

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GEORGE RODRIGUEZ,

Plaintiff,

v.

CITY OF HOUSTON, *et al.*,

Defendants.

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C.A. No. 06-2650
JURY TRIAL DEMANDED

**Plaintiff's Response to Defendant
James Bolding's Motion for Summary Judgment**

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Summary of the Argument

James Bolding's motion for summary judgment on plaintiff's §1983 claims against him should be denied. A reasonable jury could find that Bolding, a former Houston Police Department crime lab criminalist, knowingly fabricated evidence and concealed exculpatory information in the 1987 prosecution of plaintiff George Rodriguez for the kidnapping and rape of Marisela Salazar, depriving plaintiff of his constitutional right to due process and causing him to spend more than 17 years in prison for a crime he did not commit.

Specifically, a jury could find that before plaintiff's trial, Bolding falsely told the prosecutor that serology results excluded the suspect Isidro Yanez. Rodriguez's defense was that Yanez had been the perpetrator, and years later DNA testing proved this to be true. Bolding's false report excluding Yanez knowingly broke a fundamental principle of serology. This fabricated scientific evidence was fatal to Rodriguez's defense that Salazar had mistaken him for Yanez, and also deprived Rodriguez of the exculpatory fact that his own inclusion as a potential donor was statistically insignificant. Bolding's false report disregarded science in favor of advancing the prosecution's theory, and a jury could reasonably find this was a common practice by Bolding as well as by others in the crime lab. Indeed, Bolding applied the correct serology principle just three weeks after Rodriguez was convicted, but in that case applying the right principle helped the prosecutions case.

No immunity shields Bolding for this unconstitutional pretrial conduct: Absolute immunity does not apply, as Judge Atlas ruled in denying Bolding's motions to dismiss, because plaintiff's claims are not based on Bolding's trial testimony; nor does qualified immunity protect Bolding, because his misconduct was clearly wrong under long-established constitutional principles.

As to Bolding's objections to his liability as an individual supervisor, asserted in Count III of the amended complaint, in the interest of streamlining issues at trial plaintiff hereby withdraws that claim. As to all other claims, the motion should be denied.

Argument and Authorities

A. Standard of Review

"Summary judgment is appropriate only if the full record discloses 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001) (quoting Federal Rule of Civil Procedure 56). The Court must "view the evidence and all factual inferences from that evidence in the light most favorable to the [plaintiff] and all reasonable doubts about the facts are resolved in favor of the [plaintiff]." *Bryan v. McKinsey & Co., Inc.*, 375 F.3d 358, 360 (5th Cir. 2004). The Court may not "weigh the evidence or evaluate the credibility of witnesses." *Caboni v. General Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The Court may not grant summary judgment unless "no reasonable juror could find for" plaintiff. *Id.* at 451.

B. A Jury Can Reasonably Conclude That Bolding Fabricated Evidence and Concealed *Brady* Material.

1. Legal Standard

Local government officials whose conduct causes a deprivation of federal constitutional rights are liable under 42 U.S.C. §1983. Rodriguez alleges that Bolding caused his conviction "through use of false evidence," and concealed material, exculpatory information (*Brady* material) from the prosecutor, thereby depriving Rodriguez of its use at trial. It has long been clear that this conduct violates the Fourteenth Amendment guarantee of due process of law. *See Brady v. Maryland*, 373 U.S. 83 (1963) (concealment of material exculpatory information by the state violates due process guarantee); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (knowing use

of fabricated evidence violates due process guarantee); *see also* *Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (*en banc*) (“[A] state’s manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction deprives a defendant of his long recognized right to a fair trial secured by the Due Process Clause.”); *Geter v. Fotenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988) (deliberate concealment of exculpatory evidence by police gives rise to §1983 liability).

