No. _____

In the Supreme Court of the United States

STEVEN MOODY, LAPD Detective;
ROBERT PULIDO, LAPD Detective,
Petitioners,

v.

MARY TATUM,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL N. FEUER, CITY ATTORNEY

AMY JO FIELD, ASSISTANT CITY ATTORNEY
Counsel of Record
LOS ANGELES CITY ATTORNEY'S OFFICE
City Hall East 600
200 North Main St.
Los Angeles, CA 90012
(213) 978-6929
amy.field@lacity.org

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

The rule of law in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) protects the due process right to a fair trial and the circuit courts uniformly hold that a criminal defendant's right to exculpatory evidence under the *Brady* rule is not violated absent a trial and conviction. Although Michael Walker was never convicted – the prosecutor dismissed the charges before trial – he claimed the police deprived him of his due process rights by withholding exculpatory evidence and causing his pretrial deprivation of liberty. Did the Ninth Circuit panel erroneously find there is a Fourteenth Amendment substantive due process right to avoid a prolonged pretrial detention caused by a police officer's failure to disclose evidence that is "strongly indicative of innocence," or where there has been no trial and conviction, and thus no *Brady* violation, are pretrial deprivations of liberty governed by the Fourth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY 2

REASONS FOR GRANTING THE PETITION 8

I. The Ninth Circuit's Opinion Disregards The Rule of Law Set Forth In *Brady v. Maryland* And Conflicts With the Uniform View Of The Circuit Courts That Absent A Trial and Conviction, There Is No Cognizable Section 1983 Claim For Violation of The *Brady* Rule 8

II. The Ninth Circuit's Opinion Stands In Direct Conflict With This Court's Repeated Instruction That Substantive Due Process Must Not Be Unnecessarily Expanded Or Used As A "Catch-All" Constitutional Provision Where Another Constitutional Provision Explicitly Protects Against The Claimed Injury 11

III. The Ninth Circuit's Opinion Wrongly Contorts The Rule Of Law In *Baker v. McCollan* And Its Progeny To Support Its Finding of A Substantive Due Process Right To The Disclosure Of Exculpatory Evidence To Protect Against An Unjustified Pretrial Detention 13

IV. The Ninth Circuit's Opinion Stands in Direct Conflict with This Court's Controlling Opinions In *Albright v. Oliver*, *Gerstein v. Pugh,* and *Baker v. McCollan*, All of Which Clearly Direct That Pretrial Deprivations Of Liberty Are Governed By The Fourth Amendment And Not The Substantive Due Process Clause 14

CONCLUSION 18

APPENDIX

Appendix A Opinion in the United States Court of Appeals for the Ninth Circuit (September 17, 2014) . . . . . App. 1

Appendix B Order Amending Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California (June 3, 2010) . . . . . App. 34

Appendix C Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California (May 17, 2010) . . . . . App. 36

Appendix D Civil Minutes in the United States District Court, Central District of California (April 22, 2010) . . . . . App. 52

Appendix E Judgment on Verdict in the United States District Court, Central District of California (February 16, 2010) . . . . . App. 54

Appendix F Order Granting in Part and Denying Part Defendants' Motion for Summary Judgment or Partial Summary Judgment in the United States District Court, Central District of California (January 19, 2010) . . . . . App. 58

Appendix G Order denying petition for rehearing in the United States Court of Appeals for the Ninth Circuit (November 18, 2014) . . . . . App. 78

TABLE OF AUTHORITIES

CASES

Albright v. Oliver,
510 U.S. 266, 114 S. Ct. 807,
127 L. Ed. 2d 114 (1994) 12, 14, 15, 16, 17

Baker v. McCollan,
443 U.S. 137 (1979) . . . . . *passim*

Brady v. Maryland,
373 U.S. 83, 83 S. Ct. 1194,
10 L. Ed. 2d 215 (1963) . . . . . *passim*

Collins v. Harker Heights,
503 U.S. 115, 112 S. Ct. 1061,
117 L. Ed. 2d 261 (1992) 12

County of Sacramento v. Lewis,
523 U.S. 833, 118 S. Ct. 1708,
140 L. Ed. 2d 299 (2005) 8

Flores v. Satz,
137 F.3d 1275 (11th Cir 1998) 10

Gerstein v. Pugh,
420 U.S. 103, 95 S. Ct. 854,
43 L. Ed. 2d 54 (1975) 14, 15, 16, 17

Graham v. Connor,
490 U.S. 386, 109 S. Ct. 1865,
104 L. Ed. 2d 443 (1989) 8, 12

Lee v. City of Los Angeles,
250 F.3d 668 (9th Cir. 2001) 18

Livers v. Scheck,
700 F.3d 340 (8th Cir. 2012) 10

McCune v. City of Grand Rapids,
842 F.2d 903 (6th Cir. 1988) 10

Morgan v. Gertz,
166 F.3d 1307 (10th Cir. 1999) 10

Rivera v. County of Los Angeles,
745 F.3d 384 (9th Cir. 2014) 16, 17, 18

Smith v. Almada,
640 F.3d 931 (9th Cir. 2011) 15

Strickler v. Greene,
527 U.S. 263, 119 S. Ct. 1936,
144 L. Ed. 2d 286 (1999) 9

Taylor v. Waters,
81 F.3d 429 (4th Cir. 1996) 10

United States v. Agurs,
427 U.S. 97, 96 S. Ct. 2392,
49 L. Ed 2d 342 (1976) 9

United States v. Bagley,
473 U.S. 667, 105 S. Ct. 3375,
87 L. Ed 2d 481 (1985) 9

United States v. Ruiz,
536 U.S. 622, 122 S. Ct. 2450,
153 L. Ed. 2d 586 (2002) 9

Wallace v. Kato,
549 U.S. 384,127 S. Ct. 1091,
166 L. Ed. 2d 973 (2007) 15, 16

CONSTITUTION AND STATUTES

U.S. Const. amend. IV 14, 15, 17, 19

U.S. Const. amend. XIV . . . . . passim

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 . . . . . 2, 5, 8, 10, 15

42 U.S.C. § 1988 6

RULE

Fed. R. Civ. P. 50 6

OPINIONS BELOW

The following documents are reproduced in the Appendix: Opinion in the United States Court of Appeals for the Ninth Circuit dated September 17, 2014 (App. A); Order Amending Order Granting in part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California dated June 3, 2010 (App. B); Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California, dated May 17, 2010 (App. C); Civil Minutes in the United States District Court, Central District of California dated April 22, 2010 (App. D); Judgment on Verdict in the United States District Court, Central District of California, dated February 16, 2010 (App. E); Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment or Partial Summary Judgment in the United States District Court, Central District of California dated January 9, 2010 (App. F); and Order denying the Petition for Rehearing and Rehearing *en banc* in the United States Court of Appeals for the Ninth Circuit dated November 18, 2014 (App. G).

JURISDICTION

The Ninth Circuit denied Petitioners Los Angeles Police Department Detectives Steven Moody and Robert Pulido's Petition for Rehearing and Rehearing *en banc* on November 18, 2014. 28 U.S.C. section 1254, subdivision (1), confers jurisdiction on this Court to review on writ of certiorari.

STATUTORY PROVISION INVOLVED

The relevant statutory provision is 42 U.S.C. section 1983:

> 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.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Michael Walker, now deceased[1], spent 27 months in pretrial custody on charges arising from six demand-note robberies occurring in the Crenshaw Corridor of Southwest Los Angeles before the prosecutor dismissed the case. Los Angeles Police Department (LAPD)

---

[1] Mary Tatum, Walker's mother and the administrator of Walker's estate, was substituted for Walker.

officers arrested Walker without a warrant after he walked into "EB Games," a video store, and store employees recognized him as the person who had robbed the store days earlier. They alerted the security guard at the store, who detained him and telephoned the police.

At the time Walker was arrested, LAPD Detective Steven Moody was investigating several demand note robberies that had occurred in the area policed by LAPD's Southwest Division. Detective Robert Pulido was Moody's immediate supervisor. The robberies Moody was investigating all had been committed in a similar manner: the perpetrator would enter a small business and present a handwritten note to the cashier demanding money and then flee on foot. The physical description of the perpetrator was also similar in each robbery. Thus, the detectives suspected the same perpetrator committed the crimes.

By the time Walker was arrested at EB Games, there had been 13 demand note robberies in the Southwest Division. Given the suspect used a similar *modus operandi* in all of the robberies and his physical description was similar to Walker, Moody suspected Walker might be responsible for all 13 robberies. Ultimately, Walker was charged only with having committed six of the 13 demand note robberies in the area; in each instance his victim positively identified him from a six-pack photographic line-up, in a live line-up, or both.

In two follow-up reports, both approved by Pulido, Moody stated in boldface that the spate of demand note robberies in Southwest Division had stopped following Walker's arrest. Walker's criminal defense attorney

made several informal discovery requests asking the prosecutor to double-check the accuracy of Moody's statements. The prosecutor resisted these informal discovery requests claiming they were too burdensome. There is nothing in the record to indicate either Pulido or Moody were aware of these informal discovery requests but deliberately withheld the information.

In February 2007, after Walker had been in pre-trial custody for almost a year and a half, his criminal defense attorney made a formal discovery motion seeking reports of other demand-note robberies in the same area occurring shortly after Walker's arrest. The court granted the motion and LAPD provided the requested information to the prosecutor, who turned it over to Walker's attorney.

The disclosures that followed revealed at least two demand note robberies occurred in the Crenshaw Corridor days after Walker's arrest, both at fast-food restaurants: the Golden Bird and a Burger King. Moody was not assigned to investigate the Burger King robbery, but did investigate the Golden Bird robbery. When he looked at the security video from the Golden Bird and compared it to photographs from some of the other robberies he had investigated, Moody determined the perpetrator of the Golden Bird robbery was heavier than the perpetrators in the other robberies. Neither Moody nor Pulido believed there was a connection between these robberies and those with which Walker was charged. They never told the prosecutor about them nor were Moody's reports stating the demand note robberies had ceased following Walker's arrest ever corrected.

The disclosures also revealed LAPD detectives assigned to Robbery Homicide Division, a specialized division that covered the entire City, had arrested Stanley Smith as he fled a demand-note robbery he had committed in the neighboring city of Lawndale. Smith was subsequently charged in connection with several other demand-note robberies committed all over the City, including the Burger King robbery that had taken place in the days following Walker's arrest. Pulido was aware of Smith's arrest and his being charged with the Burger King robbery but since he did not believe there was any connection, he did not disclose these facts to the prosecutor in Walker's case.

Starting from these disclosures, Walker's criminal defense attorney was able to establish through a fingerprint comparison that Smith had probably committed the EB Games video store robbery with which Walker was charged. Smith's fingerprint was matched to one found on a video box the perpetrator had left at the EB Games store.[2] That fingerprint match led to the dismissal of all the charges against Walker and a declaration he was factually innocent. However, Smith was never tied to any of the other robberies Walker had been charged with nor to the Golden Bird robbery.

Walker sued Moody and Pulido pursuant to 42 U.S.C. section 1983 seeking to recover damages for his 27-month pretrial loss of liberty. He advanced three

---

[2] Soon after Walker was arrested, Moody requested a fingerprint comparison of Walker's fingerprint against the fingerprint on the video box. It was disclosed to Walker's criminal defense attorney early in the criminal proceedings that there was not a match.

theories of liability, all based on the detectives' alleged knowledge that the demand note robberies continued in the Southwest Division following his arrest and that Smith had been arrested in connection with the Burger King robbery committed days after Walker's arrest. Walker's claims were: (1) the detectives violated his due process rights by pursuing their investigation of him after they knew or should have known he was innocent; (2) they maliciously prosecuted him; and (3) the detectives' failure to disclose that the demand note robberies continued following his arrest or that Smith was arrested in connection with other demand note robberies violated his due process rights as set forth in *Brady v. Maryland*, *supra*, 373 U.S. 83.

The district court granted summary adjudication to Moody and Pulido on the first claim but denied it as to the remaining two. (App. F) The case proceeded to trial.

