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**Summary of Argument**

The City of Houston's Motion for Summary Judgment should be denied. A reasonable jury could find that HPD crime lab criminalist James Bolding violated plaintiff George Rodriguez's due process rights by fabricating scientific evidence and concealing exculpatory material from the prosecutor in Rodriguez's 1987 prosecution for the kidnapping and rape of Marisela Salazar. A jury could further find that this constitutional violation, and plaintiff's resulting wrongful conviction and 17.5 years of incarceration, were caused by the City's official policy of failing to provide supervision and oversight of the HPD crime lab.

For at least a half-decade before plaintiff's trial the crime lab – and in particular the serology section run by Bolding – was operated on a shoestring, with the obvious consequence that criminalists were overworked, unsupervised, and badly trained. Police Chief Lee Brown, the City's policymaker with respect to police department matters at that time, knew that the crime lab was hobbled by inadequate funding and unable to retain qualified analysts or supervise those it had. Numerous memoranda provided escalating warnings to Brown, eventually informing him that the crime lab's status was "critical," analysts were "cutting corners," much of the crime lab's work had become "unreliable," and the City was facing a "potentially liable" situation. In response to these alarms, Chief Brown admittedly took no action, not even to find out what "cutting corners" meant, though he concedes it could have meant coming up with an answer to support the prosecution's case for lack of time to follow correct procedures and science: the very cause of Rodriguez's constitutional deprivation.

Nearly two decades later, and only after the crime lab's failures were exposed by the media, the City finally did a comprehensive investigation. In 2005, the City hired a former Inspector General of the United States Department of Justice to conduct a thorough audit of the

crime lab's historical forensic work (the Independent Investigation). The Independent Investigation<sup>1</sup> adduced sobering evidence of supervisory indifference and its consequences: hundreds of reported serology results between 1980 and 1992 were unreliable, and many reports, like those in Rodriguez's case, deprived a defendant of potentially exculpatory scientific evidence and reflected a pattern of conforming "scientific" results to the prosecution's theory of the case.

The City's deliberate choice to rely on an underfunded, unsupervised crime lab to provide scientific evidence against criminal defendants was a "root cause" of the scientific, ethical, and constitutional failures in plaintiff's case and others. The lack of meaningful or competent scientific oversight within the crime lab fostered a pervasive pattern of reporting false scientific conclusions and concealing results unfavorable to the prosecution. Analysts like Bolding were left to make up their own interpretive rules to analyze the evidence – rules that, in the absence of technical oversight and competence, were predictably guided by prosecutors' theories rather than science. The City's deliberate choice to operate the crime lab in these circumstances foreseeably and proximately led to Bolding's violation of Rodriguez's constitutional rights.

The City simply ignores the above-described evidence, including the findings of the Independent Investigation that *it* authorized. Instead of addressing the record of the crime lab's persistent, widespread failures of supervision, the City attacks straw men: misconstruing Bolding's constitutional violations and settled law applicable to its §1983 liability for those acts. At most, questions of fact exist for the jury. Summary judgment should be denied.

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<sup>1</sup> Plaintiff refers throughout to the "Independent Investigation," the findings of which were memorialized in a final report, authorized by the City, and offered by plaintiff as direct, admissible evidence of the Bromwich Investigation's conclusions. *See generally* Plaintiff's Response to the City's Motion to Exclude Expert Testimony from the City's Investigator Michael Bromwich. In addition to the report itself, excerpts of which are attached as exhibits in light of its volume and cited herein as "Report," plaintiff relies on the opinions of renowned serology expert and Independent Investigation team member Mark Stolorow. *See Memorandum in Opposition to Motions of Defendants James Bolding and City of Houston to Strike Opinions of Plaintiff's Expert Mark Stolorow.*

The City's motion also addresses claims asserted against it arising out of the police investigation of the underlying crime by officers other than crime lab employees. In order to streamline the case and to focus on the central wrongdoing by the City's crime lab, plaintiff has settled with all HPD employees except for Bolding, and hereby withdraws any claim against the City concerning the conduct of the police investigation other than the work of the crime lab.

### **Arguments 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." Fed. R. Civ. P. 56; *Blow v. City of San Antonio*, 236 F.3d 293, 296 (5th Cir. 2001). 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," and may not grant summary judgment unless "no reasonable juror could find for" plaintiff. *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002).

#### **B. Standard for Municipal Liability Under §1983**

A city may be held liable under 42 U.S.C. §1983 for violations of constitutional rights caused by municipal policy. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Liability attaches when a municipal policy is maintained with deliberate indifference to the known or obvious risk of constitutional violations and causes a violation of a plaintiff's constitutional rights. *See City of Canton v. Harris*, 489 U.S. 378, 388–89, 390 (1989); *see also Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 398 (1997). "Municipal policy" for purposes

of §1983 includes “a persistent, widespread practice of officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.” *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir. 2002) (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984) (*en banc*)). Such a “persistent, widespread practice” can be a municipality’s pervasive and widespread failure to supervise and train its employees, causing those employees to engage in unconstitutional conduct. *See Canton*, 489 U.S. at 382; *Brown v. Bryan County*, 219 F.3d 450, 457 (5th Cir. 2000).