As the Fifth Circuit recently held in the factually similar case of *Brown v. Miller*, 519 F.3d 231 (5th Cir. 2008), government forensic scientists who “deliberate[ly] or knowing[ly]” cause “misleading and scientifically inaccurate” serology evidence to be introduced against a defendant, or who “suppress[] . . . exculpatory blood test results” are, like other government agents, liable under §1983. *Id.* at 237. Courts outside the Fifth Circuit have reached the same conclusion. *See, e.g., Gregory v. City of Louisville*, 444 F.3d 725, 744–45 (6th Cir. 2006) (summary judgment properly denied in §1983 *Brady* and fabrication claims against forensic hair examiner who withheld existence of evidence inconsistent with criminal defendant’s guilt and provided scientific conclusions “far afield of what any reasonable forensic examiner would find from the evidence”); *Pierce v. Gilchrist*, 359 F.3d 1279, 1293-94 (10th Cir. 2004) (§1983 claim stated against forensic scientist who allegedly with “knowing and reckless disregard for the truth” falsely informed police and prosecutors that hair analysis inculpated a criminal defendant, and disregarded serological findings that exculpated the defendant); *Pierce v. Gilchrist*, 2007 WL 128994, *5–6, *9–10 (W.D. Okla. Jan. 16, 2007) (Ex. L) (summary judgment denied on claim that forensic scientist fabricated conclusions and withheld exculpatory evidence); *Charles v. City of Boston*, 365 F. Supp. 2d 82, 89 (D. Mass. 2005) (§1983 claim stated against serologist

for *Brady* non-disclosure); *Wardell v. City of Chicago*, 75 F. Supp. 2d 851 (N.D. Ill. 1999) (complaint stated claim of *Brady* violations against forensic serologist).

2. A Reasonable Jury Can Find That Bolding Violated Plaintiff's Right to Due Process By Knowingly Reporting False, Misleading, and Incomplete Scientific Conclusions.

a. Bolding Made False Pretrial Reports and Concealed Exculpatory Information from the Prosecutor.

Plaintiff George Rodriguez was prosecuted in 1987 for the kidnapping and rape of Marisela Salazar. The offense was committed by two men, one of whom was Manuel Beltran, who confessed to the crime and implicated a man named Isidro Yanez as the co-assailant. The investigation leading up to Rodriguez's arrest and wrongful conviction is described in more detail at pages 2–6 of Plaintiff's Response to Defendants Harris County and Charles A. Rosenthal, Jr.'s Motion for Summary Judgment, which Rodriguez incorporates here.

Rodriguez's defense at trial was that a man named Yanez was the true assailant – a contention later proved through DNA testing that exonerated Rodriguez. Hawkins Depo. (Ex. A), 71; DNA Report of 7/22/04 (Ex. 154). Both Rodriguez and Yanez had been suspects up until the eve of Rodriguez's October 1987 trial, when the HPD crime lab performed ABO blood group analysis, also known as "serology" testing, on semen-stained evidence collected from Salazar after the rape, as well as on the three suspects considered by police: Beltran, Rodriguez, and Yanez. Kim Report of 9/24/87 (Ex. 91).

That process entailed first determining what ABO blood group substances, or "antigens," were present in the evidence collected from the victim and in blood or other body fluids of the victim and the suspects. The possible antigens were A, B, AB, or H. The H antigen is the only blood group substance present in the blood of people classified as type O, although it is also present in the blood of everyone else (people who are classified as type A, type B, or type AB).

As a second step, the analyst drew analytical conclusions about what individuals could or could not have contributed to the fluids found in the victim. Report of Independent Investigation (Ex. 39), 69–71; Shaler Report (Ex. 206), 13–14. In this case, as in any of the many other sexual assault cases handled by the crime lab during this period, the analyst had to assume at this second step that the secretions recovered from the victim were a mixture of the victim’s own (vaginal) body fluids as well as any semen deposited by the one or more perpetrators of the crime. Warren Depo. (Ex. B), 50, 226–27.