The jury determined neither detective violated Walker's constitutional rights by causing him to be maliciously prosecuted – that is, neither caused him to be prosecuted with malice and without probable cause. On Walker's *Brady*-based claim, the jury found that both detectives withheld or concealed exculpatory evidence from the prosecutors with deliberate indifference to, or in reckless disregard for, Walker's rights or the truth. (App. E) The jury awarded Walker $106,000.00 in damages and, pursuant to 42 U.S.C. section 1988, the district court awarded him $394,867.74 in attorney fees. (App. E, B, and C)

The detectives moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, subdivision (b), on the same grounds on which they had moved for summary judgment and on which they based

their eventual appeal: the Fourteenth Amendment offers no protection from the failure to disclose exculpatory evidence unless the plaintiff's right to a fair trial is compromised and thus *Brady* protections are not implicated where, as here, the criminal defendant never went to trial, let alone suffered a conviction.[3] (App. D)

In a published opinion filed on September 17, 2014, a panel of the Ninth Circuit unanimously affirmed the judgment against Moody and Pulido, finding Walker's Fourteenth Amendment rights defined by *Baker v. McCollan* were violated by Petitioners' failure to turn over exculpatory evidence. (App. A) The detectives petitioned for panel rehearing and rehearing *en banc*. On November 18, 2014, the panel unanimously voted to deny the petition for panel rehearing, and while the full court was advised of the petition for hearing *en banc*, no judge requested a vote on whether to hear the matter. (App. G)

---

[3] Walker did not appeal the judgment against him on either the first or the second claim and the *Brady*-based claim is the only claim at issue here.

REASON FOR GRANTING THE PETITION

I. The Ninth Circuit's Opinion Disregards The Rule of Law Set Forth In *Brady v. Maryland* And Conflicts With the Uniform View Of The Circuit Courts That Absent A Trial and Conviction, There Is No Cognizable Section 1983 Claim For Violation of The *Brady* Rule.

Section 1983 "is not itself a source of substantive rights" but merely provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan, supra*, 443 U.S. at 144, n.3. "[I]n any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." *County of Sacramento v. Lewis*, 523 U.S. 833, 841, fn. 5, 118 S. Ct. 1708, 140 L. Ed. 2d 299 (2005); *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989); *Baker v. McCollan, supra*, 443 U.S. at 140. Walker claimed that Petitioners' failure to disclose material exculpatory evidence – the fact that two demand note robberies occurred after his arrest and that Smith was arrested in connection with one of them – resulted in his 27-month pretrial deprivation of liberty. Walker consistently and expressly staked his claim on the rule set forth in *Brady v. Maryland, supra*, 373 U.S. 83. His complaint, the final pretrial conference order, and the jury instructions (instructions he requested) all identified *Brady* as the controlling law.

This Court has repeatedly made clear that the "exact contours" of the right protected by the *Brady* rule is "the defendant's right to a fair trial, mandated by the Due Process Due Process Clause of the

[Fourteenth] Amendment to the Constitution." *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed 2d 342 (1976); see also *Brady, supra*, 373 U.S. at 87 [goal is "avoidance of an unfair trial to the accused"]; *United States v. Bagley*, 473 U.S. 667, 65, 105 S. Ct. 3375, 87 L. Ed 2d 481 (1985) [*Brady* rule requires the prosecutor to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial]; *United States v. Ruiz*, 536 U.S. 622, 634, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002)[same].

Under *Brady,* an individual's Fourteenth Amendment due process interest in exculpatory information is only violated upon proof that: (1) the information at issue was favorable to the aggrieved party, either because it was exculpatory, or because it was impeaching; (2) the information was suppressed by the state, either willfully or inadvertently; and (3) prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

To show prejudice, a party must prove the undisclosed information was "material." *Strickler, supra*, 527 U.S. at 282. In *Strickler*, this Court stated that Fourteenth Amendment due process regarding exculpatory information is not violated without a verdict following a criminal trial: "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler, supra,* 527 U.S. at 281.

Petitioners maintain *Brady*-rule protections were never triggered here because Walker's criminal charges were dismissed before trial and thus, the Fourteenth

Amendment due process claim failed as a matter of law. This is the "universal" view of every circuit:

- **4th Circuit:** *Taylor v. Waters,* 81 F.3d 429, 436, fn. 5 (4th Cir. 1996) (Investigator's failure to disclose exculpatory evidence did not deprive Taylor of his right to a fair trial, where "it is undisputed that Taylor was not subjected to a trial.").
- **6th Circuit:** *McCune v. City of Grand Rapids,* 842 F.2d 903, 907 (6th Cir. 1988)("Because the underlying criminal proceeding terminated in appellant's favor, he has not been injured by the act of wrongful suppression of exculpatory evidence," and thus cannot maintain a *Brady*-based claim.)
- **8th Circuit:** *Livers v. Scheck*, 700 F.3d 340, 359 (8th Cir. 2012)("Assuming appellants failed to disclose exculpatory evidence, there was no *Brady* violation because Livers and Sampson were not convicted.").
- **10th Circuit:** *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999) ("[W] here all criminal charges were dismissed prior to trial," "the right to a fair trial is not implicated, and therefore, no cause of action exists under § 1983.").
- **11th Circuit:** *Flores v. Satz,* 137 F.3d 1275, 1278 (11th Cir 1998)("Plaintiff . . . was never convicted and, therefore, did not suffer the effects of an unfair trial. As such, the facts of this case do not implicate the protections of *Brady*.").

Not only did the Ninth Circuit not follow the universal view of the other circuits, it completely dismissed *Brady* and its progeny as unnecessary to its analysis.

II. The Ninth Circuit's Opinion Stands In Direct Conflict With This Court's Repeated Instruction That Substantive Due Process Must Not Be Unnecessarily Expanded Or Used As A "Catch-All" Constitutional Provision Where Another Constitutional Provision Explicitly Protects Against The Claimed Injury.

The Ninth Circuit panel re-characterized the right at issue, not as the *Brady* right to the disclosure of exculpatory evidence, a right encompassed within the procedural right to a fair trial, but rather as the right "to be free of unjustified pretrial detention" due to a police officer's failure to disclose to the prosecutor "information strongly indicative of innocence":

> [T]he Constitution does protect Walker from prolonged detention when the police, with deliberate indifference to, or in the face of a perceived risk that, their actions will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from prosecutors information strongly indicative of his innocence . . . (App. 17)

Rather than apply *Brady*'s due process analysis, the Panel opted for a more favorable standard it found in *Baker v. McCollan, supra*, 443 U.S. 137. It held:

> To resolve this appeal, we need not decide the scope of the protections established by *Brady*

> and its progeny, because Walker's claim sounds in the right first alluded to in *Baker*, 443 U.S. 137, 99 S. Ct 2689, 61 L. Ed. 2d 433, not *Brady*. (App. 21)

The Ninth Circuit's approach is one disfavored by this Court. *Graham v. Connor, supra*, 490 U.S. 386 holds that where a particular constitutional provision "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, that specific constitutional provision and "not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims. *Id.* at 395. "[T]he Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Albright v. Oliver*, 510 U.S. 266, 272, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992).

These limitations establish that *Brady* is the proper measure of Walker's claimed constitutional injury from the non-disclosure of exculpatory evidence. Because the right to exculpatory evidence is already protected under procedural due process, *Graham* prohibits exactly what the Ninth Circuit did here – recasting Walker's claim that Petitioners failed to disclose exculpatory evidence under the more generalized notion of substantive due process.

III. The Ninth Circuit's Opinion Wrongly Contorts The Rule Of Law In *Baker v. McCollan* And Its Progeny To Support Its Finding of A Substantive Due Process Right To The Disclosure Of Exculpatory Evidence To Protect Against An Unjustified Pretrial Detention.

Nothing about *Baker* or its progeny supports the Ninth Circuit's finding of a substantive due process right to disclosure of exculpatory evidence to avoid an unjustified pretrial detention. None of those cases dealt with a police officer's failure to disclose exculpatory evidence to the prosecutor and nothing about any post-*Baker* case supports the Ninth Circuit's determination that a pretrial detainee such as Walker has a Fourteenth Amendment substantive due process right to exculpatory evidence. The *Baker* line of cases addresses the ability to state a due process claim not against a police officer who investigated the underlying crime, but rather against a jailor who detains a person mistakenly arrested on a facially valid warrant intended for someone else.

> We may even assume, *arguendo*, that depending on what procedures the State affords defendants following arrest, and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after a certain amount of time deprive the accused of liberty . . . without due process of law. *Baker v. McCollan, supra*, 443 U.S. at 145.

Under *Baker*, a jailor does not violate the Fourteenth Amendment by mistakenly detaining the wrong person on an arrest warrant as long as the

arrest complies with the Fourth Amendment and the arrestee is afforded his right to a speedy hearing under the Sixth Amendment. In other words, the procedural protections afforded by the Bill of Rights are sufficient to protect the due process rights of individuals arrested on warrants and, absent a breakdown of those procedures, there is no due process violation. *Baker, supra*, 443 U.S. at 145-46.

Walker's claim does not sound in the due process right alluded to in *Baker*. Petitioners are not jailors, they were the officers who investigated the underlying crime, and Walker was not detained pursuant to a warrant, valid or otherwise. He was arrested without a warrant after store employees called the police and identified him as the person who had robbed them days earlier. Walker has never claimed his initial arrest was lacking in probable cause. Walker thereafter was afforded the full panoply of post-arrest procedural guarantees (*i.e.* appointment of counsel; preliminary hearing; bail hearing; the guarantee of a speedy trial). The Ninth Circuit has contorted the holding in *Baker* to find a violation of Walker's substantive due process rights, where none exists.

IV. The Ninth Circuit's Opinion Stands in Direct Conflict with This Court's Controlling Opinions In *Albright v. Oliver*, *Gerstein v. Pugh*, and *Baker v. McCollan*, All of Which Clearly Direct That Pretrial Deprivations Of Liberty Are Governed By The Fourth Amendment And Not The Substantive Due Process Clause.

"[T]he Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between

individual and public interests always has been thought to define the 'process that is due' for seizures of a person or property in criminal cases, including the detention of suspects pending trial." *Gerstein v. Pugh*, 420 U.S. 103, 125, n. 27, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). In fact, *Baker* itself recognizes the determination of probable cause by a detached judicial officer that complies with the Fourth Amendment constitutes all the process necessary to constitutionally detain an accused pending trial. *Baker, supra*, 443 U.S. at 142-46; *Gerstein*, 420 U.S. at 118-19. Other constitutional guarantees contained in the Bill of Rights – such as the right to a speedy trial – protect the accused by ensuring that he is not detained indefinitely before an 'ultimate determination of . . . innocence is placed in the hands of the judge and jury. *Baker*, 443 U.S. at 145-46; *Albright*, 114 S. Ct at 812-13.

Walker did have a cognizable claim that he suffered an unlawful pretrial detention – his malicious prosecution claim – but the jury decided that claim against him. In the Ninth Circuit, a police officer who includes false information or omits information in his reports that once corrected would defeat probable cause to charge the defendant may cause a malicious prosecution actionable under section 1983. *Smith v. Almada*, 640 F.3d 931, 938 (9th Cir. 2011). This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983." *Wallace v. Kato*, 549 U.S. 384,127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007). However in *Wallace v. Kato* this Court made clear that once the civil rights plaintiff is held pursuant to process any continued unlawful detention "forms part of the damages for the 'entirely distinct' tort of malicious prosecution which remedies

detention accompanied, not by absence of legal process, but by wrongful institution of legal process." *Wallace*, at 390, n. 2, citing *Albright v. Oliver, supra*, 510 U.S. at 270-71, 275. The jury here considered evidence that Petitioners failed to correct the statement in their report that the demand-note robberies stopped upon Walker's arrest yet determined that probable cause to charge him was not defeated and found against him on the malicious prosecution claim.

According to the Ninth Circuit, however, the source of constitutional protection for Walker's pretrial deprivation of liberty was the substantive due process clause of Fourteenth Amendment. The Ninth Circuit stated it was not bound by *Albright or Gerstein,* (or by *Baker* for that matter) but rather by its own subsequent opinion in *Rivera v. County of Los Angeles*, 745 F.3d 384 (9th Cir. 2014), another case involving the mistaken arrest of the wrong person on a valid warrant.