**C. Crime Lab Analyst James Bolding Violated Plaintiff’s Constitutional Rights.**

Plaintiff demonstrated at pages 2–13 of his opposition to Bolding’s motion for summary judgment (the Bolding Opposition) that a jury could find that Bolding fabricated evidence and concealed exculpatory information in conversations with prosecutor Bill Hawkins before Rodriguez’s 1987 trial for the kidnapping and rape of Marisela Salazar, violating Rodriguez’s Fourteenth Amendment right to due process of law. Those facts and arguments are respectfully incorporated here. The City’s motion does not seriously dispute the existence of an underlying constitutional violation except to assert, wrongly, that plaintiff’s claim against Bolding is based on trial perjury. It is not, for the reasons discussed at pages 12–13 of the Bolding Opposition.<sup>2</sup>

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<sup>2</sup> Even if Bolding were personally immune for any aspect of his unconstitutional conduct, the City could nonetheless be held liable. The City suggests otherwise, relying on *City of Los Angeles v. Heller*, 475 U.S. 396 (1986). But *Heller* did not hold that individual immunity vitiates the constitutional predicate for municipal liability. *See, e.g., Barkley v. Dillard Dep’t Stores, Inc.*, 277 Fed. Appx. 406 (5th Cir. 2008). Indeed, the City’s argument was specifically rejected by the Fifth Circuit in *Brown v. Lyford*, 43 F.3d 185, 191 n.18 (5th Cir. 2001), which recognized the well-settled principle that a §1983 claim may lie against a municipality even where no individual official is personally liable, so long as the plaintiff demonstrates that a violation of his or her constitutional rights took place and was caused by a municipal policy. *See Brown*, 43 F.3d at 191 n.18; *Hernandez v. Lafayette*, 643 F.2d 1188, 1196 (5th Cir. 1981); *see also Int’l Ground Transp. v. Mayor and City Council of Ocean City*, 475 F.3d 214, 219-20 (4th Cir. 2007); *Fairley v. Luman*, 281 F.3d 913, 916 (9th Cir. 2002); *Fletcher v. Town of Clinton*, 196 F.3d 41, 55 (1st Cir. 1999); *Aitchison v. Raffiani*, 708 F.2d 96, 100 (3d Cir. 1983). Of course, as these authorities make abundantly clear, the City itself can claim no immunity, absolute or qualified, for any aspect of Bolding’s conduct. *See Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Hernandez*, 643 F.2d at 1196.

**D. A Policy and Custom of Inadequate Supervision Pervaded the Crime Lab.**

A jury could find that before and during plaintiff's October 1987 criminal trial, the HPD crime lab operated with grossly inadequate supervision and oversight that was so widespread and pervasive as to constitute official City policy.

As soon as he assumed leadership of HPD in 1982, Chief Brown was alerted to the crime lab's inability to retain experienced personnel. 5/24/82 Memo (Ex. 192). This was only the beginning of a steady stream of warnings about the crime lab's deficiencies in supervision, training, and reliability. In 1984 Brown was told the lab was overworked, cutting back on procedures, and "doing less than a professional job in trying to provide scientific evidence on all cases received." 12/4/1984 Memo (Ex. 195). One month later the lab administrator reported that the lab's workload was *nearly double* "a high but manageable caseload," and said that more experienced analysts were needed to "have adequate supervision." 1/29/85 Memo (Ex. 198). By August 1986 "the situation [was] critical," "additional corners" had been cut in lab procedures, "quality assurance programs" were diluted, and 11 positions needed to be filled to "avoid an embarrassing or liable situation." 8/21/86 Memo (Ex. 199). In January 1987 the lab reported that nearly 12% of the serology section's work was done unprofessionally. 1/27/87 Memo (Ex. 202).

Indeed, 1987 proved a catastrophic year for the serology section: Without adequately experienced analysts or supervisors, "proficiency was reduced to the point that reliable analytical results were not being obtained." 3/21/88 Memo (Ex. 204). Bolding himself, who was head of the serology section, perceived an "emergency" situation by 1987, with untrained staff and workload demands having a "devastating effect" on the serology section's proficiency, and compromising his own ability to supervise it adequately. 11/13/87 Memo (Ex. 113); Bolding

Depo (Ex. A), 143. These problems were widely understood within the lab, including its supervisors,<sup>3</sup> and were being discussed with Brown. *Id.* at 56–72, 82–83, 142–43, 225–27.

The City's Independent Investigation confirmed what Brown had been told, and identified a stunning pattern of error in the serology section. In 21% of 1,020 serology cases analyzed from 1980 to 1992, the lab's work exhibited errors that undermined the reliability of the reported results – a rate the Independent Investigation described as “extraordinarily high and extremely disturbing.” Report (Ex. 39), 72–73, 114; Stolorow Depo. (Ex. B), 49. In about 10% of the cases, analysts failed to report results that were inconsistent with the victim or known suspect, and in some of those cases analysts apparently “tailored results to meet the expectations of investigators.” Report (Ex. 39), 93–94; Stolorow Depo. (Ex. B), 79–80. Fundamental violations of generally accepted forensic practice occurred in nearly all of the serology cases reviewed. Report (Ex. 39), 74; Stolorow Depo. (Ex. B), 60–61.

