatory evidence. Rule 66 requires police officers to familiarize themselves with the facts of a case, "so that all of the evidence may be properly presented to the court." Dkt. 65-1 at 4. Rule 77 requires officers to report on all matters they investigate and Rule 78 requires that all written and verbal reports be truthful and unbiased. *Id.* at 8-9. Plaintiff cites GPO No. 19-73, which contains Rule 16 of the Ohio Rules of Criminal Procedure. Dkt. 65-7. The GPO states that the police department shall not give reports or evidence directly to

defense counsel. *Id.* The Order also clarifies that the rules of criminal procedure "will be employed through the courts and through the prosecuting attorney." *Id.* The GPO does not state the obligations of the police to disclose information to the prosecuting attorney. The Cleveland Police Department's rules and policies have since been updated.

Several former detectives, along with Edward Tomba, the Deputy Chief of Homeland Security and Special Operations for the Cleveland Police Department, testified about the rules and training in place in the 1970's. All of them testified that Cleveland police officers in the 70's received both academy and on-the-job training to be police officers. Several witnesses testified that the academy trained officers to disclose exculpatory evidence, while others testified that the academy provided no such training. Several witnesses testified that they received on-the-job training to disclose exculpatory evidence to the prosecutor and no witness testified that on-the-job training did not include the duty to disclose, or that they were trained not to disclose such evidence.

Plaintiff provided several instances of alleged police misconduct in the years leading up to their incarceration. Plaintiff cite a 1972 memo from then-Mayor Ralph Perk, in which Perk said that police misconduct was rampant. Dkt 102-16 at 88. However, the misconduct involved was failure to respond to citizen complaints and the indictment of officers for manslaughter, armed robbery and rape. Plaintiff also cites two alleged incidents of Cleveland police coercing witness statements through force or threat, one in 1974, and one in 1977, two years after Plaintiffs' incarceration. Former Detectives Ronald Turner and William Tell, Sr. also testified that detectives

often did not follow the policy of turning over all evidence to the prosecutors.

Plaintiff brought suit against the individual officers for violating their constitutional rights by withholding exculpatory evidence, fabricating evidence, malicious prosecution and unconstitutional lineup procedure. Plaintiff also brought suit against the City of Cleveland under a theory of municipal liability under 42 U.S.C. § 1983, alleging that Defendant's unconstitutional policies and failure to properly train officers resulted in the violation of Plaintiff's rights.

Defendant moves for Summary Judgment on all claims, arguing that Plaintiff presented no facts to show an underlying constitutional violation and arguing that the undisputed record shows that the City had adequate policies and training during the 70's. Plaintiff argues that Defendant had an explicitly unconstitutional policy, that Defendant should have had rules instructing police officers to disclose exculpatory evidence and that Defendant failed to adequately train police officers to disclose such evidence.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the non- moving party. *Ciminillo* v. *Striecher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the nonmoving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). The fact is ma-

terial if the resolution of the dispute might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiff's plight, the Court is still under an obligation to apply the law to the evidence Plaintiff submits. Neither time nor death abrogates Plaintiff's obligation to support his claims.

II. *Monell* Claims Require an Underlying Constitutional Violation.

In order to bring a *Monell* claim against a municipality, there must be an underlying constitutional violation by one of the municipality's employees. *Watkins* v. *City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001). Plaintiffs allege constitutional violations by Frank Stoiker and Jarold Englehart. However, Plaintiffs also allege that, even if the claims against the individual defendants are dismissed, Plaintiffs' *Monell* claim can still proceed as long as they can show any constitutional violation by an officer, even if that officer is not liable for that violation. In *Garner* v. *Memphis Police Department*, 8 F.3d 358, the Sixth Circuit held that, even though the claim against the only individual defendant had been dismissed due to qualified immunity, the *Monell* claim against the city could continue. Defendant alleges that Plaintiffs have

not alleged enough facts for the Court to find there was an underlying constitutional violation.

The Court will not decide this question at this time. Regardless of whether any of the detectives involved in the Franks homicide investigation committed any constitutional violations, Plaintiffs' *Monell* claims fail as a matter of law on an independent basis discussed below.

III. Plaintiff's *Monell* Claims Fail as a Matter of Law.

A city or municipality may only be held liable for the constitutional violations of its own employees under 42 U.S.C. § 1983 if those actions are the result of a practice, policy, or custom of the municipality itself. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). There are four types of municipal action that, if they cause the underlying constitutional violation, can establish liability under a *Monell* claim: 1) legislative enactments or official policy; 2) actions by officials with final decision-making authority; 3) a policy of inadequate training or supervision; or 4) a custom of tolerance of rights violations. *France* v. *Lucas*, No. 1:07CV3519, 2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), aff'd, 836 F.3d 612 (6th Cir. 2016).

Plaintiff, in his opposition brief, did not argue that Defendant is liable under the second or fourth theory of liability. Plaintiff also did not present argument defending his claims for fabrication of evidence, malicious prosecution, or improper lineup procedure. As discussed above, once the party moving for Summary Judgment meets its burden of production, the non-moving part *must* present specific facts from the record that support its claim. *Celotex Corp*. v. *Catrett*, 477 U.S. 324 (1986). Since Plaintiff failed to do so, he cannot rely on the pleadings to survive Summary Judgment. It is not the Court's role to "wade

through" the record to find specific facts which may support the nonmoving party's claims. *United States* v. *WRW Corp.*, 986 F.2d 138, 143 (6th Cir. 1993). Thus, even though the record may contain evidence to support other claims or theories, Plaintiff has waived that argument by not raising it in their opposition brief. Furthermore, Plaintiff has not pointed to any facts that would show that the other claims were the result of an unconstitutional policy or failure to train police officers.

A. Defendant Did Not Have an Unconstitutional Policy to Withhold Exculpatory Evidence.

Plaintiff argues that Defendant is liable under the first method of *Monell* liability for two reasons. First, that Defendant had an explicit unconstitutional policy that forbade police officers from disclosing exculpatory evidence to defendants. Second, that Defendant lacked an adequate policy on police officers' obligations under *Brady* v. *Maryland* 373 U.S. 83 (1963) and that the need for such a policy was so significant and so obvious that the lack of policy amounts to an deliberate indifference. However, both of these arguments fail because Defendant did have official policies in place specifically requiring police officers to report on everything they investigated.

1. *The City Did Not Have an Explicit Unconstitutional Policy.*

Under the first method of *Monell* liability, a municipality is liable for the constitutional violations of its employees if they are executing a "policy statement, ordinance, regulation, or decision" of the city. *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). The occasional negligent administration of an otherwise sound policy is not enough; the policy itself must either be unconstitutional, or it must have "mandated, encouraged, or

authorized" unconstitutional conduct. *Heyerman* v. *Cnty. of Calhoun*, 680 F3d 642, 648-49; *France*, 2012 WL 5207555, *10. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . ., irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Plaintiff alleges that GPO 19-73 was an unconstitutional policy because it forbade police officers from disclosing evidence to defense attorneys, which violates the requirements of *Brady*. The GPO states that police officers shall not disclose records or evidence to defense counsel. This order is consistent with *Brady*. *Brady* requires prosecutors to disclose exculpatory evidence to defense counsel and requires that police officers disclose that evidence to prosecutors. *Id.*; See also *Kyles* v. *Whitley*, 514 U.S. 419, 437–438. The General Police Order applies, as the name suggests, to police officers, not prosecutors. The GPO states that the rules of criminal procedure are enacted through the courts and the prosecuting attorney. Dkt. 65-7. Since the GPO does not forbid disclosing information to the prosecutor, this policy is not unconstitutional.[1]

Plaintiff claims that Defendant admitted that GPO 19-73 was unconstitutional by changing the rule. This argument is meritless. First, this use of evidence is clearly inadmissible under Fed. R. Evid. 407, which prohibits evidence of subsequent remedial measures to prove culpable conduct. Even though Defendant did not raise the

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[1] Even if GPO 19-73 did forbid the prosecution from disclosing exculpatory evidence, the alleged constitutional violation in this case is the failure of police officers to disclose evidence to the prosecution, which the GPO does not forbid.

evidentiary objection, the Court has discretion to disregard inadmissible evidence in considering a motion for summary judgment. *Wiley* v. *U.S.*, 20 F.3d 222 at 226 (6th Cir. 1994); see also *Capobianco* v. *City of N.Y.*, 422 F.3d 47, 55 (2d Cir. 2005); *United States* v. *Dibble*, 429 F.2d 598, 603 (9th Cir. 1970). Second, Plaintiff cites no evidence as to the reason the rules were changed. The mere fact that police policies have changed in the forty-two years since 1975 is not evidence that the old policies were unconstitutional. Third, to allow Plaintiff to make such an inference would be plainly against public policy. If parties could use a change of rules or policies to prove that the old policies were unconstitutional, municipalities would avoid updating their policies for fear of creating liability under *Monell* claims. Since there is a strong public interest in having municipalities improve out-of-date policies, Plaintiff's argument fails.

2. *The City Was Not Deliberately Indifferent in Not Adopting Better Policies.*

Even if a municipality has not adopted an explicitly unconstitutional policy, the municipality may be liable for the failure to make a policy where one is needed. *Jones* v. *City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986). The Supreme Court held that a city's deliberate choice not to have a policy can be characterized as municipal policy. *City of Canton* v. *Harris*, 489 U.S. 378 (1989). However, it is not enough that a policy be imperfect; liability for failure to adopt a policy requires "deliberate indifference" to a "plainly obvious danger." *Armstrong* v. *Squadrito*, 152 F.3d 564, 578 (7th Cir. 1998). The municipality may be deliberately indifferent if there is a pattern of violations that puts the municipality on notice, or if the inadequacy of the policy in preventing constitutional vio-

lations is obvious. *Miller* v. *Calhoun Cnty*., 408 F.3d 803, 816-17 (6th Cir. 2005).

The Manual contains the rules regarding disclosure of evidence to prosecutors. Rule 77 states that "[o]fficers and members shall report on all matters referred to or investigated by them." Dkt 66-2 at 59. Rule 77 further requires all police officers to submit their reports to their superior officers. Plaintiff contends that these reports were incomplete, but all parties agree that the reports were required to be turned over to the prosecutors. Rule 78 requires that "[w]ritten and verbal reports . . . shall be truthful and unbiased." *Id*. at 60. The plain language of these policies means that police officers must report truthfully and completely on everything they investigate. Therefore, the City did have a policy in place that addressed the *Brady* obligations of police officers, since turning over everything to prosecutors would naturally include exculpatory and impeachment evidence.