> A plurality of Supreme Court justices suggested otherwise in *Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed 2d 114 (1994). The plurality reasoned that "[t]he Framers considered the matter of *pretrial* deprivations of liberty and drafted the Fourth Amendment to address it," rather than the Fourteenth. *Id*. at 274 (emphasis added); see also *Gerstein v. Pugh*, 420 U.S. 103, 125, n. 27, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). *Rivera* was issued long after *Albright* and *Gerstein* and is binding on us. (App. 18)

Not only did the panel ignore this Court's clear pronouncements in *Albright, Gerstein,* and *Baker* in

favor of its own circuit precedent, its opinion does not even align with *Rivera*. It is true the Ninth Circuit panel that decided *Rivera* cited *Baker* and stated: "Precedent demonstrates, however, that post-arrest incarceration is analyzed under the Fourteenth Amendment." 745 F.3d at 389-90. But read in context, it is clear the *Rivera* opinion did not flout this Court's decisions in *Albright* and *Gerstein*, nor did it suggest a criminal defendant's pretrial deprivation of liberty should be governed by the Fourteenth Amendment's substantive due process clause, rather than the Fourth Amendment.

Rather, the *Rivera* panel reiterated that *Baker* and its progeny target the narrow circumstance where a person is mistakenly detained on a facially valid warrant intended for someone else for a prolonged period of time with no opportunity to assert their claim of mistaken identity before the court. Rivera was arrested and mistakenly held for almost a month on a warrant for a person that shared his name, date of birth, and a similar physical description before it was determined his fingerprints did not match the subject of the warrant. Yet the Ninth Circuit panel found no violation of due process:

> Rivera was taken before a judge the very next day, a significant procedural protection. It is unclear why Rivera did not assert his claim of mistaken identity at the [first] court hearing, but the failure to take advantage of a procedural protection does not disprove its availability. *Id.* at 392.

The *Rivera* panel plainly stated that once Rivera "was no longer held on the warrant; he was held

pursuant to a court order," and "[t]his fact removes this case from the realm envisioned by *Baker*." *Rivera, supra,* at 392. The same is true here, where Walker was promptly arraigned and provided counsel.

The other opinion the panel relied on, *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), also lends no support for its determination the Fourteenth Amendment due process clause provides a right to be free of unjustified pretrial detention caused by the withholding from prosecutors of evidence "strongly indicative of innocence." (App. 17) *Lee* involved the detention of the wrong person on a facially valid warrant, but that warrant was a *post-conviction warrant*.

Again, Walker was never held on a warrant. He was arrested without a warrant and held following an arraignment, preliminary hearing, and bail hearing; in other words, he was held in pretrial detention pursuant to court order. Walker's case never fell within "the realm envisioned by *Baker*." *Rivera, supra,* at 392. Walker's claim that Petitioners violated his right to exculpatory evidence may be addressed only in the realm envisioned by *Brady* and, in the absence of a criminal trial and conviction; his *Brady* rights were never implicated.

CONCLUSION

The panel's Opinion finding a Fourteenth Amendment substantive due process right to avoid a prolonged pretrial detention caused by a police officer's failure to disclose evidence that is "strongly indicative of innocence," un-tethered to the rule of law set forth by this Court in *Brady v. Maryland*, presents both a

conflict with Supreme Court precedent and with the weight of circuit court precedent. The panel not only ignores the rule of law set forth in *Brady*, it does so in favor of an erroneous application of the rule of law set forth in *Baker v. McCollan.* The panel applies *Baker* to a set of facts that it was never intended to apply to. The result is that the panel has unnecessarily expanded substantive due process to encompass a pretrial deprivation of liberty disregarding this Court's repeated instruction that the Fourth Amendment governs pretrial deprivations of liberty. The panel's opinion creates a conflict with the universally held view of all the other circuits that absent a criminal trial resulting in a conviction there is no violation of the *Brady* rule. Accordingly, Petitioners Steven Moody and Robert Pulido respectfully request this Court grant the instant Petition for Writ of Certiorari to restore uniformity in the law.

Respectfully submitted,

MICHAEL N. FEUER, City Attorney

AMY JO FIELD, Assistant City Attorney
Counsel of Record
Los Angeles City Attorney's Office
City Hall East 600
200 North Main Street
Los Angeles, California 90012
(213) 978-6929
amy.field@lacity.org

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Opinion in the United States Court of Appeals for the Ninth Circuit (September 17, 2014) . . . . . App. 1

Appendix B Order Amending Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California (June 3, 2010) . . . . . App. 34

Appendix C Order Granting in Part and Denying in Part Plaintiff's Motion for Attorney's Fees in the United States District Court, Central District of California (May 17, 2010) . . . . . App. 36

Appendix D Civil Minutes in the United States District Court, Central District of California (April 22, 2010) . . . . . App. 52

Appendix E Judgment on Verdict in the United States District Court, Central District of California (February 16, 2010) . . . . . App. 54

Appendix F Order Granting in Part and Denying Part Defendants' Motion for Summary Judgment or Partial Summary Judgment in the United States District Court, Central District of California (January 19, 2010) . . . . . App. 58

Appendix G Order denying petition for rehearing in the United States Court of Appeals for the Ninth Circuit (November 18, 2014) . . . . . App. 78

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 17, 2014]

No. 10-55692

D.C. No. 2:08-cv-04707-PJW

MARY TATUM,	)
Plaintiff-Appellee,	)
	)
STEVEN MOODY, LAPD Detective;	)
ROBERT PULIDO, LAPD Detective,	)
Defendants-Appellants.	)
	)

No. 10-55970

D.C. No. 2:08-cv-04707-PJW

MARY TATUM,	)
Plaintiff-Appellee,	)
	)
v.	)
	)
STEVEN MOODY, LAPD Detective;	)
ROBERT PULIDO, LAPD Detective,	)
Defendants-Appellants.	)
	)

App. 2

OPINION

Appeal from the United States District Court
for the Central District of California
Patrick J. Walsh, Magistrate Judge, Presiding

Argued and Submitted
March 9, 2012—Pasadena, California

Filed September 17, 2014

Before: Kim McLane Wardlaw and Marsha S. Berzon, Circuit Judges, and Ronald M. Whyte, Senior District Judge.[*]

Opinion by Judge Berzon

SUMMARY[**]

Civil Rights

The panel affirmed the district court's judgment, entered following a jury verdict in favor of plaintiff, in an action brought pursuant to 42 U.S.C. § 1983 alleging that Los Angeles Police Department detectives failed to disclose compelling exculpatory evidence to the prosecutor while plaintiff was incarcerated pretrial, and did so with deliberate indifference to, or reckless regard for, the truth or plaintiff's rights.

---

[*] The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Plaintiff was incarcerated for 27 months pending trial on charges arising from a series of demand-note robberies. The charges were dismissed after plaintiff's defense counsel obtained exculpatory material which defendants failed to disclose. The panel held that plaintiff's claim was covered by the Fourteenth Amendment's guarantee of due process, and not by the Fourth Amendment. The panel held that the Constitution protects a plaintiff from prolonged detention when the police, with deliberate indifference to or in the face of a perceived risk that their actions will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from the prosecutors information strongly indicative of his innocence. The panel held that the jury's determination that defendants acted with deliberate indifference or reckless disregard for plaintiff's rights satisfied the standard applicable to violations of due process and that the jury instructions described a cognizable constitutional claim. Because the panel affirmed the district court's judgment, it likewise affirmed the award of fees to plaintiff, as the prevailing party.

COUNSEL

Amy Jo Field (argued), Deputy City Attorney; Carmen A. Trutanich, City Attorney, Los Angeles, California, for Defendants-Appellants.

John Burton (argued), Law Offices of John Burton, Pasadena, California; Maria Cavalluzzi, Cavalluzzi & Cavalluzzi, West Hollywood, California, for Plaintiff-Appellee.

OPINION

BERZON, Circuit Judge:

A jury found Los Angeles Police Department ("LAPD") detectives Steven Moody and Robert Pulido liable under 42 U.S.C. § 1983 for violating Michael Walker's constitutional rights by (1) acting with deliberate indifference to, or reckless disregard for, Walker's rights or for the truth, in (2) withholding or concealing evidence that (3) strongly indicated Walker's innocence of the crimes for which he was held, and was reasonably likely to have resulted in dismissal of the charges against him if revealed. Indeed, dismissal of the charges is exactly what happened when Walker's defense counsel finally obtained the exculpatory material, after Walker had endured pretrial incarceration for over two years.

Walker, now deceased, was incarcerated pending trial on charges arising from a series of demand-note robberies of small retail businesses in Los Angeles. Detectives Moody and Pulido were responsible for investigating the crimes. They knew, before Walker was bound over for trial, that additional demand-note robberies, perpetrated with the same distinctive modus operandi as those for which Walker was being held, had occurred in the same part of Los Angeles after Walker was in police custody. Pulido also knew that another man, Stanley Smith, had confessed to some of those later crimes after Walker's arrest. The spate of demand-note robberies in fact ended only upon Smith's apprehension.

Moody and Pulido never disclosed any of this information—not the continuing crime spree, not the

similarities of those continuing crimes to the crime for which Walker was being detained, not Smith's arrest, and not Smith's confession—to the prosecutor pursuing the case against Walker. Instead, the two officers falsely asserted in police reports written by Moody and approved by Pulido that the "crime spree caused by the 'Demand Note Robber'" ceased with Walker's arrest. When, twenty-seven months of pretrial detention and repeated discovery requests later, Walker's defense attorneys finally learned of Smith's arrest and conviction, Smith's fingerprints were matched to those found at the scene of one of the robberies attributed to Walker. As soon as the prosecutor was made aware of this evidence, he dropped the charges against Walker. A California court thereafter declared him factually innocent, but only after he had been deprived of his liberty for over two years.

In this 42 U.S.C. § 1983 action, the jury found that Moody and Pulido failed to disclose this compelling exculpatory evidence to the prosecutor, and did so with deliberate indifference to, or reckless regard for, the truth or for Walker's rights. We affirm.

I.

A. The Southwest Division investigation

Between June 27 and August 15, 2005, the Southwest Division of the Los Angeles Police Department ("LAPD") received reports of thirteen "demand-note" robberies. In each robbery, the perpetrator entered a small business and presented a handwritten note demanding money from the cashier.

During this period, Pulido supervised the "robbery table" at the Southwest Division. Pulido, Moody's direct

supervisor, assigned him to investigate the thirteen demand-note robberies that had been reported at that time.

By the time the sixth demand-note robbery was reported, Moody and Pulido began to suspect that the robberies were being committed by a single individual. Until the recent spree, demand-note robberies had been rare in the area. Each of these recent robberies, however, followed the same script: the robber, who appeared to be working alone, would enter a business posing as a customer; present a note to the cashier demanding money, sometimes threatening violence or displaying what looked like a firearm; take cash; and then flee on foot. Although the precise language of the demand notes varied from one robbery to the next, the messages were similar. The suspect in each of the robberies also shared a general physical description: "male black, black hair, brown eyes, 5'6" to 5'7", 160 to 180 pounds, age varying from 25 to 45."

On August 13, the twelfth demand-note robbery in the Southwest Division occurred at an EB Games store. The thirteenth occurred two days later at a nearby Blockbuster. On August 16, Walker went to EB Games and was arrested after employees identified him as the perpetrator of the robbery three days before. Police took Walker to the Southwest station, where they determined that he did not have a demand note on him. After agreeing to speak to Moody and waiving his *Miranda* rights, Walker maintained that he did not have any involvement in the EB Games robbery and consented to a search of the apartment where he stored his personal property. Moody conducted the search but found no evidence of the crime or any other robbery.

Nonetheless, Moody and Pulido concluded almost immediately that Walker had committed all thirteen demand-note robberies that had then been reported to the Southwest Division. Just two days later, however, events transpired that should have led them to reconsider that theory: someone attempted to rob the Golden Bird, a restaurant in the Southwest Division, with a demand note. The description of the perpetrator of this crime matched that of the suspect who had committed the previous thirteen robberies, and the modus operandi was the same.