The crime lab's pervasive failings were “the product of defective procedures employed in the serology section throughout the relevant time period, as well as the crime lab's systematic failure to adequately train and supervise its serologists.” Report (Ex. 39), 74. In particular, the serology section operated with virtually no technical review or oversight by any supervisory personnel. Only “a handful” of the 1,020 cases reviewed by the Independent Investigation had received any technical review. Stolorow Depo. (Ex. B), 62–63, 118–19; Report (Ex. 39) at 68, 85–86. By Bolding's own account, as supervisor of the serology section he reviewed no more than 15% of cases, and *nobody* reviewed his own reports or testimony. Bolding Depo. (Ex. A), 39–42, 55–56, 69–70, 77–78, 106–08, 217–23, 224–25. While Bolding suggested that “peer

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<sup>3</sup> In fact, specific deficiencies in Bolding's supervision were acknowledged within the lab before 1987, as expressed in a 1986 performance evaluation finding that he was “below standard acceptable” in the categories, “Establishes guidelines used to provide accurate scientific data, accurate notes and accurate conclusions and reports and monitors all section reports for scientific accuracy,” and “other working supervisor.” Bolding Evaluation (excerpt of Ex. 114).

review” was occurring among analysts, Christy Kim admitted that as far as she knew it was not. *Id.* at 248–50; Kim Depo. (Ex. C), 53–59. In fact, Bolding learned apparently for the first time *at his deposition in this case* that Christy Kim, by her own account, routinely discarded data when her tests failed – a practice that Bolding believed should not have been occurring, that compromised the integrity of lab results across cases, and that he obviously would have caught with minimal review of her work.<sup>4</sup> Bolding Depo. (Ex. A), 235–36, 239–41, 243–47. Rodriguez’s own case exemplifies the lack of oversight in the serology section. Before testifying about Christy Kim’s serology results at Rodriguez’s trial, Bolding never reviewed Kim’s underlying data. *Id.* at 156–60. Examining it at his deposition, Bolding conceded that he had no idea how Kim had determined the victim’s blood group type, since two test results had conflicted, and had no idea why Kim had failed to include interpretative conclusions for Yanez. *Id.* at 156–60, 168–69.

Indeed, any technical review that *was* done by Bolding was almost certainly inadequate or, worse, condoned errors or misconduct by subordinates. Bolding lacked the experience and competence needed to supervise the section – a fact known to Chief Brown. Bolding Promotion Memos (Ex. 111); Brown Depo. (Ex. D), 56–59; Report (Ex. 39), 36. And, as demonstrated at pages 7–13 of the Bolding Opposition, Bolding exhibited a pattern – consistent with that seen throughout the serology section – of reporting serology conclusions based not on science but rather on prosecutors’ theories. That Bolding would be more likely to exacerbate rather than remediate errors by his subordinates is borne out by plaintiff’s own case: Instead of correcting

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<sup>4</sup> In fact, the City’s Independent Investigation found that the serology section “almost universally failed” to use testing “controls” like those Christy Kim was improperly discarding – a “very serious departure from the generally prevailing forensic science principles at the time the work was being performed” and “calls into question the entire body of serology work performed in the Crime Lab.” Report (Ex.39), 68, 72 n.92, 83–85; Shaler Report (Ex. 206), 26.

Kim's failure to report an inclusion of Yanez as a potential semen donor, Bolding affirmatively misrepresented Yanez's exclusion to the trial prosecutor. Bolding Opposition at 5–6. As a result, a jury could find that serology section personnel either lacked supervision all together, or were at least implicitly encouraged in their bad practices or misconduct.

In addition to a near-complete lack of human supervision and review, the serology section also operated without any written standard operating procedures (SOPs) to govern its technical work, provide guidelines for interpreting test data, and resolve conflicting test results in the first instance. Stolorow Depo. (Ex. B), 61–62; Bolding Depo. (Ex. A), 83–85, 111–12; Kim Depo. (Ex. C), 89–90; Report (Ex. 39), 85. The Independent Investigation identified this “very serious departure” from generally accepted forensic science principles as an important cause of the lab's pervasive problems. *Id.* Indeed, Bolding's own expert admits the need for interpretive guidelines, testifying that forensic serologists in the 1980s were frequently confronted with difficult interpretive questions, and that fundamental rules of interpretation needed to be applied to reach the correct conclusions. Warren Depo. (Ex. E), 50, 226–27.

Crime lab serologists not only lacked supervision, but were incompetent and left to fend for themselves. “Serologists were poorly trained, which resulted in an abundance of very serious technical and interpretive problems across dozens of cases.” Report (Ex. 39), 68. Bolding himself recognized by October 1987 that the loss of trained staff, together with the crime lab's workload, had a “devastating effect” on the serology section's proficiency, and he was concerned that inadequately trained staff might be producing erroneous casework. Bolding Depo. (Ex. A), 66, 72, 250–51. Without adequately trained analysts, technical guidance provided by a supervisor, *or* written guidelines to follow in reaching and reporting serology results, analysts

were left to “freelance” by inventing their own rules for testing procedures or interpretations. Bromwich Depo. (Ex. F), 71–72; Shaler Report (Ex. 206), 27–28.