HPD crime lab analyst Christy Kim performed and initially reported the serology testing. Kim Report of 9/24/87 (Ex. 91). Kim reported that she found only A antigens on swabs and clothing taken from Salazar, and that the victim and suspects had the following blood types: Salazar and Rodriguez were O non-secretors, meaning their blood had only H antigens but their other body fluids (like vaginal secretions or semen) contained no blood group substances; Beltran was an A “secretor,” meaning that his blood and semen contained A antigens; and Yanez was typed as an O secretor, meaning that his blood and semen contained H antigens. *Id.* at 2.

All forensic experts who have reviewed George Rodriguez’s case agree¹ that the proper interpretation of this data was governed by an unequivocal interpretative rule that was well established in forensic serology long before 1987: All three suspects should be included as possible contributors to the fluids, because whenever A substances are detected in body fluids it must be assumed that H substances are present as well – even if they are in an undetectable quantity – and therefore Beltran the A secretor, Rodriguez the O non-secretor, and Yanez the O

¹ This group includes not only plaintiff’s expert, Dr. Robert Shaler, but also Bolding’s own expert, Dr. Joseph Warren, along with the forensic serologists who were members of the Independent Investigation of the HPD crime lab, and a panel of six notable forensic scientists who reviewed the serology conclusions in this case in connection with Mr. Rodriguez’s petition for habeas corpus. Peer Review Report (Ex. 96), 5–6.

(H) secretor, all could have contributed semen on the swabs.² Report of Independent Investigation (Ex. 39), 198–200; Peer Review Report (Ex. 96), 5; Stolorow Depo. (Ex. C), 70–72, 121–22; Warren Depo. (Ex. B), 53–54, 65–66; Shaler Report (Ex. 206), 13–14. Indeed, nearly 100% of the male population was included, as a matter of serological principle, in the pool of potential donors of the semen recovered from Salazar. Report of Independent Investigation (Ex. 39), 199 & n.258; Stolorow Depo. (Ex. C), 86.

Kim’s lab report accurately stated that Beltran and Rodriguez were included as potential donors of semen, but stated no conclusion about Yanez. Kim Report of 9/24/87 (Ex. 91), 2. Kim then took maternity leave, and Bolding, her supervisor and head of the serology section, took over the case. Kim Depo. (Ex. D), 64; Bolding Depo. (Ex. E), 154, 209. Bolding met with prosecutor Bill Hawkins before trial and told him – contrary to science – that Yanez was eliminated as a potential donor to the semen. Hawkins Depo. (Ex. A), 251–54. Bolding also failed to report the corollary, and exculpatory, scientific conclusion that while Rodriguez was a potential donor of the semen, so was nearly 100% of the male population – a scientific fact that rendered Rodriguez’s inclusion irrelevant. Report of the Independent Investigation (Ex. 39), 199 & n.258; Stolorow Depo. (Ex. C), 86.

As Hawkins admits, Bolding’s exclusion of Yanez was “critical” to the prosecution, because the primary defense was Rodriguez’s alibi and the argument that Salazar had mistaken Rodriguez for the real attacker, Yanez, who looked like Rodriguez. Hawkins Depo. (Ex. A), 251–55; *see also* Ex. 74, GR378792 (note from *Rodriguez* jury to Judge Kegans requesting “blood analysis chart”). Hawkins, relying on Bolding’s pretrial report excluding Yanez, told the jury in opening statement that it would “hear scientific evidence which shows beyond a doubt

² This is because the H antigen is the precursor to all other antigens: everyone starts out with the H antigen, and over time some people convert many – but not all – of those H antigens to A, B, or AB antigens. Report of Independent Investigator (Ex. 39), 199; Shaler Report (Ex. 206), 13–14.

that Yanez could not have committed the offense.” Trial Opening (Ex. F), 6. Bolding’s trial testimony conformed to his pretrial report, and excluded Yanez as a possible donor of the semen. Bolding Trial Testimony (Ex. 118), IP00455–56; *see also* Ex. F at 387–88.³

b. Bolding Knew His Pretrial Report Was False, Misleading, and Incomplete.