When Pulido learned of the attempted robbery at the Golden Bird, he assigned the case to Moody for investigation. Moody was "surprised" to hear about this incident; the first thing that came to his mind when he read the report of the incident was that the Golden Bird robber might be the same suspect that had committed the previous robberies. Moody discussed this theory with Pulido, who also expressed surprise that another, similar robbery had occurred in the same area, even though they had a suspect in custody.

That same day, yet another demand-note robbery occurred at a different location in the Southwest Division, a Burger King restaurant. Pulido assigned investigative responsibility for that robbery to an officer other than Moody; that officer issued a crime alert. As Pulido later testified, Moody "should have" seen the crime alert in the normal course of business.[1]

---

[1] While under oath during a discovery hearing on October 22, 2007, Moody stated that he had learned of the Burger King robbery on the same day that he learned about the attempted robbery at the Golden Bird. He also stated that he was responsible for

Pulido also testified at trial that, within days of Walker's arrest, he was aware of "the Burger King robber and the Golden Bird robber, who had the same general descriptions and the same MO [as the person] . . . committing demand-note robberies."

B. The Robbery Homicide Division investigation

During this same period, detectives Freddy Arroyo and Brett Richards were investigating a series of demand-note robberies, beginning with one that occurred on June 30, 2005. Arroyo and Richards were assigned to the Robbery Homicide Division ("RHD") of the LAPD, a specialized unit whose investigative responsibility covered the entire city. The RHD demand-note robberies shared a similar suspect description with those being investigated by the Southwest Division. The suspect was generally described as a "[m]ale black, 35 to 40 years old, . . . thin to medium build." The modus operandi for these robberies was also similar to those in the Southwest Division: the suspect would present a demand note to the cashier and sometimes simulate a handgun and threaten to shoot the victim.

Arroyo was assigned to the South Bureau of the RHD, which includes the Southwest Division. While investigating the demand-note robberies in the South

---

investigating the Burger King robbery. At trial, however, Moody testified that he did not know about the Burger King robbery in its immediate aftermath. When confronted with the discrepancy between that statement and his testimony at the discovery hearing, Moody acknowledged that he had formerly testified under oath to knowledge of the Burger King robbery, but that he had "testified in error."

Bureau, Arroyo generally spoke to Pulido at least once a week. Pulido knew about the RHD's investigation of demand-note robberies by the end of August. And during the end of August and beginning of September, Arroyo and Pulido spoke "almost on a daily basis." Nevertheless, Arroyo testified at trial, he had no recollection of Pulido telling him that the Southwest Division had investigated a similar series of demand-note robberies that culminated in an arrest. Nor did Pulido notify the RHD about the attempted robbery of the Golden Bird when it occurred. He did, however, inform Arroyo about the Burger King robbery, which was then transferred to Arroyo for investigation.

On September 15, Stanley Smith was arrested while fleeing from a Blockbuster he had just robbed using a demand note. At trial, Arroyo did not recall whether Smith had specifically admitted involvement in any of the demand-note robberies in the Southwest Division that occurred before Walker's arrest. Nor does the record reveal whether Smith was ever asked about his potential involvement in those thirteen robberies. But Smith *did* confess to committing roughly two robberies per week, and specifically identified five of these robberies, including the Burger King robbery in the Southwest Division that occurred just days after Walker's arrest.

The spree of demand-note robberies in the Southwest Division ended with Smith's arrest. Based on Smith's modus operandi, Arroyo suspected that Smith was responsible for all the recent demand-note robberies. Smith was ultimately convicted of several of the robberies attributed to him.

Arroyo notified Pulido of Smith's arrest almost immediately. Although the RHD circulated a bulletin to all LAPD divisions regarding Smith's arrest, Moody testified that he did not see it.

C. The criminal case against Walker

Neither Moody nor Pulido ever informed the prosecutors responsible for Walker's case about the August 19, 2005 Golden Bird and Burger King robberies. Instead, between August 18 and September 8, Moody conducted a number of photographic line-ups, in which four eyewitnesses identified Walker as the perpetrator of several of the demand-note robberies. Two of these identifications were less than certain: one witness identified Walker "because of the complexion" and qualified her answer by indicating, "[It] looks the most like him, but I'm not saying it's him, but looks like him." Another witness tagged Walker as the robber but noted a discrepancy between his photograph and her memory of the suspect: "The one that I think looks more [like the perpetrator] is [Walker]. The guy is the same . . . but he is shaven."

In late September—at which time Pulido both knew that demand-note robberies had continued in the area after Walker's arrest and also that RHD had arrested Smith for these later crimes—Moody drafted a report concerning his investigation of the EB Games robbery. Prosecutors routinely relied on such reports to make their charging decisions. That report, which Pulido approved, that Walker was under investigation for thirteen demand-note robberies in the Southwest Division. Moreover, the report stated the following in bold font: "**Since the arrest of Walker the crime**

spree caused by the 'Demand Note Robber' has ceased."

On October 25, at the prosecutor's request, Moody conducted a live line-up. Two of the four witnesses who had identified Walker in the photographic line-up tagged him as the demand-note robber. The other two did not.

Moody prepared another follow-up report on November 11. That report repeated—verbatim, and again in bold type—the assertion that the demand-note robberies had ceased since Walker's arrest. Pulido approved this report as well.

Walker had his first preliminary hearing, for charges relating to the EB Games robbery, on October 7, well after Smith's arrest. Moody testified at this hearing, along with one eyewitness to the EB Games robbery. By the time of the first hearing, Moody and Pulido knew that demand-note robberies had continued in the days following Walker's arrest, and at least Pulido knew that Smith had been arrested. Nevertheless, neither officer informed the prosecutor of this exculpatory information. Bail was initially set at $50,000, but was raised to $1,100,000 when additional robbery charges were added to the felony complaint. Walker had a second preliminary hearing in September 2006, at which he was held to answer for charges relating to several of the other demand-note robberies.

California Penal Code § 1054.1(e) requires pretrial disclosure of exculpatory evidence. The Code also provides that "[b]efore a party may seek court enforcement of any of the disclosures required . . . , the party shall make an informal request of opposing

counsel for the desired materials and information." *Id.* § 1054.5(b). If opposing counsel fails to provide the requested information within fifteen days, then the party may seek a court order. *Id.* Upon a showing that opposing counsel has not complied with § 1054.1(e), the court may make any order necessary to enforce the disclosure requirement. *Id.*

Relying upon the assertions in Moody's reports that the demand-note robberies had ceased upon Walker's arrest, Walker's defense attorneys, Alla Eksler and Meredith Rudhman, initially did not make informal discovery requests regarding whether the demand-note robberies had in fact continued after that time. Sometime after the first hearing, however, Walker's defense attorney learned that Walker's fingerprints did not match the fingerprints obtained from the scene of the EB Games robbery. As their investigation increasingly suggested Walker's innocence, his lawyers made the required informal discovery requests, asking the prosecutor to double-check the accuracy of Moody's statements. Walker's attorneys did not receive anything through informal discovery. Instead, the government responded, eventually, by objecting to the request as too burdensome, although the record does not reflect exactly when it did so.

Rudhman then filed a formal discovery request on February 8, 2007. Again, the prosecution opposed this request as too burdensome, but the court eventually granted the request and ordered the production of reports of similar robberies in the area after Walker's arrest. Sometime in late May or early June, Walker's attorneys finally received reports of the Golden Bird and Burger King robberies. Eksler obtained a second

formal discovery order on September 5. On October 4, she received "a number of reports of note robberies, a few before Mr. Walker's arrest and many after his arrest that were the same type of modus operandi or the same type of robberies." Strikingly, the demand note from one of the robberies with which Walker was charged shared the same misspelling as the demand note from one of these robberies: The notes both urged the recipient to hurry and hand over money, so that the robber would not "strat [sic] shooting."

After requesting additional police records, Eksler learned of Smith's arrest. She then arranged for a comparison of Smith's fingerprints with those recovered from the scene of the EB Games robbery. The fingerprints matched. Eksler notified the prosecutor of this match on November 26, and Walker's case was dismissed the same day. At that point, Walker had been in jail for 27 months. Afterward, Eksler filed a motion for a finding of factual innocence, which the court granted.

D. Walker's § 1983 suit

Walker subsequently brought this § 1983 suit against Moody and Pulido, raising two claims.

Walker first argued that Moody and Pulido had deprived him of liberty without due process of law by failing to disclose material exculpatory evidence. At trial, the district court gave the jury the following instructions:

JURY INSTRUCTION NO. 21

> The Fourteenth Amendment to the United States Constitution provides that no public

official shall deprive any person of liberty without due process of law.

When someone has been arrested and charged with a crime, the due process clause of the Fourteenth Amendment requires public officials, such as police officers and detectives, to disclose all the information and evidence in their possession which may tend to show that the accused person did not commit the crime. In other words, the Constitution compels police officers and detectives to disclose exculpatory information along with any evidence which tends to show the accused's guilt. Withholding or concealing exculpatory information violates the accused's right not to be deprived of liberty without due process of law.

In order for evidence to be "exculpatory," it must be:

(a) favorable to the accused; and

(b) material to his guilt or innocence.

Evidence is "material" if there is a reasonabl[e] probability that it would have caused a different result in the case.

The court also read the jury a related instruction:

JURY INSTRUCTION NO. 22

In order to prevail on his claim that defendants Steven Moody and Robert Pulido, or either of them, concealed or failed to turn over exculpatory evidence, the plaintiff must prove that:

> (1) defendants Steven Moody and Robert Pulido, or either of them, concealed or failed to turn over exculpatory evidence; and
>
> (2) defendants Steven Moody and Robert Pulido, or either of them, acted with deliberate indifference to or reckless disregard for the plaintiff's rights or for the truth in withholding evidence from prosecutors.
>
> To act with "deliberate indifference" means to make a conscious choice to disregard the consequences of one's acts or omissions.
>
> Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's rights, or the defendant acts in the face of a perceived risk that his actions will violate the plaintiff's rights under federal law.

The jury returned a verdict for Walker on this claim, answering affirmatively when asked whether Moody and Pulido "violated plaintiff Michael Walker's constitutional rights by withholding or concealing evidence that tended to show that plaintiff was innocent of the criminal charges against him." The jury awarded compensatory damages of $106,000.00.

Walker also claimed that Moody and Pulido had maliciously prosecuted him without probable cause and

for the purpose of violating his constitutional rights.[2] The jury returned a verdict against Walker on the malicious prosecution claim, which Walker did not appeal.

Moody and Pulido then moved for judgment as a matter of law, under Federal Rule of Civil Procedure

---

[2] As to this claim, the district court instructed the jury as follows:

JURY INSTRUCTION NO. 23

In order to prevail on his malicious prosecution claim under § 1983, the plaintiff must prove that:

(1) the defendants Steven Moody or Robert Pulido, or either of them, caused Plaintiff to be prosecuted;

(2) they did so with malice and without probable cause;

(3) they did so for the purpose of violating the plaintiff's constitutional rights; and

(4) the criminal proceeding terminated in the plaintiff's favor.

"Probable cause" exists when, under all of the circumstances known to the officers at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

If the plaintiff was held to answer following a preliminary hearing in the underlying criminal action, you are to presume that there was probable cause to arrest the plaintiff, unless plaintiff proves by a preponderance of the evidence that the prosecution of the plaintiff was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct taken in bad faith.

"Malice" means to act with ill will, or spite, or for the purpose of causing a constitutional injury to another.

50(b). The court denied the motion, and awarded Walker costs and attorney's fees. Moody and Pulido now appeal both the denial of judgment as a matter of law and the award of attorney's fees.

We review de novo the denial of a renewed motion for judgment as a matter of law, "view[ing] the evidence in the light most favorable to the nonmoving party . . . and draw[ing] all reasonable inferences in his favor." *Barnard v. Theobald*, 721 F.3d 1069, 1075 (9th Cir. 2013).

II.

"Section 1983 creates a private right of action against individuals who, acting under color of state law, violate federal constitutional or statutory rights. Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Hall v. City of L.A.*, 697 F.3d 1059, 1068 (9th Cir. 2012) (internal quotation marks and citations omitted). Moody and Pulido challenge the judgment against them on the ground that the Constitution does not confer on Walker the right that the jury found them to have violated. We hold that the Constitution does protect Walker from prolonged detention when the police, with deliberate indifference to, or in the face of a perceived risk that, their actions will violate the plaintiff's right to be free of unjustified pretrial detention, withhold from the prosecutors information strongly indicative of his innocence, and so affirm.