Instead of addressing the overwhelming evidence that the crime lab’s failures were catastrophic and evident in the 1980s, the City devotes much of its motion to refuting theories of municipal policy that have no bearing on plaintiffs’ claim. City Motion at 15–17 (Docket Entry 159). Simply put, Rodriguez’s claim is not premised on “ratification,” the existence of an illegal “formal policy,” or a widespread custom of illegality. *See, e.g., Miliam v. San Antonio*, 113 Fed. Appx. 622, 628 (5th Cir. 2004) (“[m]unicipal liability can take several guises,” including but not limited to formal policy, “evidence of a persistent pattern of misconduct,” and ratification); *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at \*40 (S.D. Tex. Sept. 29, 2007) (plaintiff need not prove custom of warrantless searches to show existence of official policy of inadequate training) (Ex. M). Rather, plaintiff alleges that the City maintained a widespread and persistent practice, amounting to official policy, of grossly inadequate supervision and oversight in its crime lab. As to *that* theory, the evidence, as set forth above, is compelling and plainly clears the summary judgment hurdle.

The City’s sole argument concerning actual evidence of crime lab conduct concerns an SOP that required personnel to document oral reports – a rule the City contends was aimed at and would, somehow, have prevented Rodriguez’s constitutional deprivation. City Motion at 17 (Docket Entry 159). The City’s argument, and its reliance on plaintiff’s expert Dr. Shaler, ignores Bolding’s own concession and Dr. Shaler’s actual conclusion that the City’s written policy governing documentation of oral reports was disregarded by the lab as a matter of custom. Bolding Depo. (Ex. A), 86, 102–04; Shaler Report (Ex. 206), 25. A written policy that is systematically unenforced cannot insulate the City from liability. *See Woodward v. Correctional*

*Medical Servs. of Illinois*, 368 F.3d 917, 927 (7th Cir. 2004); *Ware v. Jackson County*, 150 F.3d 873, 882 (8th Cir. 1998); *cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) (“Refusals to carry out stated policies could obviously help to show that a municipality’s actual policies were different from the ones that had been announced.”).

In any event, the City’s argument is a red herring because Bolding (who made the oral report to Hawkins) was also the supervisor of the section (who would have reviewed such a report, had there been any supervision). Hence, a reasonable jury could readily conclude that even *if* Bolding had followed the SOP on documenting oral reports, the outcome would merely have been a false report subject to review by the person who made it. At most, the relationship between the written SOP and the lab’s actual practices is a fact issue for the jury. In the end, SOP or not, the question is not even close: Fact issues exist as to the crime lab’s widespread and persistent failure of supervision and oversight.

**E. The City Was Deliberately Indifferent.**

The City maintained its custom of grossly inadequate supervision and oversight within the crime lab with deliberate indifference to the known *or* obvious risk that it endangered the constitutional rights of criminal defendants like George Rodriguez. *See Brown*, 520 U.S. at 407 (articulating the “known *or* obvious consequences” standard for deliberate indifference (emphasis added)). The question of municipal deliberate indifference is objective, and considers both what was actually known to the municipality’s “final policymaker” as well as what should have been known but for the policymaker’s failure to exercise his or her responsibilities.<sup>5</sup>

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<sup>5</sup> The objective deliberate indifference standard that *Canton* applies to municipalities is distinct from the subjective “deliberate indifference” standard of intent required to prove an Eighth Amendment violation. *See Farmer*, 511 U.S. 825, 841 (1994) (contrasting subjective “deliberate indifference” standard for Eighth Amendment violations with “objective” standard enunciated by *City of Canton*). Courts in the Fifth Circuit have expressly recognized this distinction in considering municipal liability claims. *Lawson*, 286 F.3d at 264; *Hare v. City of Corinth*, 74 F.3d 633, 649 n.4 (5th Cir. 1996); *Earrey v. Chickasaw County*, 965 F. Supp. 870, 876–77 (N.D. Miss. 1997).

*Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984) (*en banc*); *see also Farmer v. Brennan*, 511 U.S. 825, 841 (1994) (“[I]t would be hard to describe the *Canton* understanding of deliberate indifference . . . as anything but objective”); *Lawson*, 286 F.3d at 264 (holding that “constructive notice is adequate” to demonstrate deliberate indifference). Whether a municipality exhibited deliberate indifference is a fact-intensive question and hence is “generally a question for the jury.” *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1478 (9th Cir. 2002).

**1. The City’s Final Policymaker Disregarded Actual and Constructive Notice of the Crime Lab’s Supervisory Inadequacies and Their Consequences.**

From 1982 until 1992, Lee Brown was Chief of the HPD, and hence was the final policymaker for the HPD crime lab. City Ordinance (Ex. G); Brown Depo. (Ex. D), 8, 14–15, 17. Chief Brown, an experienced and highly credentialed police administrator, *id.* at 7–8, appreciated the relationship between ensuring adequate supervision and training in the crime lab and protecting the rights of criminal defendants. He understood that lab supervisors needed experience in their field, and that it was important to ensure that lab analysts had the training needed to perform their functions. *Id.* at 44. Most critically, Chief Brown understood that crime lab analysts routinely provided prosecutors with evidence for use against criminal defendants at trial, and that if the lab did its job badly the innocent could be convicted. *Id.* at 18–19, 21–23.