A reasonable jury could find that Bolding knew his report was false, and that he intended to help the prosecution at the expense of scientific objectivity. Bolding had worked as a forensic serologist since 1980, and in addition to early on-the-job training by his supervisors, he had received formal training from outside the lab – including attending the FBI’s 1983 symposium on the use of serology in sexual assault investigations, at which (as Bolding’s own expert concedes) the fundamental interpretative principle applicable to the Rodriguez case was taught and discussed. Bolding Depo. (Ex. E), 6–7, 10–12, 14–18, 42, 44; Training Documents (Ex. G); Certificate of Completion (Ex. 110); Warren Depo. (Ex. B), 232; Shaler Report (Ex. 206), 5–6; Stolorow Depo. (Ex. C), 24–28. This evidence alone permits a reasonable jury to conclude that Bolding knowingly disregarded basic rules of serology in his pretrial report to prosecutor Hawkins.⁴

But a jury need not rely only on inferences from Bolding’s training: It can also rely on Bolding’s own words demonstrating that at the time of Rodriguez’s case, Bolding understood the very rule of interpretation he contradicted when he excluded Yanez. Within three weeks of his

³ In his closing argument, Hawkins told the jury that “the H.P.D. Laboratory cleared for us once and for all whether or not Izadora Yanez could have been involved,” and emphasized that “scientific evidence is real important to this case.” Trial Closing (Ex. M), 28, 35.

⁴ Indeed, as the Sixth Circuit found in *Gregory*, the simple fact that all scientists who have reviewed Bolding’s conclusions agree that they are contrary to fundamental and well-known principles of forensic serology at the time is sufficient evidence at the summary judgment stage to permit the jury to conclude that Bolding’s report to the prosecutor was knowingly, rather than negligently, false. *See Gregory*, 444 F.3d at 744 (“Plaintiff’s expert reports that Katz’s findings are far afield of what any reasonable forensic examiner would find from the evidence; this is sufficient evidence from which a jury might reasonably infer that Katz fabricated her report.”).

testimony at Rodriguez's trial, Bolding performed testing in another sexual assault prosecution, *State v. Dutton*. Bolding determined that the victim was a B secretor, that Dutton was (like Yanez) an O secretor, and that the semen stain exhibited only B antigens. But in direct contradiction to his exclusion of Yanez in Rodriguez's case (where only A antigens were found on the evidence), Bolding included the defendant Dutton as a suspect, and later testified to that conclusion, confirming that he knew and understood the correct fundamental interpretative principle that he contradicted in the Rodriguez case.⁵ *Dutton* Crime Lab Docs (Ex. H); *Dutton* Trial Testimony (Ex. 116), 176–90; Warren Depo. (Ex. B), 216–17, 221–22, 233–35; Shaler Report (Ex. 206), 7–8; Bolding Depo. (Ex. E), 175–77; Stolorow Depo. (Ex. C), 67–71, 74. In other words, faced with the same serological facts, Bolding gave conclusions in the two cases that directly contradicted each other scientifically, and were consistent with each other only in that Bolding's testimony in both cases supported the prosecution's theory – by excluding Yanez in *Rodriguez* and including the defendant in *Dutton*. Shaler Depo. (Ex. I), 57–59, 172–73, 391–92; Shaler Report (Ex. 206), 7-9; Supplemental Shaler Report (Ex. J), 2.