1. Moody and Pulido first assert that "the Fourth Amendment, not the Due Process Clause of the

Fourteenth Amendment[,] governs a pretrial loss of liberty." Not so.

Rivera v. County of Los Angeles squarely rejected that proposition earlier this year. 745 F.3d 384 (9th Cir. 2014). As *Rivera* explained, "[p]recedent demonstrates . . . that post-arrest incarceration is analyzed under the Fourteenth Amendment alone." *Id.* 389–90 (citing *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Lee v. City of L.A.*, 250 F.3d 668, 683–85 (9th Cir. 2001)).[3] On that ground, *Rivera* rejected a claim, brought under § 1983, that the plaintiff's post-arrest incarceration on the basis of a warrant naming another man, after jailors should have known of the error, violated the Fourth Amendment. *Id. Rivera* forecloses Moody and Pulido's Fourth Amendment-based argument here.

Walker's claim can be characterized as one, like *Rivera*, of mistaken identity: Moody and Pulido took him for the robber, who was actually Stanley Smith. On a similar basis, the Second Circuit characterized a

---

[3] A plurality of Supreme Court justices suggested otherwise in *Albright v. Oliver*, 510 U.S. 266 (1994). The plurality reasoned that "[t]he Framers considered the matter of *pretrial* deprivations of liberty and drafted the Fourth Amendment to address it," rather than the Fourteenth. *Id.* at 274 (emphasis added); *see also Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). *Rivera* issued long after *Albright* and *Gerstein* and is binding on us. *See Miller v. Gammie*, 335 F.3d 889, 892–93 (9th Cir. 2003) (en banc).

Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) is not inconsistent with *Rivera*. *Galbraith* concerned only the initial decision to arrest and prosecute, while *Rivera* and this case concern post-arrest incarceration. *See Galbraith*, 307 F.3d at 1122–23. It is *Rivera*'s analysis that controls here.

lawsuit, like this one, seeking compensation for an extended pre-trial detention "stemming directly from . . . law enforcement officials' refusal to investigate available exculpatory evidence" or to disclose it to the prosecutors, as "a case of mistaken identity." *Russo v. City of Bridgeport*, 479 F.3d 196, 208, 199 (2d Cir. 2007).

Even if one rejects the precise analogy, *Rivera* made clear that "there is no principled distinction between claims of mistaken identity and other claims of innocence." 745 F.3d at 391 n.4 (citing *Baker*, 443 U.S. at 145–46). "When . . . a person asserts that he is a victim of mistaken identities, he in effect is pressing a claim of innocence in fact—a claim not analytically distinct from any other factual defense (say, an alibi defense or a defense premised on a lack of specific intent) tendered by a person whom the police arrest in pursuance of a warrant issued by a judge or magistrate." *Brady v. Dill*, 187 F.3d 104, 112 (1st Cir. 1999).

As there is no "principled distinction between" Walker's case and the case of mistaken identity considered in *Rivera*, 745 F.3d at 391 n.4, we conclude that his claim is covered by the Fourteenth Amendment's guarantee of due process, and not by the Fourth Amendment.[4]

---

[4] Contrary to our conclusion in *Rivera*, the Second Circuit has held that certain constitutional protections against post-arrest detention are grounded in the Fourth Amendment, not the Fourteenth. *See Russo*, 479 F.3d at 209. *Russo* considered the seven-month detention of a suspect in the face of strongly exculpatory evidence that investigating officers failed to pursue or to disclose to prosecutors. *See id.* at 206.

2. The jury found that Moody and Pulido withheld or concealed exculpatory evidence from the prosecutors with deliberate indifference to or reckless disregard for Walker's rights or for the truth. Moody and Pulido argue that the Fourteenth Amendment offers no protection from such misconduct unless the plaintiff's right to a fair *trial* is compromised. Describing Walker's claim as one based on the right to disclosure of certain exculpatory evidence first recognized in *Brady v. Maryland*, 373 U.S. 83 (1963), they assert that the right is not implicated where, as here, a defendant never goes to trial, let alone suffers a wrongful conviction.[5]

Although *Russo* traced the constitutional right against such misconduct to the Fourth Amendment, its analysis was little different from the approach we take to asserted deprivations of due process. That case evaluated whether the defendants' conduct "'shock[ed] the conscience,'" *id.* at 210 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998))—a standard originally developed to measure "the cognizable level of executive abuse of power" necessary to sustain an action vindicating the right to due process, *Lewis*, 523 U.S. at 846, and which we typically employ in that context, *see, e.g.*, *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir. 2013). And *Russo*'s analysis of the prolonged detention claim abjured any reference to probable cause, which Moody and Pulido characterize as the "touchstone" of the Fourth Amendment. In any event, several other circuits analyze claims of the sort considered in *Russo* as violations of due process, not the Fourth Amendment. *See infra* Part II.2.

[5] *Smith v. Almada*, 640 F.3d 931 (9th Cir. 2011), reserved the related question of whether a defendant acquitted at trial can claim under 42 U.S.C. § 1983 a violation of his *Brady* rights. *See id.* at 941 (Gwin, J., specially concurring); *id.* at 940 (Gould, J., concurring). We do not answer that question today.

The premise of Moody and Pulido's argument is incorrect. To resolve this appeal, we need not decide the scope of the protections established by *Brady* and its progeny, because Walker's claim sounds in the right first alluded to in *Baker*, 443 U.S. 137, not *Brady*. Where, as here, investigating officers, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment.

Baker assumed, without deciding, that,

> depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of "liberty . . . without due process of law."

443 U.S. at 145 (quoting U.S. Const. amend. XIV, § 2) (omission in original). In *Lee v. City of Los Angeles*, we answered the question *Baker* had reserved, explaining that "'continued detention after it was or should have been known that the detainee was entitled to release'" can violate the Fourteenth Amendment. 250 F.3d 668, 683 (9th Cir. 2001) (quoting *Cannon v. Macon Cnty.*, 1 F.3d 1558, 1563 (11th Cir. 1993)). Usually, claims of such a violation fall into "at least one of two categories: (1) the circumstances indicated to the defendants that further investigation was warranted, or (2) the defendants denied the plaintiff access to the courts for

an extended period of time." *Rivera*, 745 F.3d at 390–91.

Walker asserts a variant of the first of those two categories. Moody and Pulido's silence in the face of compelling exculpatory evidence breached their duty of disclosure to authorities competent to act on the information. Although Moody and Pulido's failure to disclose is one step removed from a failure to investigate, that difference is not pertinent where, as here, the suppressed exculpatory evidence was potentially dispositive—and, indeed, proved dispositive.

Under § 1983, "a [person is] responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled in part on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Thus, a § 1983 defendant is liable for "setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Crowe v. Cnty. of San Diego*, 608 F.3d 406, 430 (9th Cir. 2010) (internal quotation marks omitted). Here, "the natural consequence[]" of Moody and Pulido's conduct was that Walker remained in detention until the exculpatory information was disclosed to the prosecutors and then to Walker's lawyers. Moody and Pulido enhanced the likelihood of that outcome because they not only failed accurately to disclose the continuation of the crime spree after Walker's arrest, they affirmatively *misrepresented* the truth as to that fact in reports on which the prosecutors and defense counsel relied, writing that the robberies ended with Walker's removal from the streets; they also failed to report Smith's arrest for the later robberies.

In this sense, Moody and Pulido "concealed from the prosecutors, and misrepresented to them, facts highly material to—that is, facts likely to influence—the decision whether to prosecute [Walker] and whether (that decision having been made) to continue prosecuting him." *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988). Indeed, once the prosecutors were alerted that the spree of demand-note robberies had in fact continued after Walker's detention and the connection to the parallel investigation of Stanley Smith was made, minimal additional investigation of physical evidence already in the government's possession was enough to secure Walker's release. Where a simple fingerprint comparison can secure the release of an innocent person, we have held, failure to conduct such a comparison constitutes a violation of due process, *see Lee*, 250 F.3d at 684, particularly where the putative "investigation" requires only review of "an easily available piece of physical evidence" already in the government's possession. *Russo*, 479 F.3d at 209.

Rivera held that a *jailor* has no duty to investigate the repeated claims of innocence of a suspect held pursuant to a court order. 745 F.3d at 392.[6] In doing so,

---

[6] *Rivera* considered a lawsuit brought against Los Angeles County, the Los Angeles County Sheriff's Department, San Bernardino County, and the San Bernardino County Sheriff's Department on the claim that, inter alia, Rivera was wrongly detained on a warrant naming another man. 745 F.3d at 386–87. His claim of ongoing wrongful detention was directed at the Los Angeles defendants, into whose custody the San Bernardino defendants transferred him after his arrest. *Id.* at 387, 391–92. As the Los Angeles defendants were just his custodians, *Rivera*'s analysis of his claim prior to the preliminary hearing focused on that

it reaffirmed the longstanding rule that the Constitution usually does not require a jailor to release a suspect committed by court order to his custody. *See, e.g.*, *Hoffman v. Halden*, 268 F.2d 280, 300 (9th Cir. 1959), *overruled on other grounds by Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962); *Francis v. Lyman*, 216 F.2d 583, 585 (1st Cir. 1954). *Hernandez v. Sheahan*, on which *Rivera* relied, reasoned that the contrary rule "would create a substantial possibility that by presenting his contention [of misidentification] over and over even a guilty suspect would eventually find a deputy who did not understand the weight of the evidence and let him go." 455 F.3d 772, 777 (7th Cir. 2006). Such a result would "frustrate the public interest in carrying out the criminal law." *Id.* And, as *Lumbermens Mutual Casualty Co. v. Rhodes*—on which *Rivera* also relied—indicated, the erroneous release of a suspect would "normally subject [the jailor] to criminal penalty if he voluntarily allows . . . a prisoner to escape." 403 F.2d 2, 7 (10th Cir. 1968).

Those concerns have no application where, as here, the defendants are investigating police officers accused of failing to disclose potentially dispositive exculpatory information to the prosecutors to whom they report.[7]

---

relationship. Thus, *Rivera* explained that "a *jailor* need not independently investigate all uncorroborated claims of innocence if the suspect will soon have the opportunity to assert his claims in front of a judge," an opportunity made available to Rivera the day after his transfer to the custody of the Los Angeles defendants. *Id.* at 391–92 (emphasis added).

[7] The jury's instructions in this case did not suggest that Moody and Pulido had some sort of independent duty to secure Walker's release or even to investigate his claims.

Unlike a jailor, "[o]ne standard police function is to provide information to the prosecutor and the courts. Thus, a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information." *Brady*, 187 F.3d at 114. Prosecutors, unlike jailors, wield the authority to secure a suspect's release by dismissing pending charges. And prosecutors, unlike jailors, have a global perspective on the case and a rigorous understanding of the applicable law, attributes that minimize the danger they will weigh the evidence incorrectly.

Moreover, the preliminary hearings held in Walker's case did not afford him protection from Moody and Pulido's misconduct. In California, a criminal defendant arrested and arraigned on a felony complaint, as Walker was, is entitled to a preliminary hearing at which a judge "determine[s] whether there is probable cause to conclude that the defendant has committed the offense charged." *Galindo v. Super. Ct.*, 50 Cal. 4th 1, 8 (2010). The protection that such hearings provide against erroneous deprivations of liberty is only as good as the information on which the decisions of the prosecutor and judge are based. Absent a requirement that police officers disclose to the prosecution compelling exculpatory evidence in their possession without unreasonable delay, the post-arrest hearings to which an accused is entitled do not mitigate the risk that he may be erroneously held to answer criminal charges that a prosecutor would otherwise not pursue.