Plaintiff argues that, even if Rules 77 and 78 cover disclosing evidence to prosecutors, the rules are inadequate to prevent constitutional violations because they are too vague and do not instruct police officers as to what evidence might be exculpatory. In order for Plaintiffs' argument to prevail, the policy would have to be so inadequate as to constitute deliberate indifference by the City. *Miller*, 408 F.3d at 817. This requires that either the City knew that its policy was inadequate, or that the policy was so inadequate that the danger of violation was plainly obvious. *Armstrong*, 152 F.3d at 578.

Plaintiff argues that Defendant knew that the policy was inadequate. Plaintiff points to several reports detailing concerns with the Cleveland Police Department from the early 1970's. However, these reports concern police officers engaging in criminal activity and failing to re-

spond to calls for assistance. These reports do not show that the City was on notice that their policy regarding disclosing exculpatory evidence was inadequate. Plaintiff also argues that Defendant admits that the Rules were inadequate because the Rules have since been replaced. As discussed above, this argument is based on subsequent remedial measures and has no merit. Therefore, Plaintiff has not alleged facts showing that Defendant had notice of the need for new policies.

Plaintiff also argues that the Rules were so vague and the risk of constitutional violations so great that Defendant was deliberately indifferent to the need for better policies. Plaintiff relies heavily on his expert witness, Donald Anders, who testified that Rule 77 could be interpreted to mean that police officers were merely required to report that they investigated a matter, without reporting on the details of what the officer learned. Dkt. 105 at 74-79. However, the requirement to report on "all matters" is not ambiguous. The plain language clearly requires police officers to turn over everything to prosecutors. Furthermore, as a police expert rather than a legal expert, Anders is not qualified to testify as to how other police officers may have interpreted the rule or as to the legal adequacy of the rule. Liability for an insufficient policy requires deliberate indifference, and where there is a written policy requiring police officers to report on all their investigations, the attempts of an expert to obfuscate the rule to show how it might be inadequate will not suffice to show deliberate indifference.

B. Plaintiff Cannot Show That the City's Training of Officers was Inadequate.

Plaintiff asserts that Defendant is liable under *Monell* for failing to properly train the police officers involved in the 1975 homicide investigation. However, Plaintiff has

not alleged sufficient facts to show that the on-the-job training of officers was inadequate.

A municipality may be liable under § 1983 for failure to train its employees, but only where such failure reflects a deliberate or conscious choice. *City of Canton* v. *Harris*, 489 U.S. 378 (1989). To prevail on a claim for failure to train, a plaintiff must show: 1) the training was inadequate for the tasks officers must perform; 2) the inadequacy was the result of the city's deliberate indifference; and 3) the inadequacy was closely related to or caused the injury. *Ciminillo* v. *Streicher*, 434 F.3d 461, 469 (6th Cir. 2006). There are two ways a plaintiff can show that the inadequate training was the result of deliberate indifference. First, the plaintiff can show "prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher* v. *Harden*, 398 F.3d 837, 849 (6th Cir. 2005). Second, a plaintiff can demonstrate deliberate indifference even where there are no prior instances of constitutional violations "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has the 'highly predictable consequence' of constitutional violations of the sort Plaintiff suffered." *Gregory* v. *City of Louisville*, 444 F.3d 725, 753 (6th Cir. 2006) (citation omitted).

Plaintiff has failed to provide evidence showing that the training given to the officers was inadequate. While Plaintiff provided enough evidence to dispute whether the police academy covered handling exculpatory evidence, this dispute is not material. Defendant cites multiple witnesses who stated that police officers received on-the-job training to disclose all evidence, including exculpatory evidence to the prosecutor and Plaintiff has

presented no evidence to suggest that on-the-job training did not include handling exculpatory evidence. This training is not insufficient merely because it is on-the-job training rather than formal academy training, because "failure-to-train liability is concerned with the substance of the training, not the particular instructional format." *Connick* v. *Thompson*, 563 U.S. 51, 68 (2011). Plaintiff again relies on Anders' testimony, who stated that he believes that on-the-job training is always ineffective and therefore, the Court should infer that the officers' training in this case was inadequate. However, Anders' opinion about on-the-job training in general cannot create a genuine issue of fact where the undisputed facts on the record shows that officers received on-the-job training to disclose exculpatory evidence. Therefore, since Plaintiff has not provided enough evidence to create a genuine issue of material fact as to whether police officers received on-the-job training to disclose exculpatory evidence, he cannot meet their burden of showing that the training was inadequate for the tasks police officers had to perform.

Plaintiff does point to evidence in the record in the form of testimony by former Detective Turner and Tell, that there was a widespread custom of police committing constitutional violations. This evidence does suggest that there were problems with the Cleveland Police Department in the 1970's. However, this concern falls short of supporting Plaintiff's claims. Evidence that officers committed violations is not evidence that those officers were not trained, especially in the face of undisputed direct evidence that officers received on- the-job training to disclose all evidence. "Indeed, a law enforcement officer's choice to lie, fabricate evidence, or conceal exculpatory evidence would appear to be one that is made de-

spite any training." *France* v. *Lucas*, No. 1:07CV3519, 2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), aff'd, 836 F.3d 612 (6th Cir. 2016).

C. Plaintiff Cannot Show a Widespread Custom of Constitutional Violations.

While Plaintiff does not explicitly argue that Defendant is liable due to a widespread custom of constitutional violations, Plaintiff does cite some evidence from the record that suggests the possibility of such a custom. However, this evidence falls short of supporting Plaintiff's *Monell* claims.

In order to establish liability for a custom of tolerating constitutional violations, Plaintiff must prove four things: 1) a persistent pattern of illegal activity; 2) notice or constructive notice on the part of Defendant; 3) Defendant's tacit approval of the unconstitutional conduct; and 4) that Defendant's custom caused the underlying constitutional violation. *France*, 2012 WL 5207555, at *12 (citing *Thomas* v. *City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)).

Plaintiff cannot establish these elements for three reasons. First, Plaintiff relies on the testimony of former Detectives Ronald Turner and William Tell. While both worked for the City of Cleveland Police Department during the 1970's, neither were ever a homicide detective. Turner worked in the Vice Unit and Tell worked in the Auto Theft Unit. These officers cannot speak to the policies, practices and customs of the Homicide Unit.

Second, Plaintiff relies on Anders' expert testimony that there was a custom of constitutional violations. However, expert testimony must be based on sufficient facts to support the conclusion. Since Turner and Tell lack personal knowledge of the Homicide Unit's policies,

Anders' speculation cannot create a genuine issue of material fact.

Third, even if Plaintiff could show a widespread custom of violations, they presented no evidence that Defendant had notice of this custom. Plaintiff points to no evidence that the Mayor or the Chief of Police were ever informed of any failures of officers to disclose exculpatory evidence to prosecutors. Defendant had no notice or reason to be on notice that homicide detectives failed to disclose exculpatory evidence to prosecutors.

Because Plaintiff cannot establish the existence of a widespread custom of constitutional violations in the Homicide Unit and that Defendant had notice of such a custom, Plaintiff cannot meet his burden to prove *Monell* liability for a custom of constitutional violations.

CONCLUSION

Because Plaintiff has not shown that Defendant had an unconstitutional policy and was deliberately indifferent to the need for better policies or inadequately trained its police officers, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

ORDER

July 5, 2016

CHRISTOPHER A. BOKYO, J:

This matter is before the Court on the Motion to Dismiss all claims alleged against the Estate of Eugene Tarpay, the Estate of James T. Farmer, the Estate of John Staimpel and the Estate of Peter F. Comodeca. (ECF # 19). In the companion case of *Ricky Jackson* v. *City of Cleveland, et al.*, presently pending before the Court, involving the same Defendants and arising from the same prosecution of a murder in 1975, the Court granted the same movants' Motion to Dismiss, holding that Estates are not *sui juris* under Ohio law. See *Jackson* v. *City of Cleveland, et al.* Case No. 15-989 (Opinion and Order ECF # 65). In *Jackson*, the Court relied on the Ohio appellate court decision in *West* v. *West*, Case No. 96APE11-1587, 1997 WL 559477 at *5, (Ohio App. 10th

Sept. 2, 1997) wherein the court held "An estate cannot sue or be sued; any action for or against it must be brought by or against the executor or personal representative of the decedent."). Plaintiffs in the above-captioned case, recognizing the procedural error in bringing claims against the Estates which were either closed or never opened, with no administrators or executors with the capacity to be sued, have subsequently filed for Leave to Amend the Complaint in order to add the duly appointed administrators of the above Estates.

Therefore, for the reasons stated in the Court's Opinion and Order dismissing the above Estates in *Jackson*, the Court grants Defendants Motion to Dismiss, without prejudice the above named Estates in this action.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

July 15, 2016

CHRISTOPHER A. BOKYO, J:

This matter comes before the Court upon the Motion (ECF DKT #33) of Plaintiffs, Kwame Ajamu and Wiley Bridgeman, for Leave to File a First Amended Complaint. For the following reasons, the Motion is denied because the amendment would be futile.

I. BACKGROUND

This case was brought under 42 U.S.C. § 1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiffs, Kwame Ajamu and Wiley Bridgeman. Both Ajamu and Bridgeman were originally sentenced to death; but in

1978, their sentences were commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Jackson, Kwame Ajamu (formerly Ronnie Bridgeman) and Wiley Bridgeman. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Plaintiffs initiated this lawsuit on July 2, 2015, claiming *Brady* violations; fabrication of evidence; malicious prosecution; failure to intervene; conspiracy to deprive Plaintiffs of their constitutional rights; supervisor liability; malicious prosecution under Ohio law, unconstitutional line-up procedures; intentional infliction of emotional distress; civil conspiracy; *respondeat superior* liability; indemnification; and negligent, willful, wanton and/or reckless conduct. The Complaint listed City of Cleveland, the Estate of Eugene Terpay, the Estate of James T. Farmer, the Estate of John Staimpel, the Estate of Peter F. Comodeca, as well as several other former Cleveland police officers.

On October 12, 2015, the Estate Defendants filed their Motion to Dismiss, arguing that all claims alleged against the "Estates" must be dismissed for insufficiency of process and for failure to state a claim. They argued that an estate is not a legal entity with the capacity to be sued under state or federal law. Since none of the Estates were open, none of them had an administrator or executor with the capacity to be sued or the authority to accept service of process. On July 5, 2016, this Court granted Estate Defendants' Motion to Dismiss without prejudice.

On November 20, 2015, Plaintiffs submitted a Motion for Leave to File a First Amended Complaint. (ECF DKT #33). Specifically, Plaintiffs seek to add J. Reid Yoder, Esq., who was recently appointed Administrator of the Estates of Eugene Terpay, Peter F. Comodeca, John T. Staimpel and James T. Farmer, as a defendant for the purpose of accepting service of process in this lawsuit. On November 17, 2015, the Probate Court signed an order appointing J. Reid Yoder, Esq. as Administrator of the Estates for the limited purpose of accepting service of process in this lawsuit and receiving the claims of Kwame Ajamu and Wiley Bridgeman against the Estates in relation this lawsuit.