Bolding's use of the correct scientific principle (in aid of the prosecution) in *Dutton* was no fluke. In the 1993 sexual assault case of *State v. McFarland*, Bolding again testified about serology data that were scientifically indistinguishable from those in *Rodriguez*. Again, as in

⁵ A jury could infer that Bolding knew Dutton could not be excluded in November 1987, when he conducted and reported the testing in *Dutton*. While Bolding's handwritten report does not expressly include or exclude Dutton as a semen donor, the fact that the prosecution against Dutton continued after Bolding's serological lab work confirms at a minimum that Bolding did not determine and report that Dutton was excluded – otherwise the prosecution would have terminated. In either event – whether Bolding understood the correct scientific principle when he performed the testing within three weeks of Rodriguez's trial, or eight months later when he testified – the *Dutton* case is admissible and probative on the question of knowledge and intent under Federal Rule of Evidence 404(b). *See, e.g., United States v. Osum*, 943 F.2d 1394, 1404 & n.7 (5th Cir. 1991) (post-event evidence was admissible, since “[s]ubsequent, almost identical, accidents in which [the defendant] knowingly filed false claims and assisted his relatives in doing so make it improbable that he was an unwitting participant in the charged fraud”); *United States v. Alston*, 460 F.2d 48, 55 (5th Cir. 1972) (“[I]t is also settled law that prior or subsequent incidents may be introduced to establish that the defendant possessed the requisite knowledge or intent, or that there is a consistent pattern, scheme of operation, or similarity of method.” (internal citations omitted)). “Subsequent acts evidence is particularly relevant when intent is at issue.” *United States v. Mares*, 441 F.3d 1152, 1157 (10th Cir. 2006).

Dutton but in contrast to *Rodriguez*, Bolding correctly said that an O secretor defendant should be included as a possible contributor of semen where only A antigens were identified. Again, Bolding's analysis was diametrically inconsistent with what he did in *Rodriguez* in all respects but one: It followed the prosecution's theory of the case. *McFarland* Trial Testimony (Ex. 127), 478–79, 487–88; Warren Depo. (Ex. B), 220–24; Kim Depo. (Ex. D), 98–101; Shaler Depo. (Ex. I), 57–59, 172–73, 391–92; Shaler Report (Ex. 206), 6–8.

Bolding conceded at deposition that according to the principle he applied in *Dutton* three weeks after *Rodriguez*'s trial, Yanez should have been included as a potential semen contributor. Bolding Depo. (Ex. E), 175–77. Bolding could offer no explanation for the direct contradiction between his testimony in the two cases:

Q. Page 388, and this is after you said it's not possible for Yanez to be a donor, the question was asked to you at line 8: "And would you tell the jury why, please?" And your answer is, again, because he is a secretor, and the grouping would be O, one would predict his genetics would show up as a donor in a sexual assault or intercourse. None of those O secretions did show up by the testing of Ms. Kim. All right?

A. That's what it's -- that's what the transcript says, sir.

* * * *

Q. Now, applying the -- do you see this in any way being inconsistent with the testimony you offered in the *Dutton* case?

A. It is -- I guess the answer would have to be yes.

Q. And why is it inconsistent with your testimony in the *Dutton* case? Explain that for us.

A. I don't know why.

* * * *

Q. Okay. So the difference between the *Dutton* case and this case, one difference is that in the *Dutton* case, your interpretation was helpful to the prosecution's theory of the case that the defendant could have been a contributor, right?

A. I don't know if it was helpful or not, sir.

Q. Well, don't you think that if you give testimony that the defendant could have been a contributor of the semen in a sexual assault case, that helps the prosecution?

A. I don't know if it does or not.

* * * *

Q. Let's try it this way: Would you not agree that your testimony in the Dutton case that the defendant couldn't be excluded as a contributor, was consistent with the prosecution's theory of the case?

A. I don't remember what the theory of the prosecution's case was.

Q. Well, you know it's a sexual assault case. He's the defendant. There's a complainant. Isn't it obvious that the prosecution's theory is the defendant did it?

A. I don't know if that's obvious at all, sir.

Q. It's not obvious to you?

A. Not to me.

Bolding Depo. (Ex. E), 175–78.