Before the first preliminary hearing in Walker's case, both Moody and Pulido knew that the spree of demand-note robberies had continued after Walker's

detention. At least Pulido knew that Smith had been arrested on suspicion of having committed those robberies. And the police already had physical possession of the evidence necessary to establish Smith's presence at the scene of the EB Games robbery—namely, his fingerprints. But as far as the record shows, Moody and Pulido did not disclose any of that knowledge to the prosecutors pursuing Walker's case, either before or after the initial preliminary hearing. To the contrary, they affirmatively misrepresented—twice—highly material facts: Moody's report on the EB Games robbery, completed prior to the first preliminary hearing, stated that Walker's detention brought the spate of demand-note robberies to an end. And his second report, completed after the first preliminary hearing, but before the second, reiterated that misrepresentation. Pulido approved both documents. Prosecutors, relying on those reports, could not dismiss charges on the basis of facts of which they were unaware. Correcting the error could be accomplished only by accurate disclosure of information held by Moody and Pulido alone and unknown to the prosecutors.

Nor did Moody and Pulido correct the misinformation provided to the prosecutors, or provide accurate information concerning Smith's arrest and the consequent end of the crime spree, during the two-year period Walker remained in pretrial detention. A police officer's continuing obligation to disclose highly exculpatory evidence to the prosecutors to whom they report is widely recognized in the circuits. *Jones v. City of Chicago*, for example, sustained a judgment against police officers who failed to tell prosecutors about strongly exculpatory evidence against a suspect whose

trial had begun; prosecutors later learned the truth of the matter and dropped all charges against him. 856 F.2d at 988–91. "If police officers have been instrumental in the plaintiff's continued confinement or prosecution," *Jones* explained, "they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded." *Id.* at 994. *Sanders v. English* similarly held that an investigating officer's "deliberate failure to disclose . . . undeniably credible and patently exculpatory evidence to the prosecuting attorney's office plainly exposes him to liability under § 1983," where that failure led to the prolonged detention of a man who otherwise would have been released. 950 F.2d 1152, 1162 (5th Cir. 1992). *Russo* reversed the grant of summary judgment to investigating police officers whose willful failure to disclose to the prosecutor strong exculpatory evidence might have violated the Constitution—albeit the Fourth Amendment, rather than the Fourteenth—where their conduct enabled the prolonged detention of a man who had been arraigned but might have been released had prosecutors known the truth. 479 F.3d at 201, 209–10. And *Brady* recognized, without deciding, the possibility that investigating police officers might be liable for a prolonged detention resulting "from the officers' failure to deliver material information to competent authorities." 187 F.3d at 114.[8]

---

[8] In a related context, *Sutkiewicz v. Monroe County Sheriff* held that the district court improperly excluded from evidence audio tapes containing exculpatory information that investigating officers allegedly failed to disclose to the prosecutor. 110 F.3d 352, 357–58, 361 (6th Cir. 1997). *Sutkiewciz* concluded that the tapes

We emphasize the narrowness of the constitutional rule we enforce today, which is restricted to detentions of (1) unusual length, (2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff's rights from withholding the information or were completely indifferent to those risks. We explain each limitation in turn.

A. As to the length and process afforded by the state, *Baker* held that mistaken detention for three days on the basis of a seemingly valid warrant did not violate due process. *See* 443 U.S. at 145. As we explained in *Lee*, however, *Baker* also "stated that the mistaken incarceration of an individual in other circumstances may violate his or her right to due process 'after the lapse of a certain amount of time,' 'depending on what procedures the State affords defendant[] following arrest and prior to trial.'" *Lee*, 250 F.3d at 684 (quoting *Baker*, 443 U.S. at 144–45) (omission in original). In that case, we held actionable the one-day detention of a mentally incapacitated man

---

were relevant to the plaintiff's claims under § 1983 of malicious prosecution and false imprisonment. "[E]ven though an officer is not obligated to actively search for exculpatory evidence," the Sixth Circuit reasoned in part, "he has a duty to disclose those facts and circumstances to the prosecutor." *Id.* at 358.

In addition, several circuits recognize that "someone who is wrongly imprisoned as a result of mistaken identity [may] state a constitutional claim against his jailers based on their failure to ascertain that they had the wrong man." *Gray v. Cuyahoga Cnty. Sheriff's Dep't*, 150 F.3d 579, 582 (6th Cir. 1998), *as amended*, 160 F.3d 276 (6th Cir. 1998); *see also Cannon*, 1 F.3d at 1563.

in the absence of probable cause, reversing the district court's dismissal of the claim under Federal Rule of Civil Procedure 12(b)(6). *See id.* at 684–85.

Here, Walker was detained for 27 months after preliminary hearings that, as noted, offered him no protection from Moody and Pulido's misconduct, because the exculpatory information was withheld both before and after the hearings. That period of time, under any measure, is sufficiently lengthy to trigger the narrow due process right at issue here. *Russo*, for example, held that a 217-day and even a 68-day detention were lengthy enough to "carr[y] constitutional implications." 479 F.3d at 209.[9]

B. As to the significance of the evidence Moody and Pulido withheld from the prosecutors, the district court instructed the jury that "exculpatory" evidence was evidence both "favorable to the accused" and "material to his guilt or innocence." Evidence is "material," the district court continued, "if there is a reasonabl[e] probability that it would have caused a different result in the case."

---

[9] Although the district court did not instruct the jury as to this element of the cause of action, Moody and Pulido failed to object to that omission, as required by Federal Rule of Civil Procedure 51. "If a party does not properly object to jury instructions before the district court, we may only consider 'a plain error in the instructions that . . . affects substantial rights.'" *Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1230 (9th Cir. 2011) (quoting Fed. R. Civ. P. 51(d)(2)) (alteration in original). We hold that the failure to instruct the jury as to this element of the cause of action did not affect Moody and Pulido's substantial rights. Indeed, it was entirely harmless. *See* Fed. R. Civ. P. 61. The length of Walker's detention went uncontested at trial and, on appeal, Moody and Pulido concede that Walker "spent 27 months in jail."

We can assume here that this sort of due process claim is actually triggered by the failure to disclose evidence that is not merely material but *strongly* indicative of the plaintiff's innocence. Although the jury was not specifically so instructed, the evidence proved in fact nearly dispositive, not merely material, to the prosecutor's decision to continue prosecuting Walker. Once disclosed to the prosecutor, the withheld information *did* alter that decision. With minimal further investigation, the evidence prompted the prosecutor to drop all charges against Walker and led the judge to declare Walker factually innocent. Thus, any instructional error—to which Moody and Pulido in any case did not object—is harmless. *See* Fed. R. Civ. P. 61.

C. In the context of a § 1983 suit against police officers for a due process violation, official conduct violates due process "only when [it] 'shocks the conscience,'" a standard satisfied in circumstances such as these by conduct that either consciously or through complete indifference disregards the risk of an unjustified deprivation of liberty. *Gantt*, 717 F.3d at 707.

> Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives.

Id. (quoting *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010)).

Deliberation is impractical "where a suspect's evasive actions force the officers to act quickly," *Wilkinson*, 610 F.3d at 554, or when dealing with other "fast paced circumstances presenting competing public safety obligations," *Porter v. Osborn*, 546 F.3d 1131, 1139 (9th Cir. 2008). Examples of such circumstances include chasing a fleeing suspect or responding to gunfire in crowded public spaces. *See Porter*, 546 F.3d at 1139.

In contrast, "the decision whether to disclose or withhold exculpatory evidence is a situation in which 'actual deliberation is practical,'" such that deliberate indifference to individual rights—rather than intent to injure—is enough. *Tennison v. City & Cnty. of S.F.*, 570 F.3d 1078, 1089 (9th Cir. 2008) (quoting *Osborn*, 546 F.3d at 1137). In *Gantt*, we expressed approval of the following definition of deliberate indifference:

> Deliberate indifference is the conscious or reckless disregard of the consequence of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.

Gantt, 717 F.3d at 708.

The jury here received an instruction fully consistent with the holding in *Gantt*. The district court explained that Walker needed to demonstrate that Moody and Pulido "acted with deliberate indifference to or reckless disregard for the plaintiff's rights or for the

truth in withholding evidence from prosecutors." The instructions went on to define "deliberate indifference" as "a conscious choice to disregard the consequences of one's acts or omissions," and "reckless disregard" as "complete indifference to the plaintiff's rights" or action "in the face of a perceived risk" that the plaintiff's rights will be violated. This mens rea standard is a subjective one and describes a culpable state of mind. The jury's determination that Moody and Pulido acted with deliberate indifference or reckless disregard for Walker's rights thus satisfies the standard applicable to violations of due process.

* * *

In sum, we hold that the jury instructions described a cognizable constitutional claim. The district court's enforcement of the jury verdict thus stands.[10]

---

[10] Moody and Pulido do not independently appeal the denial of qualified immunity on the ground that even if the jury was properly instructed, "the right at issue was [not] 'clearly established' at the time of [their] alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). They have thus forfeited any such objection for failure to assert it "specifically and distinctly" in their opening brief. *See, e.g.*, *U.S. Fidelity & Guar. Co. v. Lee Invs. LLC*, 641 F.3d 1126, 1136 n.9 (9th Cir. 2011).

Nor could Moody and Pulido have asserted that the right they violated was not clearly established. They *concede* "that withholding exculpatory evidence may cause constitutional injury not only at the criminal trial, but during the pretrial stages of the criminal proceedings as well," but they argue that this rule applies only if their conduct violates the standards set by the Fourth Amendment. Immunity, however, turns "on an officer's duties, not on other aspects of the constitutional violation." *Stoot v. City of Everett*, 582 F.3d 910, 927 (9th Cir. 2009). Uncertainty regarding the procedural niceties of privately enforcing the relevant

III.

Moody and Pulido's appeal from the award of attorney's fees is contingent on their appeal of the judgment. They have not brought a particularized challenge to the calculation of the attorney's fees awarded to Walker by the district court or alleged an abuse of discretion. *See Corder v. Brown*, 25 F.3d 833, 836 (9th Cir. 1994) ("[A] district court's award of attorney's fees . . . is reviewed for an abuse of discretion."). Under 42 U.S.C. § 1988, the district court has discretion to "award a reasonable attorney's fee to prevailing parties in civil rights litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Because we affirm the district court's judgment, we likewise affirm the award of fees to the prevailing party, Walker.

AFFIRMED.

---

constitutional prohibition—including knowledge of the particular constitutional provision implicated by the violation—does not immunize state officials from liability. *See Southerland v. City of N.Y.*, 680 F.3d 127, 160 (2d Cir. 2011); *Alexander v. Perrill*, 916 F.2d 1392, 1398 n.11 (9th Cir. 1990). Where, as here, officers recognize that their conduct "*could* ripen into" an actionable violation on the basis of subsequent contingencies beyond their control, they are not immune from suit. *Stoot*, 582 F.3d at 927. Commonsense confirms Moody and Pulido's concession that the withholding of exculpatory evidence can cause constitutional injury; that concession recognizes "the almost tautological conclusion that an individual in custody has a constitutional right to be released from confinement after it was or should have been known that the detainee was entitled to release." *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) (internal quotation marks omitted).

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 08-4707 PJW

[Filed June 3, 2010]

MICHAEL WALKER,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF LOS ANGELES, ET AL.,	)
	)
Defendants.	)
	)

ORDER AMENDING ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Plaintiff's counsel has brought to the Court's attention that the Court inadvertently overlooked a supplemental brief he had filed setting forth the attorney's fees that were incurred after the motion for attorney's fees had been filed. The Court has reviewed the supplemental brief, as well as the letter briefs filed by Plaintiff and Defendants following the Court's initial order granting attorney's fees and costs. The Court hereby amends that order to allow for additional

attorney's fees incurred following the filing of the motion. Plaintiff's counsel will be paid an additional $46,537.50 in fees as follows: Mr. Burton, 49.3 hours at $600 per hour for a total of $29,580; Ms. Cavalluzzi, 35.7 hours at $475 per hour for a total of $16,957.50. The total for attorney's fees is $383,485.50, and for costs is $11,382.24, for a grand total of $394,867.74.[1]

IT IS SO ORDERED.

Dated this 3rd day of June 2010.