Defendants argue that leave to amend should not be granted because such amendment would be futile on the grounds that Plaintiffs did not file their claims against the Estates within the proper statutory deadline. Plaintiffs argue that an exception to the statutory deadline applies when a judgment can be satisfied by something other than the assets of the estate.

II. LAW AND ANALYSIS

A. Standard of Review

Rule 15(a) of the Federal Rules of Civil Procedure provides that when a party, not entitled to amend as a matter of course, seeks leave to amend their complaint, the court should give leave freely when justice so requires. In *Foman* v *Davis*, the Supreme Court further held that if a plaintiff's claims rest upon facts that may be a proper subject for relief, then he should be given the chance to test his claims on the merits. 371 U.S. 178, 182 (1962). Further, the Court held that "in the absence of any apparent or declared reason -such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments pre-

viously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, be freely given." *Id.* The court in *Williams* v *City of Cleveland* held that when a court denies a motion to amend on the ground that the amendment would be futile, the basis for its denial is the purely legal conclusion that the proposed amendment would be unable to withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. 771 F. 3d 945, 949 (6th Cir. 2014). The *Williams* court further held that the dispositive question is whether the plaintiff's second amended complaint contains sufficient factual matter, accepted as true, to state a claim for relief that is plausible upon its face. *Id.*

B. Survival Statutes

Ohio Revised Code § 2305.21 provides that "in addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto." In *Tinney* v *Richland County*, the court held that the plaintiff's § 1983 claims involved violations of the plaintiff's personal rights, not physical injuries; as such, the individual capacity § 1983 claims did not survive the defendant's death under Ohio law. No. 1:14 CV 703, 2014 WL 6896256, at *2 (N.D. Ohio Dec. 8, 2014). Similarly, the court in *Murray* v. *State* held that a claim for wrongful imprisonment did not qualify as injuries to the person, rather the injury is the violation of one's personal rights. 2002-Ohio-664, 2002 WL 337732, *3 (Ohio App. 8 Dist. 2002).

Similarly, the court in *State ex rel. Crow* v *Weygandt* held that claims for malicious prosecution do not survive death. 170 Ohio St. 81, 84, 162 N.E.2d 845, 848 (1959).

i. Plaintiffs' §1983 and Malicious Prosecution Claims

Plaintiffs allege a number of §1983 claims and a malicious prosecution claim against a number of defendants and in this motion, Plaintiffs seek to name the Administrator as a defendant for these claims. Plaintiffs allege that these §1983 violations of their personal rights resulted in physical and emotional injury, however, as the *Tinney* and *Murray* courts held, violations of Plaintiffs' personal rights do not qualify as injuries to the person. Plaintiffs' claims arise from violations of their personal rights, not from harm to their persons, and as such, they do not survive the death of the decedent officers. Because these claims do not survive, the Court finds that Plaintiffs' amendment to assert §1983 claims against the Estates is futile and denies leave to amend. Similarly, the Court finds that Plaintiffs' malicious prosecution claims do not survive the death of the decedent officers and denies leave to amend.

C. Statute of Limitations

Ohio Revised Code §2117.06(B) provides that all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. §2117.06(G) provides that

> "Nothing in this section or in §2117.07 shall be construed to reduce the periods of limitations or periods prior to repose in §2125.02 or Chapter 2305 of the Revised Code, provided that no portion of any

> recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117 of the Revised Code."

Ohio Revised Code §2117.37 provides that

> "if a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues on the claim, it shall be presented to the executor, in the same manner as other claims, before the expiration of six months after the date of death of the decedent, or before the expiration of two months after the cause of action accrues, whichever is later."

The court in *Meinberg* v *Glaser* explained that the part of the paragraph before the word 'provided' unmistakably specifies that nothing in §2117.06 or §2117.07 is intended to reduce the two-year time within which a personal injury action might be brought. 14 Ohio St. 2d 193, 197, 237 N.E. 2d 605, 608 (1968). Further, the court explained that the provision limits the application of the amendment so that 'no portion of any recovery on a claim' for injury to person or property is to 'come from the assets of the estate'. *Id.* The court later defined 'assets of the estate' as assets

> "which 'may lawfully' be 'paid out or distributed' by the executor or administrator; from which 'payment or distribution' may be made to 'creditors, legatees, and distributees' or to a surviving spouse; or which may be lawfully sold or otherwise encumbered or disposed of by the executor or administrator." *Id.* at 609.

In *Meinberg*, the plaintiff sought to recover against the decedent's automobile liability insurance policy due

to injuries stemming from an automobile accident with the decedent prior to his demise. The court found that an automobile insurance policy might, to the extent required to satisfy the claim, constitute an 'asset of the estate' if the claim were presented within the four-month time period specified by §2117.06 or the nine-month period specified by §2117.07. *Id.* Because the plaintiff presented the claim beyond the nine-month time period, the court found that the policy was not an 'asset of the estate' within the meaning of §2117. The court also held that a plaintiff

> "who seeks to avoid the claim requirements and the four- and nine-month time limitations of §2117.06 and §2117.07 must allege and prove that there is something other than an asset of the estate, such as liability insurance, against which any judgment in his favor may be enforced." *Id.*

The court in, *In re George's Estate*, held that actions for personal injury may be brought against an estate within two years, so long as recovery from the action will not subject the assets of the estate to any liability. 24 Ohio St. 2d 18, 20, 262 N.E. 2d 872, 873 (1907). Further, the court held that this provides an injured plaintiff a method of proceeding against the decedent's estate to the extent that there is a policy of liability insurance in force from which recovery may be had, even though the claim has not been presented to the administrator within the time limit set forth in §2117.06. *Id.*

D. Indemnification

Ohio Revised Code §2744.07(A)(2) provides that:

> "except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damag-

> es, that is obtained against the employee in a state or federal court or as a result of a law of foreign jurisdiction and that is for damages from injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities."

The court in, *Piro* v *Franklin Twp.,* held that this section does not remove a political subdivision's immunity; rather, it obligates the political subdivision to indemnify its employees if they are found liable for a good faith act that is related to a governmental or proprietary function. 102 Ohio App. 3d 130, 141, 656 N.E. 2d 1035, 1042 (1995). The court further held that "requiring the subdivision to indemnify its employees is entirely different from imposing direct liability on the subdivision. *Id.* Similarly, the court in *Maruschak* v *City of Cleveland* held that "the right of indemnification is the right of the employee; it does not create a cause of action or any enforceable right against the city in favor of a Plaintiff who sues a municipal employee." No. 1:09 CV 1680, 2010 WL 2232669, at *6, fn. 8 (N.D. Ohio May 28, 2010).

ii. Plaintiffs' Civil Conspiracy, Negligence and Intentional Infliction of Emotional Distress Claims

Plaintiffs allege state law tort claims and in this motion, Plaintiffs seek to amend these claims to name the Administrator as a defendant. Plaintiffs allege their causes of action arose in November 2014. Plaintiffs presented their claims to the Administrator on November 19, 2015. Typically, Plaintiffs would have needed to present their claims within six months of the death of each of

the decedent officers. However, the Court finds that because Plaintiffs' claims are contingent, arising after the death of the officers involved, Plaintiffs should have instead presented their claims within two months of the accrual of their causes of action, by January 2015. R.C. 2117.37 Plaintiffs argue that they should be allowed to file within two years of the accrual of their causes of action under the rule articulated in *Meinberg*, alleging that a judgment in their favor can be satisfied against the City of Cleveland's obligation to indemnify its employees. The Court finds that Plaintiffs' argument fails, as the City's obligation to indemnify its employees is not the same thing as a policy of liability insurance. Rather, as the court in *Maruschak* held, the right to indemnification is a right of the employee; it does not create a separate cause of action for a plaintiff who sues a municipal employee. Moreover, the Cuyahoga County Probate Court specifically declined to decide whether a claim for indemnification would be considered an "asset" of the Estates. Because Plaintiffs cannot establish that there is something other than an asset of the estate against which any judgment in their favor may be enforced, the Court finds that their amendment would be futile and denies leave to amend.

III. CONCLUSION

Plaintiffs seeks to amend to add the Administrator for the decedent officers' Estates as a Defendant in their First Amended Complaint. The Court finds that Plaintiffs' proposed amendment would be futile, in part because their § 1983 claims do not survive the death of the decedent officers and in part because they have not filed their remaining state law claims within the appropriate statutory time line. Because Plaintiffs' amendments

would be futile, the Court denies Plaintiffs leave to amend their Complaint.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: July 15, 2016

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

July 27, 2016

CHRISTOPHER A. BOKYO, J:

This matter is before the Court on Defendant City of Cleveland's Motion for Judgment on the Pleadings on Counts Seven Through Eleven of the Complaint. (ECF # 15). For the following reasons, the Court grants Defendant's Motion and Dismisses Counts Seven, Eight, Nine, Ten and Eleven against the City of Cleveland.

I. BACKGROUND

The captioned case was originally brought under 42 U.S.C. §1983 and under state law against the City of Cleveland and eight former detectives and/or sergeants who were allegedly involved in the investigation of a 1975 murder that resulted in the prosecution and conviction of Plaintiffs Kwame Ajamu and Wiley Bridgeman. Plain-

tiffs were sentenced to death; but in 1978, their sentences were commuted to life in prison. Edward Vernon, who was twelve years old at the time of the murder, identified the perpetrators and testified at the trials of Kwame Ajamu (formerly Ronnie Bridgeman), Wiley Bridgeman and a third Defendant, Ricky Jackson. In 2013, Vernon confessed to his pastor that he was threatened and coerced by Defendant officers into testifying falsely against Jackson, Ajamu and Bridgeman. At an evidentiary hearing in state court, Vernon recanted and Jackson, Ajamu and Bridgeman were exonerated on November 21, 2014.

Plaintiffs filed this lawsuit on July 2, 2015. On October 1, 2015, Defendant City of Cleveland moved for dismissal of Counts VII through XI of Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(c). Those Counts are:

Count VII: Ohio State Law – Malicious Prosecution

Count VIII: Ohio State Law – Intentional Infliction of Emotional Distress

Count IX: Ohio State Law – Civil Conspiracy

Count X: Ohio State Law – *Respondeat Superior*

Count XI: Ohio State Law – Indemnification

Defendant City argues that all these claims fail as a matter of law. The Motion has been fully briefed and is ripe for decision.

II. LAW AND ANALYSIS

Motion for Judgement on the Pleadings

After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. Fed.R.Civ.P. 12(c). In this jurisdiction, "[t]he standard of review for a judgment on the pleadings is the same as that for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) . . . . We 'construe the

complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief.'" *Roger Miller Music, Inc.* v. *Sony/ATV Publishing, LLC,* 477 F.3d 383, 389 (6th Cir.2007) (citations omitted). The court's decision "rests primarily upon the allegations of the complaint;" however, "'exhibits attached to the complaint[] also may be taken into account.'" *Barany-Snyder* v *Weiner,* 539 F.3d 327, 332 (6th Cir.2008) (citation omitted) (brackets in the original). Lastly, a Rule 12(c) motion "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan* v. *City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir.1991).