Bolding's inability to explain why his conclusions in *Dutton* and *Rodriguez* are scientifically inconsistent, as well as his patently incredible assertion that he did not know whether it helped the prosecution in each case, is devastating. Standing alone, it is sufficient to permit a trier of fact to conclude that Bolding knew of and deliberately disregarded the correct scientific principle in *Rodriguez* in order to support the prosecution. At a minimum, even if Bolding was ignorant of the correct scientific principle, a jury could find that he knowingly reported conclusions based solely on what would help the prosecution's case – consistent with his habit, as discussed below. In either case, Bolding knew that his purportedly scientific conclusions were false and misleading, violating due process.

c. **Bolding's Knowing Misconduct Is Further Evidenced by His Pattern of Tailoring Evidence.**

But *Rodriguez*, *Dutton*, and *McFarland* are not isolated blips. Rather, a reasonable jury could find that Bolding's conduct was part of a larger and continuous pattern exhibited by him to knowingly conform scientific conclusions to the prosecution's theory. Indeed, as uncovered by former United States Inspector General Michael Bromwich's team (the Independent Investigation), which the City hired to investigate and report on the crime lab, Bolding's apparent slanting of results was part of a pattern throughout the serology section of apparent selective reporting of scientific results to conform to prosecutors' theories: "[S]erologists – including Mr. Bolding, the head of the serology section, and Ms. Kim, one of the Section's most experienced and prolific analysts – generally lacked confidence in their ability to obtain reliable ABO typing results and, therefore, were reluctant to report finding rare blood types or results that were not consistent with known profiles. In some cases, it appears that analysts tailored results to meet the expectations of investigators." Report of Independent Investigation (Ex. 39), 68.

Less than a year after his testimony in *Rodriguez's* trial, Bolding performed and reported serological analysis in *Dwight Riser's* prosecution for rape. Comparison of Bolding's reported results with his underlying test data shows that Bolding altered the serology results he obtained from evidence in order to include Riser as a suspect.⁶ Bolding also failed to report that on a vaginal swab from the victim he had identified blood group substances that could not have been contributed by Riser. Report of Independent Investigation (Ex. 39), 109–12; *Riser Lab Documents* (Ex. 120), GR360361–62. The Independent Investigation concluded that Bolding's

⁶ Bolding's deposition testimony in this case was his first public account of his conduct in the *Riser* case. He denied altering his report, saying that what appeared to be crossed-out test result was in fact his initials – notwithstanding that his initials clearly appeared directly below the cross-out. Bolding Depo. (Ex. E), 188–91, 194–202. An enlargement of Bolding's laboratory worksheet created by plaintiff's expert Dr. Shaler reveals the falsity of Bolding's explanation. Shaler Report (Ex. 206), 15–18.

conduct in the *Riser* case appeared to constitute “scientific fraud.” Report of the Independent Investigation (Ex. 39), 68, 109–12; Stolorow Depo. (Ex. C), 58–60. Bolding’s own expert conceded that the alterations in Bolding’s report appeared to lack scientific basis, and that he would have to put scientific fraud “at the top of [his] list” of explanations for Bolding’s conduct in the *Riser* case. Warren Depo. (Ex. B), 152–53, 156–59, 175–77, 182–83.

The Independent Investigation identified the Derrick Leon Jackson murder investigation as another instance of selective reporting by Bolding. Report of Independent Investigation (Ex. 39), 68, 95, 104–07; Stolorow Depo. (Ex. C), 58, 79. Bolding conducted serology testing on crime scene evidence in 1988, and found blood group substances in some of the evidence foreign to both the victims and the suspect at that time. *Jackson* Lab Documents (Ex. K), GR392089–90, GR392096–97. Bolding did not report that exculpatory result, but instead recorded the test as “inconclusive.” *Id.* at GR392089–90. In 1995, the investigation was renewed when Jackson was identified as a new suspect. *Id.* at GR392091. His blood type matched the testing results that Bolding had reported as inconclusive seven years earlier. *Id.* Without conducting new tests, Bolding reported the previously “inconclusive” results as “conclusive,” and included Jackson as a suspect. *Id.* at GR392089–91, GR392096–97. At his deposition, Bolding’s only explanation for his conduct in the Jackson case was that his 1995 conclusions were in fact based on new testing that he had conducted and that he said should be contained in the laboratory file. Bolding Depo. (Ex. E), 230–31. The crime lab case file for the Jackson case does not, however, reflect that anyone conducted new tests. Supplemental Shaler Report (Ex. J), 5.