Brown knew from the start of his administration that the crime lab was struggling to retain qualified personnel. 5/24/82 Memo (Ex. 192). Two years in, the Chief was informed by crime lab administrator Peter Christian that the lab had received an unprecedented 25% increase in cases, that the “case load per criminalist [was] too large to adequately manage,” and that the laboratory was “doing a less than professional job in trying to provide scientific information on all cases received.” 12/4/84 Memo (Ex. 195). The following month, Christian put a finer point

on the problem in a memo to Brown addressing budgetary needs: The caseload was almost double a manageable level for the lab, and additional supervisory personnel were needed in order to have adequate experience and training within the laboratory. 1/29/85 Memo (Ex. 198).<sup>6</sup>

By 1986, Chief Brown knew that the crime lab's situation was even bleaker. Brown Depo. (Ex. D), 96–101. Only two employees had been hired in the 18 months since Christian's request for 12 criminalists and more supervisors. 8/21/86 Memo (Ex. 199). The lab had already cut corners in laboratory procedures and was "cut[ting] additional corners," which had "diluted [the lab's] quality assurance and security programs." *Id.* The situation was "critical," and more personnel were needed "to avoid an embarrassing or liable situation." *Id.*<sup>7</sup> By 1987, in the months leading up to Bolding's testimony against Rodriguez, the warnings had grown even more direct: The acting lab administrator told Brown's second-in-command that in 1986 the lab had done a "less than professional job" on 11.7% of its cases.<sup>8</sup> 1/27/87 Memo (Ex. 202), GR384602; Brown Depo. (Ex. D), 110–12. After the lab was nevertheless directed to cut its budget by 8.5%, 3/11/87 Memo (Ex. 203); Brown Depo. (Ex. D), 116–17, the lab administrator told Brown that efficiency measures had been instituted "at the expense of providing quality information and is a less than professional job. Our quality assurance, accountability, and security programs must be

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<sup>6</sup> In response to the December 1984 memo, Chief Brown requested compensatory time to offset extra hours being worked by Crime Lab employees on the case backlog, describing the situation as a "true emergency." 12/10/84 Memo (Ex. 196). Yet Chief Brown admits he knew that compensatory time would not provide more time or resources to address the overwork situation facing the lab, but would simply shift hours from one pay period to another. Brown Depo. (Ex. D), 79. This further demonstrates the City's deliberate indifference to the lab situation.

<sup>7</sup> Brown knew full well why the crime lab could not attract and retain personnel. A 1986 audit conducted at his request by the City Personnel Division revealed that quality of supervision and quality of training were two of the primary reasons why criminalists were leaving. 9/19/86 Memo (Ex. 200); 1/23/87 Memo (Ex. 201); Brown Depo. (Ex. D), 101–10. That Brown actively sought out information concerning the causes of the crime lab's deficiencies, and yet took no action in response, is textbook deliberate indifference – particularly since the causes pointed out by the personnel audit echoed the very same concerns Brown had heard from the crime lab since 1982. *Id.* at 109–10.

<sup>8</sup> Chief Brown stated that he would have expected this fact concerning the Crime Lab's poor performance to have been reported to him by his second-in-command. Brown Depo (Ex. D), 112. A reasonable jury could infer that they were.

improved in the near future.” Failure to reduce the caseload per criminalist could, he warned Brown, result in the dismissal of cases and “possible lawsuits.” 3/17/87 Memo (Ex. H).<sup>9</sup>

But as the crime lab was sounding alarms, Chief Brown admittedly took no corrective action to address inadequate supervision, poor training, or substantive deficiencies in the lab’s work, and although he claimed at deposition never to have learned of such problems, the record of a half decade of flares sent straight from the lab to Brown’s desk belie such a contention. Brown Depo. (Ex. D), 33–37, 70. Even when informed that the crime lab was “cutting corners” in its work – a phrase that Brown conceded could have meant that analysts were skipping procedures and just coming up with answers that supported the prosecution’s case – Brown didn’t follow up or even ask what the ominous warning *meant*. *Id.* at 34, 148–49.

It gets worse. Not only did Brown fail to take corrective action, he actually took affirmative steps that exacerbated the lab’s reported supervisory deficiencies. Brown personally approved the promotion of Bolding to supervise the serology section despite knowing that Bolding lacked the experience required by HPD’s own regulations for the position. Promotion Memoranda (Ex. 111); Brown Depo. (Ex. D), 56–59, a decision that would prove “fateful for the quality of the crime lab’s analysis of biological evidence for decades to come,” Report (Ex. 39), 36. Two years later, Chief Brown personally recommended reclassification of certain lab employees, including hair analyst Hilleman (then named Pederson) to supervisory positions within the lab, despite knowing that several of them lacked the experience HPD required for the

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<sup>9</sup> A reasonable jury could infer that these documented reports represent the tip of the iceberg with regard to the City’s notice of deficiencies. As described *supra*, at 5–6, Bolding and others within the crime lab were actively discussing the deteriorating situation and, according to Bolding, expressing concern about supervision, training, and proficiency to Brown. Further, a reasonable jury could conclude that the chain-of-command documents discovered by Rodriguez in this case – compelling and legally sufficient evidence in their own right – do *in fact* represent the tip of the iceberg because the City admits that “some 250 boxes of documents, including correspondence files from the Chief of Police for the years 1980 to 1998 were destroyed in 1998.” Harkins Affidavit (Ex. I), 4.

positions.<sup>10</sup> Brown Depo. (Ex. D), 45, 47–48; 4/16/84 Memo (Ex. 191). In 1985, Hilleman, who had already been moved up the career ladder early in 1984, was again promoted to fill a supervisory position, even though she lacked the minimum qualifications established by HPD for the job. 12/18/85 Memo (Ex. 160); Brown Depo. (Ex. D), 52–56, 92.