With regard to the state law claims of malicious prosecution, intentional infliction of emotional distress and civil conspiracy, Plaintiffs contend that they pled these claims against the individual Defendants only and "did not intend to assert these claims directly against the City, but only under *respondeat superior*." (Plaintiffs' Response Brief, ECF DKT #38 at 2). Therefore, the Motion for Judgment on the Pleadings is granted as to Counts VII, VIII and IX as unopposed. Furthermore, the parties expressly stipulated to a dismissal with prejudice of Plaintiffs' Intentional Infliction of Emotional Distress claim.

Defendant argues that Chapter 2744 of the Ohio Revised Code provides the City with immunity from *respondeat superior* liability for its employees' actions with respect to Plaintiffs' state law claims. Moreover, as the Ohio Supreme Court has held, "there are no exceptions for intentional torts" such as malicious prosecution, intentional infliction of emotional distress and civil conspir-

acy in R.C. §2744.02(B). *Wilson* v. *Stark Cnty. Dept. of Human Svcs.*, 70 Ohio St.3d 450, 452 (1994). In light of existing Ohio case law, Plaintiffs do not oppose dismissal of their respondeat superior claim (Count X). (Plaintiffs' Response Brief, ECF DKT #38 at 2).

Defendant lastly moves for dismissal of Plaintiffs' indemnification claim (Count XI). R.C. §2744.07(A)(2) provides:

> Except as otherwise provided in this division, a political subdivision shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee in a state or federal court or as a result of a law of a foreign jurisdiction and that is for damages from injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of employment or official responsibilities.

In *Piro* v *Franklin Twp.*, the court held that the foregoing section does not remove a political subdivision's immunity; rather, it obligates the political subdivision to indemnify its employees if they are found liable for a good faith act that is related to a governmental or proprietary function. 102 Ohio App. 3d 130, 141 (9th Dist.1995). The *Piro* court further held that "requiring the subdivision to indemnify its employees is entirely different from imposing direct liability on the subdivision." *Id.* Similarly, the court in *Maruschak* v *City of Cleveland* held that "the right of indemnification is the right of the employee; it does not create a cause of action or any enforceable right against the city in favor of a plaintiff who sues a

municipal employee." No. 1:09 CV 1680, 2010 WL 2232669, at *6, fn. 8 (N.D. Ohio May 28, 2010). Also, R.C. §2744.07(A)(2) "does not provide [plaintiff] with a cause of action against the City or anyone . . ." *Shoup* v. *Doyle*, 974 F.Supp.2d 1058, 1093 (S.D. Ohio 2013).

When faced with the question of whether Plaintiffs could amend their Complaint to assert an indemnification claim against the Estates of the deceased Defendant officers, the Court ruled that the amendment would be futile. (Opinion and Order, ECF DKT #50). Consistent with the Court's prior rationale, and in accordance with Ohio federal and state case law, Plaintiffs' Count XI for Indemnification asserted against the City of Cleveland fails.

III. CONCLUSION

For all these reasons, the Motion (ECF DKT #15) of Defendant, City of Cleveland, for Judgment on the Pleadings is granted as to Counts VII through XI of the Complaint. Accordingly, Plaintiffs shall file an amended complaint within fourteen (14) days of this Order reflecting the dismissal of Counts VII through XI, as well as the voluntary dismissal of Defendant Michael Cummings and Defendant James White (ECF DKT ##44 & 45) and the substitution of Karen Lamendola, Guardian ad Litem for Defendant Frank Stoiker (Nondocument Order of 9/21/2015).

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: July 27, 2016

APPENDIX M

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

ORDER

December 8, 2016

CHRISTOPHER A. BOKYO, J.:

This matter is before the Court on Plaintiffs' Motion for Reconsideration, or in the Alternative, to Certify Interlocutory Appeal or Final Judgment under Rule 54(b) on Claims against Administrator of Estates. (ECF # 52).

On July 15, 2016, the Court issued an Opinion and Order denying Plaintiffs the opportunity to amend their Complaint to add the Administrator of the estates of decedent Defendant officers. The Court denied as futile the Motion to Amend holding:

> The Court finds that Plaintiffs' proposed amendment would be futile, in part because their § 1983 claims do not survive the death of the decedent officers and in part because they have not filed their

> remaining state law claims within the appropriate statutory time line. Because Plaintiffs' amendments would be futile, the Court denies Plaintiffs leave to amend their Complaint.

On July 28, 2016, Plaintiffs filed their Motion for Reconsideration. Plaintiffs acknowledge that their Motion for Reconsideration " mirrors the analogous one filed in Ricky Jackson's case (Case No. 15-989)." On November 10, 2016, the Court denied the Motion for Reconsideration in *Ricky Jackson* v. *City of Cleveland, et al.*, No.1:15CV989. Because the arguments in the above-captioned case mirror those in *Jackson*, the Court adopts the ruling in Jackson and denies Plaintiffs' Motion for Reconsideration for the reasons stated therein.

Therefore, Plaintiffs' Motion for Reconsideration is denied.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: December 8, 2016

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J.:

The matter comes before the Court upon the Motion of Karen Lamendola (ECF DKT #63) for Summary Judgment on Plaintiffs' claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED, in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Kwame Ajamu and Wiley Bridgeman filed their original Complaint on July 2, 2015 against Frank Stoiker, as well as several other former detectives and the City of Cleveland, alleging constitutional violations by the detectives caused by the City's unconstitutional policies and lack of training. Plaintiffs filed their First Amended Complaint on August 10, 2016. On January 27,

2017, Defendant Karen Lamendola, Guardian ad Litem for Frank Stoiker, filed a Motion for Summary Judgment on all claims against him.

In 1975, Ricky Jackson, Kwame Ajamu and Wiley Bridgeman were arrested and imprisoned for the murder of Harold Franks. They were found guilty based on the testimony of then-twelve-year-old Edward Vernon, who claimed to have witnessed the crime. Nearly forty years later, after many of the detectives involved in the case were deceased, Vernon recanted his testimony, claiming he had been coerced by Cleveland police officers into saying that he had witnessed the crime. The State of Ohio dismissed the charges against Plaintiffs and they filed suit against the City of Cleveland, several former detectives and the estates of several deceased detectives. The cases against the estates were dismissed, leaving only the claims against the City of Cleveland and former Detectives Frank Stoiker and Jerold Englehart. However, Stoiker has Alzheimer's-type Dementia and is represented by Guardian ad Litem Karen Lamendola.

On May 25, 1975, Vernon was taken to a police lineup by two detectives. The lineup was conducted by a third police officer. When asked if he recognized anyone in the lineup, Vernon said no. Vernon had previously identified Ricky Jackson and Wiley Bridgeman, who were both in the lineup. After the lineup, two detectives took Vernon to another room. Vernon later identified one of the detectives as Detective John Staimpel, but Vernon was unable to identify the other detective. Vernon says that Staimpel got angry, beat the table and yelled at Vernon for lying. Then Staimpel told Vernon that he would "fix this" and both detectives left the room for a while. When they returned, Staimpel gave Vernon a statement to sign, which said that Vernon recognized Jackson and Bridge-

man in the lineup and that Vernon hadn't identified them because Vernon was afraid of them. Vernon never told those detectives that he was afraid and never told them any of the details of the crime.

In 1975, Frank Stoiker was partnered with John Staimpel in the Homicide Unit of the Cleveland Police Department. Stoiker and Staimpel were assigned to the Franks homicide investigation. Detectives Eugene Terpay and James Farmer were the lead detectives on the case and Stoiker and Staimpel worked the second shift on the case. Vernon's only alleged interaction with Staimpel was on May 25, 1975, and Vernon never alleged that he met Detective Stoiker and did not recognize Stoiker's name or photograph. However, Stoiker signed a statement dated May 25, 1975, which was also signed by Staimpel and Vernon.[1] Dkt 82-31. This statement contained a series of questions that Vernon was supposedly asked, along with Vernon's answers. The statement covers both the details of the crime and the May 25 lineup.

Stoiker also signed a report dated May 25, 1975, in which Stoiker said that he and Staimpel picked up Vernon and another witness to review the lineup, where Vernon did not identify anyone in the lineup. Dkt. 82-25.[2] The report states that Vernon, outside the lineup room, identified Jackson and Bridgeman and told Stoiker that

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[1] Defendant argues that Lamendola was not able to authenticate Stoiker's signatures. However, as Lamendola also testified that the signature on the police report resembles Stoiker's, this creates an issue of fact for the jury to determine their authenticity.

[2] Defendant objects to this report as hearsay in her Reply Brief. However, this report would not be offered for the truth of the matter asserted, as Plaintiffs allege that the statements within are, in fact, false.

Vernon was afraid of the men in the lineup. Stoiker's name is on another report, dated May 28, 1975, which states that he and Staimpel consulted with "Police Prosecutor A. Johnson who issued papers charging the two arrested males. . . " Dkt. 82-34. This report is unsigned, but has Stoiker's name printed on it.

Plaintiffs filed suit alleging seven counts under 42 U.S.C. §1983 against Defendant for withholding exculpatory evidence, fabrication of evidence, malicious prosecution, failure to intervene to prevent a constitutional violation, conspiracy to violate Plaintiffs' constitutional rights, supervisory liability improper lineup procedure and three state law claims for negligence, malicious prosecution and conspiracy. Defendant moves for summary judgment on all counts.

Plaintiffs argue that Stoiker's signatures show that he was present at the lineup and present when Detective Staimpel threatened Vernon. Plaintiffs argue that Stoiker left the room, created or helped create the false statement and forced Vernon to sign it. Defendant argues that there is insufficient evidence to place Stoiker in the room with Vernon after the lineup and, even if Stoiker were present, Stoiker did not fabricate or withhold any evidence. Defendant also argues that Stoiker is entitled to qualified immunity on all counts.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Ciminillo* v. *Striecher*, 434 F.3d 461,

464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the nonmoving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). A fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiffs' plight, the Court is still under an obligation to apply the law to the evidence Plaintiffs submit. Neither time nor death abrogates Plaintiffs' obligation to support their claims.