/s/Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

S:\PJW\Cases-Consent\Walker\amended attorney's fees order.wpd

[1] Ms. Cavalluzzi's hours have been reduced by four hours for the time she spent preparing for and attending the hearing on the motion for attorney's fees. Only one lawyer was reasonably necessary for the motion, and the Court has awarded fees to Mr. Burton for it. Plaintiff's further requests, for parking fees and for more time incurred in preparing the letter brief are denied.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 08-4707 PJW

[Filed May 17, 2010]

MICHAEL WALKER,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF LOS ANGELES, ET AL.,	)
	)
Defendants.	)
	)

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Before the Court is Plaintiff's motion for costs and attorney's fees. For the following reasons, the motion is granted in part and denied in part. Plaintiff is awarded $336,948 in attorney's fees and $11,382.24 in costs, for a total of $348,330.24.

Plaintiff was incarcerated by the Los Angeles Police Department for 28 months for crimes he did not commit. The reason he was held so long is because Defendant police detectives withheld evidence that established that he was innocent. After Plaintiff's

lawyer obtained a court order requiring Defendants to produce this evidence, the case against him quickly unraveled and he was released from jail and deemed factually innocent of the charges.

This civil rights action followed. After 18 months of pretrial proceedings, the case went to trial before a jury and the jury returned a verdict in favor of Plaintiff for $106,000. Plaintiff now moves for attorney's fees and costs in the amount of $546,876.89.

Defendants concede that attorney's fees are available to Plaintiff under the law, but contend that Plaintiff's request is inflated and urge the Court to reduce the amount requested. As explained in detail below, the Court concludes that Plaintiff is entitled to attorney's fees and costs but finds that the amount requested by Plaintiff exceeds what is reasonable for this case. For that reason, the requested fees will be reduced as set forth below.

The starting point for the attorney's fees analysis in civil rights cases is the lodestar method, in which the Court multiplies the number of hours reasonably incurred in prosecuting the action by a reasonable hourly rate for the services. *Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006). The goal is to arrive at what counsel would have been paid from a private client for similar work. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1111 (9th Cir. 2008) ("The number of hours to be compensated is calculated by considering whether, in light of the circumstances, the time could reasonably have been billed to a private client."). In performing this analysis, the Court is guided by the factors laid out in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975). There, the

Ninth Circuit instructed district courts to consider: 1) the time and labor required, 2) the novelty and difficulty of the questions involved, 3) the skill required to perform the job properly, 4) the preclusion of other employment, 5) the customary fee, 6) whether the fee was fixed or contingent, 7) the time limits imposed by the client or the circumstances, 8) the amount involved and the results obtained, 9) the experience, reputation, and ability of the attorneys, 10) the undesirability of the case, 11) the nature of the professional relationship with the client, and 12) awards in similar cases.

Plaintiff contends that his lawyers reasonably spent almost 750 hours on this case. He seeks $700 an hour for Mr. Burton and $550 an hour for Ms. Cavalluzzi. Defendants contend that 750 hours is too many and that Mr. Burton should be paid only $500 an hour and Ms. Cavalluzzi $400 an hour.

Analyzing Plaintiff's fee request under the factors enumerated in *Kerr*, the Court concludes: The time and labor required by counsel was significant. There was nothing novel or difficult about the case that was presented to the jury. Though there was some nuance in Plaintiff's theory in this case--that Defendants were required to turn over *Brady* material despite the fact that there was no trial--once that issue was resolved in Plaintiff's favor pre-trial, a less skilled lawyer acting alone could have achieved a similar result at trial as did Plaintiff's two counsel. Compensating counsel for their time will adequately compensate them for the work they were precluded from doing while they worked on this case. The Court has considered the customary fees in similar cases. The fee agreement counsel had with Plaintiff was based on the parties'

understanding that, if Plaintiff prevailed, counsel would be paid by Defendants. And, if Plaintiff did not prevail, counsel would not be paid. There were no unusual time limits imposed on counsel as a result of this case. The jury verdict in this case of $106,000 was a good outcome, but by no means an exceptional one. Counsel's experience, reputation, and ability (as set forth in the declarations and as observed by the Court) support hourly rates on the high end. There was nothing undesirable about this case and many things that were desirable. Most importantly on this point was the fact that Defendants conceded that Plaintiff's version of events, i.e., that he was arrested for a crime he did not commit and held in custody for 28 months despite the fact that Defendants had evidence that he might not have committed the crime, was true. Thus, this was not a case where a civil rights plaintiff was claiming one thing and the police were claiming another. The professional relationship with the client was similar to other relationships in similar cases, lasting about two years. And, finally, the Court has considered the awards in similar cases, some of which were brought to the Court's attention by the parties.

With these considerations in mind, the Court now turns to the specifics of Plaintiff's request. In doing so, the Court has looked very carefully at this issue and has considered all of the pleadings filed by both sides, including the declarations filed in support of the parties' positions, the decisions from other judges of this court that were submitted with the pleadings, and the arguments of counsel at the hearing on the motion. The Court has analyzed the fee request in the context of this case and in the context of other similar and dissimilar cases now before the Court or which have

been before the Court in the past. The Court has also considered the general economic conditions of the city, state, and country that have prevailed between July 2008, when the case was filed, and today, i.e., that the country has experienced a severe recession over the last 18 months to two years. Finally, the Court has taken into account its experience over the past 25 years as a lawyer and a judge.

Plaintiff contends that Mr. Burton reasonably spent 363 hours on this case and Ms. Cavalluzzi spent 378. Neither the Court nor Defendants question the veracity of the lawyers' representations in their declarations that they actually spent this much time on this case. Thus, that is not in issue here. What is in issue is whether the 741 hours was reasonable. The Court concludes that not all of it was and reduces the number of hours and/or the hourly rates to account for time in which two lawyers were employed to do the work of one.

Both counsel attended Sergeant Arroyo's and Deputy District Attorneys Lopez, Huntsman, and Ashvanian's depositions. There was no need to have two lawyers at these depositions, particularly two lawyers with the breadth of experience of Mr. Burton and Ms. Cavalluzzi. As such, the Court deducts 13 hours from Ms. Cavalluzzi's billing (since her billing rate is lower than Mr. Burton's). In addition, the Court deducts 3.8 hours that Ms. Cavalluzzi inadvertently included in her billing. Finally, the Court concludes that Ms. Cavalluzzi is entitled to only half of her billing rate for the time that she was in trial alongside Mr. Burton and the time that she was in court idle waiting for the jury to return its verdict. All told, the Court

concludes that Ms. Cavalluzzi is entitled to be paid for 361.20 hours (378-13-3.8=361.20), 78 of which will be paid at half the hourly rate.

Plaintiff's counsel does not object too strenuously to the reduction for the double billing at the depositions but argues vociferously that the reduction for two lawyers at trial is wrong.[1] At the hearing, counsel argued that there was no authority for such a reduction and pointed to the Ninth Circuit's decision in *Moreno,* in which Chief Judge Alex Kozinski, writing for the court, explained:

> The court may permissibly look to the hourly rates charged by comparable attorneys for similar work, but may not attempt to impose its own judgment regarding the best way to operate a law firm, nor to determine if different staffing decisions might have led to different fee requests. The difficulty and skill level of the work performed, and the result achieved - not whether it would have been cheaper to delegate the work to other attorneys - must drive the district court's decision.

Moreno, 534 F.3d at 1115.

Counsel argues that the court in *Moreno* set down a new rule in which trial judges are no longer called upon to determine whether the prevailing party's

---

[1] At the time of the hearing on the motion, the Court had informed the parties that it was denying the fees incurred by Ms. Cavalluzzi for the time she was in trial. The Court has reconsidered that decision and concludes that she should be paid at half her hourly rate.

attorney's hours are reasonable, rather, the court merely determines what a reasonable fee is in a particular case and multiplies it by the number of hours the plaintiff's attorney or attorneys worked. Under this view, counsel is the final arbiter of what is reasonable and what is not; judges are merely the bookkeepers who, after determining what the hourly rate should be, simply multiply that rate by the number of hours counsel billed.

Clearly, that is not what the Ninth Circuit did in *Moreno*. In reversing the district court's attorney's fees award in that case, the court found that the district court had failed to adequately explain its basis for reducing the fee request and sent it back for further consideration. *Id.* at 1116. It did not change the basic structure for determining fees. Under this structure, the Court determines the reasonable hourly rate and the reasonable number of hours expended.

Unlike the plaintiff's lawyer in *Moreno*, who was seeking $300 an hour for his time, Plaintiff's lawyers herein seek $700 per hour for Mr. Burton and $550 an hour for Ms. Cavalluzzi. They do so with good reason; they are very, highly-skilled trial lawyers, each with more experience than most two lawyers who appear before the court. Mr. Burton has been practicing civil rights law for 31 years and specializes in police misconduct cases. Ms. Cavalluzzi, the "junior" of the two, has been a lawyer for 26 years and has tried over 100 felony jury trials, as both a prosecutor and a defense counsel. These are not your run-of-the-mill trial lawyers who need to be shown where to sit at trial. All told they have 57 years of experience between them, 44 more than Defendants' counsel in this case.

Nor was this trial complicated, by any means. It ran a total of eight days, but a day was spent picking the jury and the jury was out for two-and-a-half days. Thus, the evidence ran for about four days. There were 11 witnesses. All of the critical witnesses had been deposed before trial. Further, the facts of the case were not complicated. In sum, Plaintiff was arrested for a robbery he did not commit; the robbery was somewhat unusual in that it was a demand-note robbery of a neighborhood video store; ultimately he was charged with 12 more robberies and held in jail for 28 months awaiting trial; during that time, Defendant police officers knew that similar demand-note robberies of similar type establishments--i.e., small retail establishments like neighborhood video stores and restaurants--were being committed by someone matching Plaintiff's description; Defendants not only did not tell the prosecutor about these other robberies, they told her that the robberies had stopped when Plaintiff was arrested, bolstering their shaky case that Plaintiff was the robber. Though Defendants had a slightly different take on what these facts meant and the relevance of them, they agreed that Plaintiff was not the robber, that he had been locked up for 28 months for a crime he had not committed, and that the police knew that similar robberies occurred after Plaintiff's arrest but told the prosecutor that they had stopped. The Court's pre-trial ruling that withholding this evidence violated *Brady* provided Plaintiff's counsel with the ruling they needed to prevail at trial, assuming that they could prove the facts as they had alleged them in the Complaint. The trial was really about whether counsel could convince the jury that Defendants' conduct was sufficiently blameworthy to warrant liability and, assuming that they could, how

much Plaintiff, who was practically homeless when he was arrested, was entitled to receive.

Plaintiff's counsel dispute the Court's characterization of this case as simple and straightforward. They point out that, in addition to the 13 robberies committed before Plaintiff was arrested, there were numerous robberies after, and counsel had to be familiar with all of them. The Court answers this charge "yes" and "no." Clearly, counsel had to be familiar with the facts of all of the robberies, but only enough to point out that they occurred, that Plaintiff had not committed them, and that the police knew about them. Defendants did not take the position that Plaintiff committed these robberies. Further, the police reports, which were used as exhibits at the trial, were fairly short and to the point, easing counsel's efforts to become familiar with them.

In addition to the factors discussed above, the Court also takes into account other cases before this court and the courts of this city, county, and state. Notably in this regard is the fact that each day criminal defendants, like Plaintiff in the underlying criminal case, face the daunting prospect of losing their liberty with one lawyer at their side. Not only is this not considered improper, it is the accepted norm in both state and federal courts in this country. Yet, in the wake of Plaintiff's sole criminal defense lawyer establishing that he had not committed the crimes he was charged with and obtaining a ruling from the state court that Plaintiff was factually innocent, Plaintiff argues that he needed two lawyers to present his civil case against Defendant police officers. Plaintiff has not established that it was reasonable to have two lawyers

try his case. Either Mr. Burton or Ms. Cavalluzzi could have tried this case on their own and had the identical success. No doubt! As Ms. Cavalluzzi explained, in her 100+ jury trials as a prosecutor and defense lawyer, she never had co-counsel.

Considering the circumstances of this case, including the experience of Plaintiff's counsel (57 years) and Defendants' counsel (13 years), the number of trial witnesses (11), the length of the trial (four days of evidence), the pre-trial rulings in Plaintiff's favor, Defendants' concession that they had locked up the wrong person for 28 months and had failed to turn over to the prosecutor the evidence exonerating him, the Court concludes that a second lawyer of Ms. Cavalluzzi's caliber was not necessary. *See Cruz v. Alhambra Sch. Dist.*, 601 F. Supp. 2d 1183, 1191 (C.D. Cal. 2009) ("Billed time that includes unnecessary duplication of effort should be excluded from the lodestar.").