Thus, while Brown actually understood that unreliable work by the crime lab risked compromising criminal defendants' rights and convicting the innocent, *id.* 18–19, 21–23, he either disregarded or exacerbated its decline. Brown's own account of his head-in-the-sand posture toward a crime lab careening toward crisis is alone sufficient to raise a fact issue as to the City's deliberate indifference. The question should go to the jury.

## 2. The Risk of Constitutional Violations Was Obvious.

The City argues throughout its brief that the alleged failure to prove misconduct by Bolding or other crime lab employees that predated Rodriguez's trial is fatal to his claim. City Motion at 15 (Docket Entry 159). The City is both factually and legally wrong. As demonstrated above, the record *in fact does* contain evidence of a pattern of misconduct strikingly similar to that committed by Bolding in Rodriguez's prosecution: reporting false, misleading, and incomplete scientific conclusions to the trial prosecutor. As the Independent Investigation found, the work of the serology section from 1980 to 1992 exhibited a "reluct[ance]," by both Bolding and Kim, "to report finding rare blood types or results that were not consistent" with blood types of victims or suspects, and in some cases apparent "tailor[ing of] results to meet the expectations of investigators." Report (Ex. 39), 68; Stolorow Depo. (Ex. B), 80, 203–05. In some 10% of the serology section's cases data that was potentially favorable to the defense was not reported. Report (Ex. 39), 93–94; Stolorow Depo. (Ex. B), 175–76. The

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<sup>10</sup> Brown's memorandum notes that the question of reclassification was "studied in detail" between January and April 1984, and was approved "reluctantly," 4/16/84 Memo (Ex. 191), again demonstrating the deliberate nature of the continuing failure to address the supervisory and oversight deficiencies in the crime lab.

Independent Investigation's findings were "replete" with misconduct extending back as early as 1980. Report (Ex. 39), 106. Moreover, a reasonable jury could conclude that the City was at least constructively aware of the false and prejudicial work generated by the crime lab: Had Chief Brown responded in any meaningful way to the years of warnings about the lab's crumbling supervision, training, and reliability, he would have uncovered the sobering patterns of deficiencies and misconduct revealed by the Independent Investigation 20 years – and countless prosecutions – later.

In any event, the City's argument rests on a wrong legal premise that a "pattern of fabrication or perjury" must be proved for Rodriguez to prevail. Not so. It has been clear since the Supreme Court's decision in *City of Canton* that proof of municipal deliberate indifference in a claim premised on inadequate supervision or training *may*, but *need not*, be made through a pattern of illegality by municipal employees; rather, the Court held that liability could also be established by proof of only a single constitutional violation, together with additional evidence of inadequate supervision or training. *City of Canton*, 489 U.S. at 390 & n.10; *Brown*, 219 F.3d at 459. The Court subsequently reaffirmed that the touchstone of the deliberate indifference inquiry is not the existence of a pattern of illegality *per se*, but rather the "likelihood" or "predictability" that in the absence of supervision or training an officer "will violate citizens' rights." *Brown*, 520 U.S. at 409; *see also Brown*, 219 F.3d at 460–61. As the Fifth Circuit summarized in *Brown*, the question is whether constitutional violations were "the highly predictable consequence" of municipal inaction. *Brown*, 219 F.3d at 461; *see also Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006); *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 28–29 (1st Cir. 2005); *Woodward*, 368 F.3d at 929; *Vineyard v. County of Murray*, 990 F.2d 1207, 112 (11th Cir. 1993); *McDonald v. Dallas County*, 06-CV-0771-1,

2008 WL 918286, \*7 (N.D. Tex. Mar. 31, 2008) (Ex. N); *Mayes v. City of Hammond*, 442 F. Supp. 2d 587, 645–46 (N.D. Ind. 2006); *Thompson v. Connick*, No. Civ.A.03-2045, 2005 WL 3541035, at \*12–\*13 (E.D. La. Nov. 15, 2005) (Ex. O).

The above-described record of Chief Brown’s *actual notice* of the grossly inadequate and rapidly deteriorating supervision, oversight, and scientific reliability in the crime lab, his *admitted understanding* that poor work by the crime lab risked convicting innocent defendants, and his *conceded failure* to remedy the situation or even inquire about it in any meaningful way undeniably raises a jury question of whether Rodriguez’s constitutional deprivation was a “highly predictable” and disregarded consequence of Brown’s inaction.