II. Standard for Qualified Immunity

Officials who perform discretionary functions are generally entitled to qualified immunity from individual liability for civil damages unless they violate clearly established rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 812 (1982). The Sixth Circuit, in determining whether an official is entitled to qualified immunity, applies a three-part test: 1) whether the plaintiff's constitutional right was violated; 2) whether that right was clearly established at the time such that a reasonable official would have understood that he was violating that right; and 3) whether the official's action was objectively unreasonable in light of the clearly established rights. *Sample* v. *Bai-*

ley, 409 F.3d 689, 696-97 (6th Cir. 2005). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ciminillo* v. *Streicher*, 434 F.3d 461, 468 (6th Cir. 2006). The legal right cannot be framed in general terms to encompass an expansive area of law. *Bills* v. *Aseltine*, 52 F.3d 596. 602 (6th Cir. 1995). However, the exact circumstances of the particular case need not have been previously held illegal for the right to be "clearly established," but the right must be clear in a particularized way to put the official on notice that his conduct is illegal. See *Scicluna* v. *Wells*, 345 F.3d 441, 446 (6th Cir. 2003); *Bell* v. *Johnson*, 308 F.3d 594, 602 (6th Cir. 2002).

To determine if a right is clearly established, the Court looks first to Supreme Court decisions, then decisions from the Sixth Circuit Court of Appeals, then to other courts within this circuit, and finally to decisions from other circuits. *Buckner* v. *Kilgore*, 36 F.3d 536, 539 (6th Cir. 1994). Decisions from other circuits must point unmistakably to the unconstitutionality of the act and be so clearly foreshadowed by direct authority as to leave no doubt in a reasonable person's mind that the act is unconstitutional. *Gean* v. *Hattaway*, 330 F.3d 758, 767-78 (6th Cir. 2003).

Once the defense of qualified immunity has been raised, plaintiffs have the burden of demonstrating the defendant is not entitled to qualified immunity. *Rodriquez* v. *Passinault*, 637 F.3d 675, 689 (6th Cir. 2011).

III. Plaintiffs' § 1983 Claims Against Frank Stoiker Fail Because There is No Evidence Stoiker Committed Constitutional Violations.

A. Fabrication of Evidence

Plaintiffs allege that Stoiker fabricated evidence by coercing Vernon into signing a false statement and by submitting a false report to his superiors about the lineup. Defendant contends that Stoiker was not involved in any coercion and there is no evidence that he knowingly made any false statements.

The Sixth Circuit has held that "[a]n officer violates a person's constitutional rights when he knowingly fabricates evidence against them and a reasonable likelihood exists that the false evidence would have affected the jury's decision." *France* v. *Lucas*, 836 F.3d 612, 629 (6th Cir. 2016). Furthermore, in 1936, the Supreme Court held that prisoners' constitutional rights were violated when police officers coerced confessions used against them in trial. *Brown* v. *Mississippi*, 297 U.S. 278, 286 (1936).

Plaintiffs fail to show that Stoiker fabricated evidence by creating the written statement. Vernon could not identify Stoiker and did not allege that Stoiker engaged in any wrongdoing, or was even involved in the investigation. The only evidence that points to Stoiker's involvement are the signatures on the statement and the report. However, even if those are Stoiker's signatures, Plaintiffs have not cited to any policy, practice, or procedure about the meaning or effect of signature. Therefore, the Court is left to speculate as to what the signature meant.

Even assuming that Stoiker fabricated the statement and report, he still did not commit a constitutional violation. The second requirement for a fabrication of evi-

dence claim is that a reasonable likelihood exists that the false evidence influenced the jury's decision. It is clear that the statement and the report did not influence the jury's decision in the 1975 trials. Plaintiffs cite no evidence that Stoiker's report was ever even mentioned in any trial. Furthermore, while parties attempted to introduce the statement in both Bridgeman's and Ajamu's trials, it was objected to and kept out in both. Dkt 82-23 at J2035; Dkt. 82-24 at J3760. In the Jackson trial, Vernon was asked a series of questions about the statement. Dkt. 82-12 at J1014-16; J1029-39. The questions concerned inconsistencies between Vernon's testimony at trial and the statement, such as whether the victim was leaving the store or going into the store at the time of the murder. However, it is unclear whether the jury in the Jackson trial had the statement while they were deliberating.

In all three trials, there is not a reasonable likelihood that any false evidence that Stoiker may have created affected the jury's decision. Vernon's live testimony led to the conviction in all three trials. Vernon testified at the trial as to what he saw and Stoiker had no part in compelling any testimony at trial. In the Bridgeman and Ajamu trials, the statement was kept out by objections, so the jury did not even hear about its contents. In the Jackson trial, the statement was used by the defense to point out inconsistencies. Because of this, it appears that the jury convicted Jackson in spite of, rather than because of, the statement.

Because there is no evidence that Stoiker committed a constitutional violation, Plaintiffs' claim of fabrication of evidence against Stoiker fails. Furthermore, because there is no evidence that Stoiker committed or knew of a constitutional violation, there is no evidence that Stoiker

conspired to commit such a violation. Therefore, Plaintiffs' conspiracy claim also fails.

B. Withholding Exculpatory Evidence

Plaintiffs allege that Stoiker violated his *Brady* obligations to disclose exculpatory evidence by not disclosing how Vernon's signed statement was prepared.

In 1963, the Supreme Court held that the prosecutor has a constitutional obligation to disclose exculpatory evidence to the defendant. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Defendant asserts that the Supreme Court did not extend this duty to police officers until 1995, while Plaintiffs argue that the Sixth Circuit held a police officer liable for failure to disclose exculpatory evidence in 1975. See *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995); *Hillard* v. *Williams*, 516 F.2d 1344, 1349-50 (6th Cir. 1975), vacated in part, 424 U.S. 961 (1976).

In order to be liable for a *Brady* violation, Stoiker must have been in possession of some exculpatory evidence which he did not disclose. Plaintiffs allege that Stoiker knew that Vernon did not witness the crime because Vernon told police that he did not know anybody in the lineup involved in the murder. However, that is not what Vernon actually said. Vernon explained that he thought the police were asking him whether he saw anyone in the lineup that had committed the crime. What the police actually asked Vernon was whether he knew anyone in the lineup and Vernon said no. Dkt. 82-11 at J6452. Vernon's personal, unspoken meaning cannot prove what Stoiker understood or knew. Furthermore, the officers knew that Vernon had previously identified the men and had led Detectives Terpay and Farmer to their houses.

Plaintiffs' other allegation of withholding exculpatory evidence is that Stoiker did not disclose how the statement was prepared. However, as discussed above, there is no evidence Stoiker fabricated the statement or knew that it was fabricated. Plaintiffs cannot demonstrate by a preponderance of evidence that Stoiker had any exculpatory evidence to disclose.

Furthermore, even if Stoiker had exculpatory evidence which he did not disclose, he would be entitled to qualified immunity against the *Brady* claim. Defendant argues that evidence of an officer's wrongdoing is not exculpatory evidence, citing a recent Seventh Circuit decision, *Saunders-El* v. *Rohde*, 778 F.3d 556 (7th Cir. 2015), in which the court held that *Brady* does not require police officers to disclose the circumstances of their investigations. However, as Plaintiffs point out, the Seventh Circuit has also recently held that police violate *Brady* when they withhold the pressure tactics employed to threaten witnesses. *Avery* v. *City of Milwaukee*, 847 F.3d 433, 443 (7th Cir. 2017). These cases are difficult to reconcile, but neither constitute binding precedent and neither indicate that the law was clearly established in 1975 as to whether evidence of police misconduct is exculpatory or impeachment evidence. A reasonable official would not be aware that failure to disclose a constitutional violation would itself be a second constitutional violation. Without case law clearly establishing a defendant's right to have police misconduct disclosed to him before trial, police would not be on notice of such a right. Plaintiffs have not pointed to any case law suggesting that this principle was clearly established in 1975.

Plaintiffs cannot show that Stoiker had exculpatory evidence to disclose, or that it was clearly established in 1975 that *Brady* required police officers to disclose evi-

dence of their own misconduct. Therefore, Plaintiffs' *Brady* claims fails.

C. Malicious Prosecution

A person's constitutional rights are violated if they are maliciously prosecuted without probable cause. *Gregory* v. *City of Louisville*, 444 F.3d 725, 750 (6th Cir. 2006). To prove Stoiker liable for malicious prosecution, Plaintiffs must show that Stoiker influenced Plaintiffs' arrest or continued detention and that the influence was based on knowing misstatements or "pressure or influence" over the prosecutor or someone who testified at the initial hearing. *Sykes* v. *Anderson*, 625 F.3d 294, 316. Plaintiffs must also show a lack of probable cause for the prosecution. *Id.* at 308-09.

As discussed above, Plaintiffs cannot show that Stoiker made knowing misstatements. Furthermore, there is no evidence that Stoiker influenced the prosecutor or any witness. Prosecutor Del Balso interviewed Vernon and found him to be a credible witness. While Stoiker's report does indicate that he spoke to a prosecutor, the report does not have the content of that conversation and it is not a reasonable inference that Stoiker influenced the prosecutor, especially since Vernon was available to give live testimony.

Plaintiffs also cannot show a lack of probable cause. An indictment by a grand jury is sufficient to show probable cause, unless the indictment was the result of police officers knowingly presenting false evidence or testimony. *France*, 836 F.3d at 626. Plaintiffs were indicted by the grand jury and there is no evidence to suggest that Stoiker testified to the grand jury, or that his report was used to obtain the indictment. The indictment was obtained from Vernon's live testimony about witnessing the

crime. While Vernon says that he was coerced into testifying that he saw the crime, Stoiker played no part in that coercion. Vernon alleges that only Detectives Terpay and Farmer compelled Vernon's live testimony. There is no evidence to suggest that Stoiker influenced Vernon's live testimony at all. Furthermore, as discussed above, there is no evidence to suggest that Stoiker knew that Vernon's testimony was false.

Because Plaintiffs were indicted by a grand jury and because Stoiker did not testify or present knowing misstatements to the prosecution, Plaintiffs' claim of malicious prosecution fails.

D. Plaintiffs' Remaining § 1983 Claims

There is no evidence to suggest that Stoiker committed supervisory misconduct, improperly influenced the lineup procedure, or failed to intervene. Furthermore, Plaintiffs did not argue any of these claims in their Opposition Brief. Therefore, Plaintiffs' other § 1983 claims are dismissed.

IV. Plaintiffs' State Law Claims Are Dismissed Without Prejudice.

The Court declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims and dismisses them without prejudice.

CONCLUSION

Because Plaintiffs failed to show that Stoiker fabricated evidence, or knew or should have known that other officers fabricated evidence, Defendant's Motion for Summary Judgment is GRANTED, in part.

IT IS SO ORDERED.

s/ Christopher A. Boyko

CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX O

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J.:

This matter comes before the Court upon the Motion of Defendant Jerold Englehart (ECF DKT #64) for Summary Judgment on Plaintiff's claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED, in part.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Kwame Ajamu and Wiley Bridgeman filed their original Complaint on July 2, 2015 against Defendant Jerold Englehart, as well as several other former detectives and the City of Cleveland, alleging constitutional violations by the detectives caused by the City's unconstitutional policies and lack of training. Plaintiffs filed their First Amended Complaint on August 10, 2016. On Janu-

ary 27, 2017, Defendant Jerold Englehart filed a Motion for Summary Judgment on all claims against him.