In the 1989 rape investigation of Roy Qualls, Bolding again reported serology results and analysis that were unsupported by the actual data he had obtained in testing, and that, as wrongly reported, assisted the prosecution. Bolding reported that Qualls was a potential source of semen

recovered from the victim. But Bolding that his report misstated the actual testing results he had obtained, and that based on his results Qualls should not have been reported as a potential contributor to the semen. Report of the Independent Investigation (Ex. 39), 102–03; Bolding Depo. (Ex. E), 203–08; *Qualls* Lab Documents (Ex. 121), GR360374–79.

Based upon Bolding’s documented work and testimony in *Rodriguez*, his conflicting conclusions in *Dutton* and *McFarland*, and his work on the *Riser*, *Jackson*, and *Qualls* cases, plaintiff’s expert Dr. Robert Shaler determined that Bolding engaged in a pattern of falsifying and slanting scientific results to support the prosecution’s theories of cases. Shaler Report (Ex. 206), 4, 5–10, 13–18; Supplemental Shaler Report (Ex. J), 2–5. Dr. Shaler’s conclusions accord with those of the Independent Investigation with regard to not only Bolding but the serology section as a whole. Report of Independent Investigation (Ex. 39), 68. A jury could consider this additional, ongoing misconduct as further evidence of Bolding’s intent and course of conduct in *Rodriguez*’s prosecution, and reasonably conclude that he knew better when he reported, contrary to science, that Yanez was excluded as a semen donor in the *Rodriguez* case, and failed to report that, along with *Rodriguez* and Yanez, nearly every male in the world could have contributed to the semen. *See, e.g.*, Fed. R. Evid. 404(b); *United States v. Flores*, 217 Fed. Appx. 346, 347 (5th Cir. 2007); *Alston*, 460 F.2d at 55. Bolding’s contention that there is “no record evidence showing Bolding was personally involved in fabricating any evidence against or withholding any material, exculpatory and impeaching evidence from *Rodriguez*,” Doc. 172 at 11, is wrong. The question is not close: Plaintiff is entitled to a jury’s judgment of Bolding’s conduct.

C. Bolding's Misconduct Is Not Shielded by Absolute Testimonial Immunity.

Bolding's bare assertion that he has absolute testimonial immunity for violating Rodriguez's due process rights is without merit, because Bolding's liability is not based on his trial testimony, but on his knowingly false pretrial reports to prosecutor Hawkins, and on his knowing pretrial failure to disclose exculpatory evidence to Hawkins. Bolding's suggestion that his later testimony about the fabricated and misleading scientific conclusions he gave Hawkins insulates his unconstitutional pretrial conduct has been rejected by the Fifth Circuit, *Keko v. Hingle*, 318 F.3d 639, 642-43 & n.8 (5th Cir. 2003), and by Judge Atlas in denying Bolding's motion to dismiss the amended complaint in this case, *Rodriguez v. City of Houston*, 2007 WL 1189639, *5 (S.D. Tex. Apr. 19, 2007) (Doc. 96) (Ex. N) ("This argument misses the point of Rodriguez's claim; Rodriguez's claim seeks to impose liability arising from the alleged fabrication itself and its alleged pretrial effect on prosecutors' decisions about . . . what theories to prepare and argue at trial. . . . While it is clear that Bolding is immune from suit for any failure to disclose falsehoods during his trial testimony, he has cited no authority that grants him immunity for fabricating or deliberately concealing exculpatory evidence before trial."). Judge Atlas's determination remains as true at summary judgment as it was in Bolding's prior motion to dismiss, and is in accord with other courts around the country. *See, e.g., Gregory*, 444 F.3d at 740-41; *Ienco v. City of Chicago*, 286 F.3d 994, 1000 (7th Cir. 2002). Bolding's testimonial immunity defense should be rejected.