### 3. The City’s Authorities Require Denial of Summary Judgment.

The City’s primary legal authority for the proposition that Rodriguez must prove a pattern of “fabrication or perjury,” *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), actually supports *denial* of summary judgment because Rodriguez meets *Walker*’s test for deliberate indifference. Chief Brown knew “to a moral certainty,” *id.* at 298, that crime lab employees regularly performed tests and reported results to prosecutors in connection with criminal trials. Brown Depo. (Ex. D), 18–19. He further appreciated the obvious fact that the “wrong choice” by a crime lab analyst – the reporting of scientifically incorrect results – would “frequently cause the deprivation of a citizen’s rights.” *Walker*, 974 F.3d at 298; Brown Depo. (Ex. D), 21–23.

Moreover, contrary to the City’s central assertion, a jury could find that Bolding and other crime lab analysts who lacked adequate supervision or technical guidance were frequently presented “with a difficult choice of the sort that training or supervision will make less difficult.” *Walker*, 974 F.3d at 298. As Bolding’s own expert testified, forensic scientists like Bolding

frequently faced scientifically difficult interpretative questions such as those that arose in Rodriguez's case. Warren Depo. (Ex. E), 50, 226–27; Kim Depo. (Ex. C), 82–83, 122–23.<sup>11</sup> In the absence of clear scientific supervision or guidelines, crime lab analysts were left to their own to decide how to conduct and interpret tests, and could be expected to “freelance” in their work. Shaler Report (Ex. 206), 27–28; Bromwich Depo. (Ex. F), 71–72. Certainly no technical guidance or checks could be expected from outside the lab. Prosecutors typically didn't understand the science behind crime lab analysts' work; they only understood how it was useful for the prosecution. Holmes Depo. (Ex. J), 288, 293–94; Hawkins Depo. (Ex. K), 255. In such an atmosphere, prosecutors' needs for particular results can be expected to influence forensic scientists like those in the crime lab who were institutionally situated within the law enforcement team. Shaler Report (Ex. 206), 3–4; Warren Depo. (Ex. E), 29–30, 35–36, 38–39.<sup>12</sup> The well-documented push for HPD crime lab serologists to “cut corners” could only be expected to exacerbate such pressures. Indeed, the Independent Investigation documented just such a pattern in the HPD serology section: Analysts, including but not limited to Bolding, appeared routinely to resolve conflicting data by conforming to the prosecution's theory. Report (Ex. 39), 68.

The City's assertion that Bolding's decision to commit perjury at Rodriguez's trial was *not* a “difficult choice” with respect to which the City was required to supervise misses the mark. As discussed fully at pages 13–14 of the Bolding Opposition, Bolding's perjury, though reprehensible, is not the issue. Bolding's constitutional violation here was to report scientific conclusions to the prosecutor, before trial, that were false, misleading, and incomplete. The

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<sup>11</sup> A plain example of this is Kim's testimony that she routinely followed the opposite, and wrong, interpretive principle from what Bolding followed in the *Dutton* and *McFarland* cases. Kim Depo (Ex. C), 122–23.

<sup>12</sup> This influence was known to Chief Brown, who was told by the lab administrator during the budget justification process in March 1987 that one of the benefits of the crime lab Program was that “[e]xpert testimony from the laboratory personnel often results in conviction.” 3/4/87 Memo (Ex. L).

City's reliance on *Walker* simply ignores the record evidence that the task of reporting accurate and objective scientific conclusions *did* present Bolding and other personnel operating in the crime lab's supervisory vacuum with "a difficult choice of the sort that . . . supervision [would have made] less difficult." *Walker*, 974 F.2d at 298.<sup>13</sup>

**F. The City's Policy Caused Plaintiff's Constitutional Deprivation.**

Finally, a reasonable jury could find that the City's failure to supervise and oversee the crime lab was a "moving force" behind, or "played a part in," Rodriguez's constitutional deprivations. *Kentucky v. Graham*, 473 U.S. 149, 166 (1985); *Monell*, 436 U.S. at 694.

Bolding's pretrial report to prosecutor Hawkins that disregarded scientific principles in lieu of furthering the prosecution's case was not the isolated act of a renegade scientist. Rather, it fit within a pattern of conduct that pervaded the serology section: numerous instances of reporting results that appeared tailored to the prosecution's theory, and more than a hundred cases of potentially exculpatory results undisclosed to prosecutors (and, hence, defendants like

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<sup>13</sup> The City's argument appears to be grounded in an imagined *per se* rule that it cannot be liable for causing potentially criminal conduct – a contention that finds no support in the law. Indeed, it proves far too much, since most constitutional violations that form predicates to municipal liability claims are crimes. 18 U.S.C. § 242. Critically, the cases cited by the City for that contention, *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 490 (11th Cir. 1997), and *Floyd v. Waiters*, 133 F.3d 786, 796 (11th Cir. 1998), both involve instances of serious sexual misconduct by City employees. Such actions bear little if any connection to the duties of a municipal employee, which explains courts' reluctance as a general matter to require that municipalities anticipate the risk of such conduct through policies or training. By contrast, as already discussed and as other courts have found, Bolding's pretrial fabrications and concealment of exculpatory evidence are in fact a foreseeable risk inherent in his official tasks.