In 1975, Ricky Jackson, Kwame Ajamu and Wiley Bridgeman were arrested and imprisoned for the murder of Harold Franks. They were found guilty based on the testimony of then-twelve-year-old Edward Vernon, who claimed to have witnessed the crime. Nearly forty years later, after many of the detectives involved in the case were deceased, Vernon recanted his testimony, claiming he had been coerced by Cleveland police officers into saying that he had witnessed the crime. The State of Ohio dismissed the charges against Plaintiffs and they filed suit against the City of Cleveland, several former detectives and the estates of several deceased detectives. The cases against the estates were dismissed, leaving only the claims against the City of Cleveland and former Detectives Frank Stoiker and Jerold Englehart.

In 1975, Jerold Englehart worked in the Criminal Statement Unit of the Cleveland Police Department. His duties involved taking typed statements from victims, witnesses and defendants. Englehart testified that he did not remember taking statements relating to the murder of Harold Franks and that he did not remember taking Vernon's statement. Englehart testified that he never typed the statement of a witness who was not present at the time. Englehart did not investigate Franks' murder.

On May 25, 1975, Vernon was taken to the police station to review a lineup. After the lineup, Plaintiffs allege that Detectives Frank Stoiker and John Staimpel gave Vernon a prepared statement about the lineup ("Statement") to sign and that the Statement contained false claims. Dkt. 82-31. Plaintiffs allege that Vernon was coerced into signing it. The Statement had Englehart's last

name and badge number typed at the bottom. This is the only piece of evidence connecting Englehart to this case. Vernon never met Englehart and does not remember hearing his name during the investigation. Englehart did not sign the Statement.

Plaintiffs filed suit alleging seven counts under 42 U.S.C. § 1983 against Defendant for withholding exculpatory evidence, fabrication of evidence, malicious prosecution, failure to intervene to prevent a constitutional violation, conspiracy to violate Plaintiffs' constitutional rights, supervisory liability, improper lineup procedure and three state law claims for negligence, malicious prosecution and conspiracy. Defendant moves for summary judgment on all counts.

Plaintiffs allege that Defendant's name on the Statement indicates that Defendant typed the Statement and that Defendant prepared it without Vernon present. Plaintiffs further allege that Defendant conspired with Detectives Stoiker and Staimpel to prepare a false statement for Vernon to sign, or that Defendant at least knew or should have known that the Statement was false, since Staimpel had Defendant create the Statement without the witness present. Defendant argues that Englehart's typed name is insufficient evidence to show that Englehart prepared the Statement and that even if he did prepare the Statement, it is not the same statement that Vernon signed after the lineup, and thus, there is no evidence about how the Statement was prepared. Defendant also argues that Englehart is entitled to qualified immunity on all counts.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgment

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *Ciminillo* v. *Striecher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the non-moving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). A fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 248-49; *Celotex Corp.*, 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiffs' plight, the Court is still under an obligation to apply the law to the evidence Plaintiffs submit. Neither time nor death abrogates Plaintiffs' obligation to support their claims.

II. There Is Insufficient Evidence To Show That Defendant Was Involved In Fabricating Or Withholding Evidence.

Defendant argues that Englehart's name on the Statement is insufficient evidence to support Plaintiffs' claim that Defendant prepared the statement. However, Englehart testified that normally, when he prepared a statement, he typed his name and badge number at the bottom. This supports a reasonable inference that Englehart prepared it. Englehart's statement that he does not recall preparing this statement at most creates an issue of fact. Taking the evidence and drawing all reasonable inferences in favor of the non-moving party, there is enough evidence that a jury could conclude that Englehart typed the Statement.

Englehart further contends that the evidence shows that the Statement is not the one that Detectives Stoiker and Staimpel forced Vernon to sign. Vernon testified in his deposition that the statement he signed after viewing the lineup only stated that Vernon was too scared to pick someone out of the lineup, while the Statement also contains information about the crime itself. Dkt. 64-1 at 85-86. However, in Vernon's declaration, Vernon states that the Statement was shown to him at Plaintiffs' trials and that Vernon recalled only signing one statement. Dkt. 82-31. Furthermore, the Statement is dated May 25, 1975, the day of the lineup. This creates an issue of fact as to how the Statement was prepared and whether Vernon signed it right after the lineup. Once again, viewing all evidence in the light most favorable to Plaintiffs, there are issues of fact concerning whether the representations in the Statement accurately reflect what Vernon told the investigating officers.

However, even though there are genuine issues of fact, these issues are not material, as even taking the evidence in the light most favorable to Plaintiffs and drawing reasonable inferences in their favor, there is not enough evidence to show that Englehart committed a constitutional violation. The Court must draw reasonable inferences in favor of the non-moving party, but "[t]his standard . . . does not allow, much less require, that we draw strained and *unreasonable* inferences in favor of the nonmovant." *Willis* v. *Roche Biomedical Laboratories, Inc.*, 21 F.3d 1368, 1380 (5th Cir.1994) (emphasis in original). While the inferences that Englehart prepared the Statement and that the Statement were made the day of the lineup are reasonable, Plaintiffs also ask the Court to infer that because Englehart prepared the Statement without Vernon present, Englehart knew or should have known that the Statement was false. This inference is unreasonable. Plaintiffs cite no case law to suggest that Englehart committed a constitutional violation by preparing the statement without Vernon present and cite no facts in the record to indicate what Englehart knew when preparing the Statement. Instead, Plaintiffs assert that because the Statement is false and because Englehart prepared it without the witness present, Englehart knew or should have known that it was false. This goes beyond reasonable inferences. There is no evidence to suggest that Englehart conspired with any other police officers, that Englehart knew that the information in the Statement was false, or that Englehart had any reason to know that the information was false.

Even assuming that Englehart knew the Statement contained false information, Plaintiffs failed to establish the elements required for fabrication of evidence. The Sixth Circuit has held that "[a]n officer violates a per-

son's constitutional rights when he knowingly fabricates evidence against them and a reasonable likelihood exists that the false evidence would have affected the jury's decision." *France* v. *Lucas*, 836 F.3d 612, 629 (6th Cir. 2016). Vernon testified live before the grand jury and at all three trials. Plaintiffs were convicted based on that live testimony, not Vernon's prior written statements. The Statement could not have been used to obtain Plaintiffs' convictions and therefore, the Statement could not have affected the jury's decision.

Because Plaintiffs have not demonstrated that Englehart knew the Statement contained false information, all of Plaintiffs' federal claims against Englehart fail.

III. Plaintiffs State Law Claims Are Dismissed Without Prejudice.

The Court declines to exercise its supplemental jurisdiction over Plaintiffs' state law claims and dismisses them without prejudice.

CONCLUSION

Because Plaintiffs have not alleged any facts connecting Defendant to the Franks murder investigation or to the fabrication of Vernon's statements, Defendant's Motion for Summary Judgment is GRANTED, in part.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX P

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE No. 1:15-CV-1320

KWAME AJAMU, ET AL.,

Plaintiffs,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

OPINION AND ORDER

August 4, 2017

CHRISTOPHER A. BOKYO, J:

This matter comes before the Court upon the Motion of the City of Cleveland for Summary Judgment (ECF DKT #65) on Plaintiffs' claims pursuant to Fed. R. Civ P. 56. For the following reasons, Defendant's Motion for Summary Judgment is GRANTED.

FACTUAL AND PROCEDURAL HISTORY

Plaintiffs Kwame Ajamu and Wiley Bridgeman filed their original Complaint on July 2, 2015, against Defendant City of Cleveland and several individual former detectives, alleging constitutional violations by the detectives caused by unconstitutional policies and inadequate training by the City. Plaintiffs filed their First Amended Complaint on August 10, 2016, against Defendants City

of Cleveland, former Detective Jarold Englehart and Karen Lamendola, Guardian ad Litem on behalf of Frank Stoiker. On January 20, 2017, Defendant City of Cleveland filed a Motion for Summary Judgment on all claims against the City.

In 1975, Plaintiffs were convicted of murdering Harold Frank. Their conviction was based on the eyewitness testimony of twelve-year old Eddie Vernon. However, nearly forty years later, in 2014, Vernon recanted his testimony, claiming that he never witnessed the crime and that he had been coerced into testifying. After being released, Plaintiffs brought suit against the Investigative Officers in the Frank murder investigation and the City of Cleveland. Many of the detectives involved in the investigation were deceased by the time Plaintiffs filed their claims and the Court dismissed the claims against the deceased detectives' estates. Plaintiffs' remaining claims are against Karen Lamendola, Detective Jerold Englehart and the City of Cleveland.

The Cleveland Police Department in the 1970's had two forms of written rules: the Manual of Rules of Conduct and Discipline for Officers, Members, and Employees of the Division of Police ("Manual"), and General Police Orders ("GPOs"). Defendant cites several rules in the Manual that Defendant alleges relate to the requirement to disclose exculpatory evidence. Rule 66 requires police officers to familiarize themselves with the facts of a case, "so that all of the evidence may be properly presented to the court." Dkt. 65-1 at 4. Rule 77 requires officers to report on all matters they investigate and Rule 78 requires that all written and verbal reports be truthful and unbiased. *Id.* at 8-9. Plaintiffs cite GPO No. 19-73, which contains Rule 16 of the Ohio Rules of Criminal Procedure. Dkt. 65-7. The GPO states that the police

department shall not give reports or evidence directly to defense counsel. *Id.* The Order also clarifies that the rules of criminal procedure "will be employed through the courts and through the prosecuting attorney." *Id.* The GPO does not state the obligations of the police to disclose information to the prosecuting attorney. The Cleveland Police Department's rules and policies have since been updated.

Several former detectives, along with Edward Tomba, the Deputy Chief of Homeland Security and Special Operations for the Cleveland Police Department, testified about the rules and training in place in the 1970's. All of them testified that Cleveland police officers in the 70's received both academy and on-the-job training to be police officers. Several witnesses testified that the academy trained officers to disclose exculpatory evidence, while others testified that the academy provided no such training. Several witnesses testified that they received on-the-job training to disclose exculpatory evidence to the prosecutor and no witness testified that on-the-job training did not include the duty to disclose, or that they were trained not to disclose such evidence.

Plaintiffs provided several instances of alleged police misconduct in the years leading up to their incarceration. Plaintiffs cite a 1972 memo from then-Mayor Ralph Perk, in which Perk said that police misconduct was rampant. Dkt 66-16 at 88. However, the misconduct involved was failure to respond to citizen complaints and the indictment of officers for manslaughter, armed robbery and rape. Plaintiffs also cite two alleged incidents of Cleveland police coercing witness statements through force or threat, one in 1974, and one in 1977, two years after Plaintiffs' incarceration. Former Detectives Ronald Turner and William Tell, Sr. also testified that detectives

often did not follow the policy of turning over all evidence to the prosecutors.