D. Bolding Is Not Entitled to Qualified Immunity.

Part VI.C of Bolding's brief in support of summary judgment is titled, "Defendant Bolding is also entitled to qualified immunity of the §1983 claims asserted by Plaintiffs against him in his individual capacity." Doc. 172 at 10. The section begins, however, by stating:

“Assuming Rodriguez establishes a §1983 supervisory claim against Bolding, . . . Bolding is entitled to qualified immunity for any actions undertaken as Kim’s supervisor.” *Id.* (emphasis added). Thus, Bolding clearly asserts qualified immunity only as to the supervisory claim plaintiff has withdrawn, and not for claims that Bolding, in his individual capacity, fabricated evidence or failed to disclose *Brady* material. Bolding’s failure to clearly assert or develop a basis for asserting qualified immunity on those individual claims forfeits that argument at this summary judgment stage. *See, e.g., Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996) (where defendant’s summary judgment brief asserted qualified immunity only as to certain claims, “isolated and belated references” to qualified immunity for other claims did not adequately preserve the defense for appellate review).

In any event, it would border on the frivolous for Bolding to assert qualified immunity for his own conduct in fabricating evidence and withholding *Brady* material.

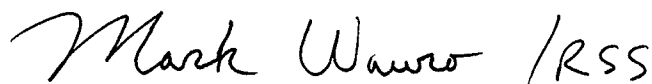
Qualified immunity analysis entails a two-step inquiry: Was there a clearly established right, and was the defendant’s conduct objectively unreasonable in light of clearly established law? *See Brown*, 519 F.3d at 236-37. As to the first inquiry, the Fifth Circuit recently affirmed in *Brown* that the right not to be convicted on the basis of false and fabricated evidence or to be deprived of exculpatory evidence was clearly established long before 1987. Thus, where government forensic scientists knowingly provide false or materially incomplete information to the prosecution, qualified immunity offers no shield. *See id.* at 237–38 (qualified immunity denied to crime lab analyst who in 1984 allegedly reported fabricated and misleading serological conclusions and concealed exculpatory serological interpretations, given that the constitutional duties at stake in such claims have been established for decades); *see also Gregory*, 444 F.3d at 744; *Pierce*, 359 F.3d at 1292-93; *Rodriguez*, 2007 WL 1189639, at *3 (Ex. M).

The second prong (objective reasonableness) weighs equally clearly against Bolding. The facts set forth above, if credited by a jury, establish that Bolding knowingly fabricated scientific conclusions and concealed exculpatory evidence. That kind of conduct is far beyond the realm of “reasonable mistake” for purposes of qualified immunity. *See Gregory*, 444 F.3d at 744-45; *Pierce v. Gilchrist*, 359 F.3d at 1298–1300 (“[A]n official in Ms. Gilchrist’s position could not have labored under any misapprehension that the knowing or reckless falsification and omission of evidence was objectively reasonable.”); *Geter*, 849 F.2d at 559 (“[A] police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means or deliberately conceals exculpatory evidence, for such activity violates clearly established constitutional principles.”).

Conclusion

A jury could conclude that Bolding fabricated evidence and concealed *Brady* material in pretrial reports to the prosecutor in the case against Rodriguez. That misconduct violated constitutional obligations that were clearly established long before Rodriguez’s 1987 trial. Summary judgment should be denied.

Respectfully submitted,

 /RSS

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Certificate of Service

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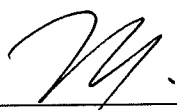
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