Two additional cases cited by the City also do not support its asserted rule that municipal liability requires proof of a pattern of prior illegality. In *Conner v. Travis County*, 209 F.3d 794, 796 (5th Cir. 2000), the Fifth Circuit noted that the plaintiffs had not "attempt[ed] to prove" deliberate indifference by showing a pattern of prior incidents, but also noted that the plaintiffs had adduced *no evidence* supporting alternate paths of proof, including evidence concerning the nature of the injury suffered by the plaintiff or applicable professional standards. The other, *Cozzo v. Tangipahoa Parish Council*, 279 F.3d 273, 286 (5th Cir. 2002), found plaintiff's proof of deliberate indifference to the need to train on illegal searches inadequate, but noted that the record was completely devoid not only of prior unconstitutional searches, but also of any evidence of complaints about officer conduct or any similar events to alert the department to the need for more training. *Id.* at 288–89. Both cases thus support Rodriguez's manner of proof of deliberate indifference, amply supported by the record, through actual and constructive notice by policymakers of supervisory inadequacies and their risks, paired evidence that the risks had in fact been realized.

Rodriguez). Report (Ex. 39), 68, 93–94; Stolorow Depo. (Ex. B), 174-75). As the Independent Investigation found, such misconduct was the direct outgrowth of “the product of defective procedures employed in the Serology Section throughout the relevant time period, as well as the Crime Lab’s systematic failure to adequately train and supervise its serologists.” *Id.* at 74, 101.

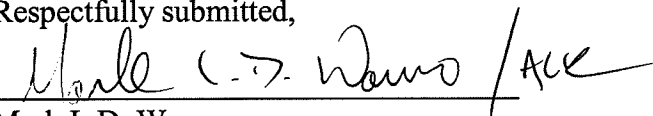
The account of plaintiff’s expert Dr. Shaler, which defendant’s expert confirmed and a jury could credit, explains this link between the absence of supervision and the generation of false and slanted scientific conclusions: Institutionally situated within the law enforcement team, crime lab analysts were vulnerable, absent adequate supervision and training, to influences from prosecutors who understandably sought data that was favorable to their case. Shaler Report (Ex. 206), at 3–4; Warren Depo. (Ex. E), 29–30, 35–36, 38–39. With absolutely no scientific oversight of his analysis or reporting, Bolding Depo. (Ex. A), 77–78, his only feedback coming from prosecutors whose primary interest was in how Bolding’s conclusions would prove their cases, Holmes Depo. (Ex. J), 228, 293-94, and possibly a lack of confidence in his own scientific abilities, Report (Ex. 39), 68, Bolding’s choice of scientific interpretations to match the prosecution’s theory of the case (and exclude Yanez) was as foreseeable as it is reprehensible. Indeed, a jury could find that *only* in such an atmosphere of utter supervisory and scientific disregard could Bolding’s misrepresentations to the prosecutor have occurred and then – despite his directly contradictory analysis and testimony almost immediately afterward in the *Dutton* case, *see* Bolding Opposition at 7–10 – go uncorrected. *See Mayes*, 442 F. Supp. 2d at 645–46 (causation of deliberate *Brady* violations established with evidence of “hands-off approach” to supervision of detectives and a “‘climate of impunity’ in which detectives knew that the chain of command would either never detect or would actively condone their investigative practices”). Certainly a jury could so conclude.

The City contends that Rodriguez's constitutional deprivation was caused solely by Bolding's intentional misconduct or bad character, rather than by the City's mismanagement of the crime lab. It is free to make that argument at trial, but at this stage it simply presents a classic jury question – not a basis for summary judgment. *See, e.g., Johnson v. Morel*, 876 F.2d 477, 482 (5th Cir. 1989) (*en banc*) (Rubin, J., concurring in part, dissenting in part, and concurring in judgment of en banc court) (“[A] §1983 plaintiff ordinarily need prove only cause in fact and proximate or legal cause, not sole causation.”), *overruled on other grounds by Harper v. Harris County*, 21 F.3d 597 (5th Cir. 1994); Fifth Circuit Pattern Jury Instructions § 10.3 – Civil (2006) (proximate cause standard in municipal §1983 claim); *see also Murray v. Earle*, 405 F.3d 278, 290 (5th Cir. 2005) (“Section 1983 does require a showing of proximate causation, which is evaluated under the common law standard.”); *Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999) (questions of causation are “intensely factual”) (quoting *Savidge v. Fincannon*, 836 F.2d 898, 905 (5th Cir. 1988)); *Bielevicz v. Dubinon*, 915 F.2d 845 (3d Cir. 1990) (causation presents jury question “[a]s long as the causal link is not too tenuous”).

### Conclusion

For the reasons set forth above, the City's motion for summary judgment should be denied.

Respectfully submitted,



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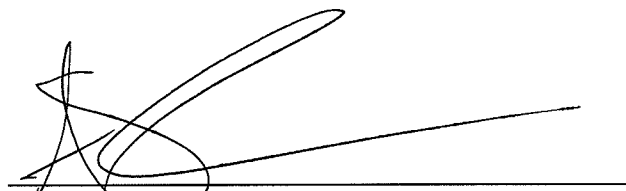
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