Plaintiffs brought suit against the individual officers for violating their constitutional rights by withholding exculpatory evidence, fabricating evidence, malicious prosecution and unconstitutional lineup procedure. Plaintiffs also brought suit against the City of Cleveland under a theory of municipal liability under 42 U.S.C. § 1983, alleging that Defendant's unconstitutional policies and failure to properly train officers resulted in the violation of Plaintiffs' rights. Defendant moves for Summary Judgment on all claims, arguing that Plaintiffs presented no facts to show an underlying constitutional violation and arguing that the undisputed record shows that the City had adequate policies and training during the 70's. Plaintiffs argue that Defendant had an explicitly unconstitutional policy, that Defendant should have had rules instructing police officers to disclose exculpatory evidence and that Defendant failed to adequately train police officers to disclose such evidence.

LAW AND ANALYSIS

I. Standard of Review for Summary Judgement

Summary judgment is proper if the movant can show 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). The Court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Ciminillo* v. *Striecher*, 434 F.3d 461, 464 (6th Cir. 2006). A dispute is genuine if it is based on facts on which a reasonable jury could find for the nonmoving party. *Tysinger* v. *Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006). The fact is material if the resolution of the dispute might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477

U.S. 242, 248 (1986). To meet its burden, the moving party can either present evidence showing the lack of genuine dispute as to material facts, or it may show the absence of evidence to support the nonmoving party's claims. *Celotex Corp.* v. *Catrett,* 477 U.S. 317 (1986). Once the moving party has met its burden, the nonmoving party cannot rest on its pleadings; rather, the nonmoving party must point to specific facts in the record that show that there is a genuine issue for trial. *Liberty Lobby,* 477 U.S. at 248-49; *Celotex Corp.,* 477 U.S. at 324.

No matter how sympathetic one may be to Plaintiffs' plight, the Court is still under an obligation to apply the law to the evidence Plaintiffs submit. Neither time nor death abrogates Plaintiffs' obligation to support their claims.

II. *Monell* Claims Require an Underlying Constitutional Violation

In order to bring a *Monell* claim against a municipality, there must be an underlying constitutional violation by one of the municipality's employees. *Watkins* v. *City of Battle Creek,* 273 F.3d 682 (6th Cir. 2001). Plaintiffs allege constitutional violations by Frank Stoiker and Jarold Englehart. However, Plaintiffs also allege that, even if the claims against the individual defendants are dismissed, Plaintiffs' *Monell* claim can still proceed as long as they can show any constitutional violation by an officer, even if that officer is not liable for that violation. In *Garner* v. *Memphis Police Department,* 8 F.3d 358, the Sixth Circuit held that, even though the claim against the only individual defendant had been dismissed due to qualified immunity, the *Monell* claim against the city could continue. Defendant alleges that Plaintiffs have not alleged enough facts for the Court to find there was an underlying constitutional violation. The Court will not

decide this question at this time. Regardless of whether any of the detectives involved in the Franks homicide investigation committed any constitutional violations, Plaintiffs' *Monell* claims fail as a matter of law on an independent basis discussed below.

III. Plaintiffs' *Monell* Claims Fail as a Matter of Law.

A city or municipality may only be held liable for the constitutional violations of its own employees under 42 U.S.C. § 1983 if those actions are the result of a practice, policy, or custom of the municipality itself. *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). There are four types of municipal action that, if they cause the underlying constitutional violation, can establish liability under a *Monell* claim: 1) legislative enactments or official policy; 2) actions by officials with final decision-making authority; 3) a policy of inadequate training or supervision; or 4) a custom of tolerance of rights violations. *France* v. *Lucas,* No. 1:07CV3519, 2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), aff'd, 836 F.3d 612 (6th Cir. 2016).

Plaintiffs, in their opposition brief, did not argue that Defendant is liable under the second or fourth theory of liability. Plaintiffs also did not present argument defending their claims for fabrication of evidence, malicious prosecution, or improper lineup procedure. As discussed above, once the party moving for Summary Judgment meets its burden of production, the non-moving part *must* present specific facts from the record that support its claim. *Celotex Corp.* v. *Catrett,* 477 U.S. 324 (1986). Since Plaintiffs failed to do so, they cannot rely on the pleadings to survive Summary Judgment. It is not the Court's role to "wade through" the record to find specific facts which may support the nonmoving party's claims. *United States* v. *WRW Corp.,* 986 F.2d 138, 143 (6th Cir.

1993). Thus, even though the record may contain evidence to support other claims or theories, Plaintiffs have waived that argument by not raising it in their opposition brief. Furthermore, Plaintiffs have not pointed to any facts that would show that the other claims were the result of an unconstitutional policy or failure to train police officers.

A. Defendant Did Not Have an Unconstitutional Policy to Withhold Exculpatory Evidence.

Plaintiffs argue that Defendant is liable under the first method of *Monell* liability for two reasons. First, that Defendant had an explicit unconstitutional policy that forbade police officers from disclosing exculpatory evidence to defendants. Second, Plaintiffs argue that Defendant lacked an adequate policy on police officers' obligations under *Brady* v. *Maryland* 373 U.S. 83 (1963) and that the need for such a policy was so significant and so obvious that the lack of policy amounts to an deliberate indifference. However, both of these arguments fail because Defendant did have official policies in place specifically requiring police officers to report on everything they investigated.

1. The City Did Not Have an Explicit Unconstitutional Policy.

Under the first method of *Monell* liability, a municipality is liable for the constitutional violations of its employees if they are executing a "policy statement, ordinance, regulation, or decision" of the city. *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978). The occasional negligent administration of an otherwise sound policy is not enough; the policy itself must either be unconstitutional, or it must have "mandated, encouraged, or authorized" unconstitutional conduct. *Heyerman* v.

Cnty. of Calhoun, 680 F3d 642, 648-49; *France*, 2012 WL 5207555, *10. In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process…, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87.

Plaintiffs allege that GPO 19-73 was an unconstitutional policy because it forbade police officers from disclosing evidence to defense attorneys, which violates the requirements of *Brady*. The GPO states that police officers shall not disclose records or evidence to defense counsel. This order is consistent with *Brady*. *Brady* requires prosecutors to disclose exculpatory evidence to defense counsel and requires that police officers disclose that evidence to prosecutors. *Id.*; See also *Kyles* v. *Whitley,* 514 U.S. 419, 437–438. The General Police Order applies, as the name suggests, to police officers, not prosecutors. The GPO states that the rules of criminal procedure are enacted through the courts and the prosecuting attorney. Dkt. 65-7. Since the GPO does not forbid disclosing information to the prosecutor, this policy is not unconstitutional.[1]

Plaintiffs claim that Defendant admitted that GPO 19-73 was unconstitutional by changing the rule. This argument is meritless. First, this use of evidence is clearly inadmissible under Fed. R. Evid. 407, which prohibits evidence of subsequent remedial measures to prove culpable conduct. Even though Defendant did not raise the evidentiary objection, the Court has discretion to disre-

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[1] Even if GPO 19-73 did forbid the prosecution from disclosing exculpatory evidence, the alleged constitutional violation in this case is the failure of police officers to disclose evidence to the prosecution, which the GPO does not forbid.

gard inadmissible evidence in considering a motion for summary judgment. *Wiley* v. *U.S.,* 20 F.3d 222 at 226 (6th Cir. 1994); see also *Capobianco* v. *City of N.Y.,* 422 F.3d 47, 55 (2d Cir. 2005); *United States* v. *Dibble,* 429 F.2d 598, 603 (9th Cir. 1970). Second, Plaintiffs cite no evidence as to the reason the rules were changed. The mere fact that police policies have changed in the forty-two years since 1975 is not evidence that the old policies were unconstitutional. Third, to allow Plaintiffs to make such an inference would be plainly against public policy. If parties could use a change of rules or policies to prove that the old policies were unconstitutional, municipalities would avoid updating their policies for fear of creating liability under *Monell* claims. Since there is a strong public interest in having municipalities improve out-of-date policies, Plaintiffs' argument fails.

2. The City Was Not Deliberately Indifferent in Not Adopting Better Policies.

Even if a municipality has not adopted an explicitly unconstitutional policy, the municipality may be liable for the failure to make a policy where one is needed. *Jones* v. *City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986). The Supreme Court held that a city's deliberate choice not to have a policy can be characterized as municipal policy. *City of Canton* v. *Harris,* 489 U.S. 378 (1989). However, it is not enough that a policy be imperfect; liability for failure to adopt a policy requires "deliberate indifference" to a "plainly obvious danger." *Armstrong* v. *Squadrito,* 152 F.3d 564, 578 (7th Cir. 1998). The municipality may be deliberately indifferent if there is a pattern of violations that puts the municipality on notice, or if the inadequacy of the policy in preventing constitutional violations is obvious. *Miller* v. *Calhoun Cnty.,* 408 F.3d 803, 816-17 (6th Cir. 2005).

The Manual contains the rules regarding disclosure of evidence to prosecutors. Rule 77 states that "[o]fficers and members shall report on all matters referred to or investigated by them." Dkt 66-2 at 59. Rule 77 further requires all police officers to submit their reports to their superior officers. Plaintiffs contend that these reports were incomplete, but all parties agree that the reports were required to be turned over to the prosecutors. Rule 78 requires that "[w]ritten and verbal reports... shall be truthful and unbiased." *Id.* at 60. The plain language of these policies means that police officers must report truthfully and completely on everything they investigate. Therefore, the City did have a policy in place that addressed the *Brady* obligations of police officers, since turning over everything to prosecutors would naturally include exculpatory and impeachment evidence.

Plaintiffs argue that, even if Rules 77 and 78 cover disclosing evidence to prosecutors, the rules are inadequate to prevent constitutional violations because they are too vague and do not instruct police officers as to what evidence might be exculpatory. In order for Plaintiffs' argument to prevail, the policy would have to be so inadequate as to constitute deliberate indifference by the City. *Miller,* 408 F.3d at 817. This requires that either the City knew that its policy was inadequate, or that the policy was so inadequate that the danger of violation was plainly obvious. *Armstrong,* 152 F.3d at 578.

Plaintiffs argue that Defendant knew that the policy was inadequate. Plaintiffs point to several reports detailing concerns with the Cleveland Police Department from the early 1970's. However, these reports concern police officers engaging in criminal activity and failing to respond to calls for assistance. These reports do not show that the City was on notice that their policy regarding

disclosing exculpatory evidence was inadequate. Plaintiffs also argue that Defendant admits that the Rules were inadequate because the Rules have since been replaced. As discussed above, this argument is based on subsequent remedial measures and has no merit. Therefore, Plaintiffs have not alleged facts showing that Defendant had notice of the need for new policies.

Plaintiffs also argue that the Rules were so vague and the risk of constitutional violations so great that Defendant was deliberately indifferent to the need for better policies. Plaintiffs rely heavily on their expert witness, Donald Anders, who testified that Rule 77 could be interpreted to mean that police officers were merely required to report that they investigated a matter, without reporting on the details of what the officer learned. Dkt. 69 at 74-79. However, the requirement to report on "all matters" is not ambiguous. The plain language clearly requires police officers to turn over everything to prosecutors. Furthermore, as a police expert rather than a legal expert, Anders is not qualified to testify as to how other police officers may have interpreted the rule or as to the legal adequacy of the rule. Liability for an insufficient policy requires deliberate indifference, and where there is a written policy requiring police officers to report on all their investigations, the attempts of an expert to obfuscate the rule to show how it might be inadequate will not suffice to show deliberate indifference.

B. Plaintiffs Cannot Show That the City's Training of Officers was Inadequate.

Plaintiffs assert that Defendant is liable under *Monell* for failing to properly train the police officers involved in the 1975 homicide investigation. However, Plaintiffs have not alleged sufficient facts to show that the on-the-job training of officers was inadequate.

A municipality may be liable under § 1983 for failure to train its employees, but only where such failure reflects a deliberate or conscious choice. *City of Canton* v. *Harris*, 489 U.S. 378 (1989). To prevail on a claim for failure to train, a plaintiff must show: 1) the training was inadequate for the tasks officers must perform; 2) the inadequacy was the result of the city's deliberate indifference; and 3) the inadequacy was closely related to or caused the injury. *Ciminillo* v. *Streicher*, 434 F.3d 461, 469 (6th Cir. 2006). There are two ways a plaintiff can show that the inadequate training was the result of deliberate indifference. First, the plaintiff can show "prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher* v. *Harden,* 398 F.3d 837, 849 (6th Cir. 2005). Second, a plaintiff can demonstrate deliberate indifference even where there are no prior instances of constitutional violations "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has the 'highly predictable consequence' of constitutional violations of the sort Plaintiff suffered." *Gregory* v. *City of Louisville,* 444 F.3d 725, 753 (6th Cir. 2006) (citation omitted).

Plaintiffs have failed to provide evidence showing that the training given to the officers was inadequate. While Plaintiffs have provided enough evidence to dispute whether the police academy covered handling exculpatory evidence, this dispute is not material. Defendant cites multiple witnesses who stated that police officers received on-the-job training to disclose all evidence, including exculpatory evidence to the prosecutor and Plaintiffs have presented no evidence to suggest that on-the-job training did not include handling exculpatory evidence.

This training is not insufficient merely because it is on-the-job training rather than formal academy training, because "failure-to-train liability is concerned with the substance of the training, not the particular instructional format." *Connick* v. *Thompson*, 563 U.S. 51, 68 (2011). Plaintiffs again rely on Anders' testimony, who stated that he believes that on-the-job training is always ineffective and therefore, the Court should infer that the officers' training in this case was inadequate. However, Anders' opinion about on-the-job training in general cannot create a genuine issue of fact where the undisputed facts on the record shows that officers received on-the-job training to disclose exculpatory evidence. Therefore, since Plaintiffs have not provided enough evidence to create a genuine issue of material fact as to whether police officers received on-the-job training to disclose exculpatory evidence, they cannot meet their burden of showing that the training was inadequate for the tasks police officers had to perform.

Plaintiffs do point to evidence in the record in the form of testimony by former Detective Turner and Tell, that there was a widespread custom of police committing constitutional violations. This evidence does suggest that there were problems with the Cleveland Police Department in the 1970's. However, this concern falls short of supporting Plaintiffs' claims. Evidence that officers committed violations is not evidence that those officers were not trained, especially in the face of undisputed direct evidence that officers received on-the-job training to disclose all evidence. "Indeed, a law enforcement officer's choice to lie, fabricate evidence, or conceal exculpatory evidence would appear to be one that is made despite any training." *France* v. *Lucas*, No. 1:07CV3519,

2012 WL 5207555, at *12 (N.D. Ohio Oct. 22, 2012), aff'd, 836 F.3d 612 (6th Cir. 2016).

C. Plaintiffs Cannot Show a Widespread Custom of Constitutional Violations.

While Plaintiffs do not explicitly argue that Defendant is liable due to a widespread custom of constitutional violations, Plaintiffs do cite some evidence from the record that suggests the possibility of such a custom. However, this evidence falls short of supporting Plaintiffs' *Monell* claims.

In order to establish liability for a custom of tolerating constitutional violations, Plaintiffs must prove four things: 1) a persistent pattern of illegal activity; 2) notice or constructive notice on the part of Defendant; 3) Defendant's tacit approval of the unconstitutional conduct; and 4) that Defendant's custom caused the underlying constitutional violation. *France*, 2012 WL 5207555, at *12 (citing *Thomas* v. *City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)).

Plaintiffs cannot establish these elements for three reasons. First, Plaintiffs rely on the testimony of former Detectives Ronald Turner and William Tell. While both worked for the City of Cleveland Police Department during the 1970's, neither were ever a homicide detective. Turner worked in the Vice Unit and Tell worked in the Auto Theft Unit. These officers cannot speak to the policies, practices and customs of the Homicide Unit.

Second, Plaintiffs rely on Anders' expert testimony that there was a custom of constitutional violations. However, expert testimony must be based on sufficient facts to support the conclusion. Since Turner and Tell lack personal knowledge of the Homicide Unit's policies,

Anders' speculation cannot create a genuine issue of material fact.

Third, even if Plaintiffs could show a widespread custom of violations, they presented no evidence that Defendant had notice of this custom. Plaintiffs point to no evidence that the Mayor or the Chief of Police were ever informed of any failures of officers to disclose exculpatory evidence to prosecutors. Defendant had no notice or reason to be on notice that homicide detectives failed to disclose exculpatory evidence to prosecutors.

Because Plaintiffs cannot establish the existence of a widespread custom of constitutional violations in the Homicide Unit and that Defendant had notice of such a custom, Plaintiffs cannot meet their burden to prove *Monell* liability for a custom of constitutional violations.

CONCLUSION

Because Plaintiffs have not shown that Defendant had an unconstitutional policy and was deliberately indifferent to the need for better policies or inadequately trained its police officers, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: August 4, 2017

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 17-3840/3843

RICKY JACKSON (17-3840); KWAME AJAMU, FKA RONNIE BRIDGEMAN, AND WILEY EDWARD BRIDGEMAN (17-3843),

Plaintiffs-Appellants,

v.

CITY OF CLEVELAND, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland,

No. 1:15-cv-00989

Christopher A. Boyko, District Judge.

ORDER

June 27, 2019

Before: ROGERS and BUSH, Circuit Judges.*

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition

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* The third member of this panel, Judge Keith, died on April 28, 2019. This order is entered by the quorum of the panel. 28 U.S.C. § 46(d).

were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX R

RELEVANT STATUTORY PROVISIONS

Title 42 U.S.C. §§ 1983 and 1988 provide in relevant part as follows:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable

remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

* * *

APPENDIX S

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:15-CV-989

RICKY JACKSON

Plaintiff,

v.

CITY OF CLEVELAND, ET AL.,

Defendants.

General Police Order 19-73
(ECF #101-7)

January 27, 2017

No. 19-73 **HEADQUARTERS** July 18, **19** 73

SUBJECT: PRETRIAL DISCOVERY RIGHTS OF DEFENSE ATTORNEYS AND COURTS IN CRIMINAL CASES

TO THE MEMBERS OF THE DEPARTMENT

In a letter to this Department, County Prosecutor John T. Corrigan has defined the legal rights of defense attorneys and courts to statements, reports and other items in criminal cases. His letter, as a part of this order, shall be considered an integral part of criminal case

preparation procedures and all members shall comply with its provisions.

Copies shall be forwarded to all Divisions, Districts, and Units.

The Ohio Supreme Court has recently promulgated Criminal Rules of Procedure, which have become effective July 1, 1973. Particularly, Rule 16 is going to be the concern of police departments and prosecutors.

At the outset I wish to advise that these are rules of criminal procedure that will be employed through the courts and through the prosecuting attorney.

NO POLICE DEPARTMENT IS REQUIRED OR SHALL GIVE TO DEFENSE COUSEL AND/OR ANY COURT ANY RECORD, PAPER, STATEMENT, REPORT OR TANGIBLE OBJECT OF A CRIMINAL CASE.

Under proper circumstances under this rule, by application to the Prosecuting Attorney and/or the court, the defense counsel may be entitled to the following:

1. Statement of defendant or co-defendant, written, recorded, or a summary of an oral statement.
2. Defendant's prior felony record.
3. Inspection of photos, books, papers, documents, tangible objects, material to the preparation of the defense or intended for use by the Prosecuting Attorney as evidence.
4. Reports of results of physical or mental examinations, scientific tests or experiments.
5. Names and addresses of witnesses.
6. Evidence favorable to the defendant.

EXCEPTION TO THE FOREGOING:

The foregoing does not authorize the discovery or the inspection of reports, memoranda, or other internal documents made by the Prosecuting Attorney or his agents (police departments are his agents) in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

NOTE: Wherein the Prosecuting Attorney certifies to the Court that the disclosure of the names and addresses of the witnesses may subject the witness to physical or substantial economic harm or coercion, such names and addresses of witnesses shall not be the subject of disclosure.

Discovery and Inspection (RULE 16)

1) One of the dramatic provisions of new rule placing criminal litigation on similar philosophical footing with civil trials. Surprise and gamesmanship reduced consistent with constitutional guarantees.
2) Information subject to disclosure on application of defendant.
    a) Statements of defendants or co-defendants including
        1) written or recorded statements.
        2) written summaries.
        3) Recorded testimony of defendant or co-defendant before grand jury.
    b) defendant's prior record.
    c) documents and tangible objects including papers, photographs, building or parts, or places.
    d) reports of examination and tests.

e) witnesses names and address.

f) disclosure of evidence favorable to defendant.

g) in camera (in chambers) inspection of witnesses prior statements.

3) Information not subject to disclosure.

a) prosecuting attorney's work product.

b) grant jury's transcripts.

4) Information subject to disclosure by defendant

a) Documents and tangible objects if defendant has sought disclosure from prosecutor.

b) Same with regard to examination and tests.

c) and witness tests.

d) and in camera inspection of witness statements.

5) Information not subject to disclosure includes attorney's work product.

6) Continuing duty to disclose as to materials arising subject to original order.

7) Court has broad power to regulate and prescribe limitation of discovery and enforcement thereof.

8) Discovery may be made within 21 days after arraignment or seven days before trial whichever is earlier.

Respectfully Submitted
/s/ John T. Corrigan
Prosecuting Attorney