Though it may have been plausible for Mr. Burton to try this case with another lawyer, there is no reason why that second lawyer should have been someone with Ms. Cavalluzzi's skill and experience. Nor is it reasonable to assume that, if Plaintiff was paying his lawyers, he would have agreed to pay $1,250 an hour (the combined hourly rate requested by Plaintiff's counsel) for these two lawyers to try this case. More likely, if Mr. Burton was able to convince a client like Plaintiff that two lawyers were needed, the second lawyer would have been a junior associate billed at considerably less than the $550 per hour sought by Ms. Cavalluzzi. For these reasons, the Court will reduce by half Ms. Cavalluzzi's hourly rate for the time she spent

at trial alongside Mr. Burton. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) ("[C]ourts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation for such needless duplication as when three lawyers appear for a hearing when one would do." (Footnote omitted.)).

In addition, the Court concludes that counsels' time spent in court waiting for the jury to return the verdict (eight hours for Mr. Burton and ten hours for Ms. Cavalluzzi) should not be paid at the full hourly rate but should be paid at half the hourly rate. The justification for this ruling is that counsel were not required to work on this case while waiting for the verdict and could have been working on other cases, checking emails, returning phone calls, etc., during that time. Mr. Burton complains that it is not fair to require him to be in the courthouse and not pay him his full hourly fee. He argues that a trial is physically and emotionally draining and he finds it difficult to work on other matters while waiting for the verdict in a case. The Court sympathizes with this complaint but does not find it justifies forcing Defendants to pay for time that counsel is unable to work because of the emotional toll caused by the trial. Nor would it be reasonable to assume that a private client would pay the full hourly rate for a lawyer while the lawyer, who was free to do other work, was unable to work because he was emotionally drained from a trial.[2]

---

[2] The Court has awarded the full hourly rate for Mr. Burton for the last day of trial--despite the fact that much of it was incurred while

Defendants argue that the hours should be further reduced because Plaintiff was not successful on all of his claims. Plaintiff counters that all of the claims were related and, therefore, no reduction should apply. The Court concludes that not all of the claims contained in the Complaint were related to the claim Plaintiff was successful on at trial and, therefore, a reduction is warranted. For example, Plaintiff had originally sued another police officer (Officer Record) for allegedly intentionally destroying a videotape of one of the robberies. This claim was really not related to the case that went to trial, except for the fact that the tape that was destroyed was from one of the subsequent robberies, which Plaintiff contended established his innocence. In addition, Plaintiff brought a *Monell* claim, which he later dropped. Again, this claim was not related to the claims that proceeded to trial. As such, the Court concludes that a 10% reduction for work that was unsuccessful and not related to the claims that were is appropriate. Reducing the hours by 10% results in totals of 326.70 hours (363-36.3=326.70) for Mr. Burton and 263.88 hours (293.20-29.32=263.88) for Ms. Cavalluzzi.

The parties disagree as to the hourly rate, too. Plaintiff believes that $700 per hour for Mr. Burton and $550 an hour for Ms. Cavalluzzi is appropriate. Defendants contend that Mr. Burton should be paid $500 per hour and Ms. Cavalluzzi $400. Both sides provide declarations supporting their proposed hourly rates.

---

the jury was deliberating--to account for the time counsel had to deal with opposing counsel and the clerk regarding the exhibits and to address a note (later in the deliberations).

As to Mr. Burton, the Court concludes that $600 per hour is appropriate in this case, taking into account his experience and the prevailing rates in the community for lawyers of his skill and experience. Mr. Burton points out in his declaration that he was awarded $600 an hour a year ago in another civil rights case in this court. He contends that he deserves $700 an hour now, due, in part, to the passage of time. The Court disagrees. Nothing suggests that over the last twelve months the market is demanding a 17% increase in attorney's fees. In fact, most indicators suggest that the opposite is true, i.e., that lawyers in this town are regularly reducing their rates, agreeing to non-traditional fee structures, and, even then, not getting paid. *The Daily Journal*, a daily, legal newspaper in California, regularly reports on the economic woes of lawyers in all sectors and at all levels in this state. Though Plaintiff has submitted declarations suggesting that higher fees are being charged, absent from those declarations are the actual rates at which lawyers who charge $700 per hour are being paid. The Court finds that the anecdotal evidence is that few if any are. For all these reasons, the Court concludes that the reasonable hourly rate for Mr. Burton is $600 per hour.

As to Ms. Cavalluzzi, the Court, again, finds that the most appropriate figure is in the middle of Plaintiff's $550 an hour request and Defendants' counter at $400. Thus, the Court will award fees to Ms. Cavalluzzi at $475 an hour.

Having arrived at what the Court concludes is the appropriate number of hours and the reasonable rates, it calculates the fees as follows: Mr. Burton - 317.80 hours at $600 per hour, for a total of $190,680, plus

eight hours at $300 per hour, for a total of $2,400. Combining the two, the Court arrives at a total of $193,080. As for Ms. Cavalluzzi - 263.88 hours at $475, for a total of $125,343, plus 78 hours at $237.50, for a total of $18,525. Combining these two, the Court concludes that Ms. Cavalluzzi is entitled to a total of $143,868. The grand total for attorney's fees then is $336,948 ($193,080 + $125,343).

Moving now to costs, Plaintiff has submitted a bill for $16,591.14. The Court finds two entries that it concludes are not reasonable. The first, for $797.25, is for an airplane ticket for a witness in another case who was scheduled to fly to Los Angeles for a deposition that was canceled when Plaintiff's counsel had to attend a settlement conference in the case at bar on the eve of trial. Plaintiff argues that the cancellation was the result of Defendants' counsel waiting until the last minute to agree to a settlement conference. Even assuming that that is true, it does not justify requiring Defendants to pay for the canceled flight. Presumably, a paying client would not agree to pay for canceled flights in another case that were the result of his lawyer attending a settlement conference in his case.

The second entry the Court takes exception to is $4,411.65 for a jury consultant to help counsel, with 57 years of trial practice between them, pick the jury in this case. The Court finds that this expense was not reasonably incurred in this case. Before this trial, Ms. Cavalluzzi had picked 100+ juries on her own, never once using a juror consultant. At stake in those 100+ trials was her client's liberty, not $106,000 in damages. If she did not need a jury consultant to help her pick the jury in those cases, it stands to reason that she did

not need one here. Further, as pointed out above, she was the "junior" lawyer in this case. Sitting next to her was a lawyer with 31 years experience in these type of cases. Though the Court is not certain as to how many times Mr. Burton has picked a jury, it assumes that it was more than enough to provide him with the requisite experience to pick the jury in this case. Between the two of them, they could have picked the jury on their own.

Plaintiff's counsel argues that the jury consultant's role was not limited to simply picking a jury. She also helped the lawyers develop a theme for the trial and convert the complex issues of the case into easily digestible concepts for the jury. This is what trial lawyers are supposed to do. Especially trial lawyers who have been trying cases for as long as Plaintiff's counsel. Counsel cannot come into court and argue in one part of their motion that their experience justifies fees of $700 an hour for one and $550 for the other and in another part of their motion argue that they need help to pick the jury and explain the case to the jury once picked. Lawyers with the type of skill experience necessary to command such high hourly rates have the skill and experience necessary to pick a jury on their own and to break down the concepts of the case for the jury. For this reason, the request for reimbursement for the jury consultant is denied.

Reducing the requested costs by $797.25 and $4,411.65 results in total costs of $11,382.24. Defendants are ordered to pay to Plaintiff $336,948 in attorney's fees and $11,382.24 in costs.

IT IS SO ORDERED.

Dated this 17th of May 2010.

/s/Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

S:\PJW\Cases-Consent\Walker\atty's.fees.wpd

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

CASE NO.: CV 08-4707-PJW **Date:** April 22, 2010

TITLE: ***Michael Walker v. City of Los Angeles, et al.***

PRESENT:

HON. PATRICK J. WALSH, MAGISTRATE JUDGE

Celia Anglon-Reed	CS 04/22/2010
Relief Deputy Clerk	**Court Smart**

ATTORNEYS PRESENT FOR PLAINTIFF:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
John C. Burton	**Surekha A. Pessis**
Maria Cavalluzzi	

PROCEEDINGS: Defendants' Rule 50 Motion

The Court has read and considered the pleadings relating to Defendants' Rule 50(b) motion for judgment as a matter of law. The motion is denied based on the reasoning set forth in the Court's January 19, 2010 Order, denying Defendants' summary judgment motion. Nothing presented at trial materially altered

the factual context under which the Court decided the summary judgment motion. Nor has the law changed in the interim. The Court concludes that, where, as here, police officers hold an innocent person in jail for 28 months by failing to produce to the prosecutor and the defense exculpatory evidence which establishes the person's innocence and affirmatively represents that no such evidence exists, the officers cannot avoid liability under *Brady* based on the fact that the suspect was never given a trial. The focus of *Brady* is the production of exculpatory evidence when it can be used by the defense. The evidence withheld here triggered Plaintiff's release. Thus, it could have been used at any time during the 28 months Plaintiff was unlawfully held.

Initials of Deputy Clerk: ag
1:10

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 08-4707 PJW

[Filed February 16, 2010]

MICHAEL WALKER	)
	)
Plaintiff,	)
	)
v.	)
	)
STEVEN MOODY and ROBERT PULIDO,	)
	)
Defendants.	)
	)

JUDGMENT ON VERDICT

On February 2, 2010, the foregoing matter was called for trial in Courtroom 827-B of the United States District Court for the Central District of California, Magistrate Judge Patrick J. Walsh, Presiding. The parties answered ready for trial. A panel of eight jurors was called and sworn.

The cases was tried to the jury on February 3, 4, 5, and 8 and 9, and the case was then submitted to the jury for deliberation.

On February 11, 2010, the jury returned a unanimous verdict as follows:

Question No. 1:

Did defendant Steven Moody violated plaintiff Michael Walker's constitutional rights by withholding or concealing evidence that tended to show that plaintiff was innocent of the criminal charges against him?

Yes X No ___

Please answer the next question.

Question No. 2:

Did defendant Robert Pulido violate plaintiff Michael Walker's constitutional rights by withholding or concealing evidence that tended to show that plaintiff was innocent of the criminal charges against him?

Yes X No ___

Please answer the next question.

Question No. 3:

Did defendant Steven Moody violate plaintiff Michael Walker's constitutional rights by causing him to be maliciously prosecuted?

Yes ___ No X

Please answer the next question.

Question No. 4:

Did defendant Robert Pulido violate plaintiff Michael Walker's constitutional rights by causing him to be maliciously prosecuted?

Yes ___ No X

If you answered all the foregoing questions "No," the presiding juror should date and sign this form. If you answered any one of the foregoing questions "Yes," please answer the following question.

Question No. 5

We award plaintiff compensatory damages in the sum of:

$106,000.00

If you answered Question No. 1 and/or Question No. 3 "Yes," please answer Question No. 6.

If you answered Question No. 2 and/or Question No. 4 "Yes," please answer Question No. 7.

Question No. 6

We assess punitive damages against defendant Steven Moody in the amount set forth below, or we have left the line blank if we determined that no punitive damages should be assessed:

$ _____

Question No. 7

We assess punitive damages against defendant Robert Pulido in the amount set forth below, or we

have left the line blank if we determined that no punitive damages should be assessed:

$ _____

The presiding juror should date and sign this form.

Dated: February 11, 2010

/S/
Presiding Juror

ORDER

Therefore, IT IS HEREBY ORDERED, DECREED AND ADJUDGED that judgment be entered in favor of plaintiff Michael Walker, in accordance with the jury's verdict, in the sum of $106,000.00, plus interest accrued, and against defendants Steven Moody and Robert Pulido; and that plaintiff Michael Walker, as the prevailing party in accordance with the jury's verdict, this 42 U.S.C. § 1983 action, may be entitled to recover his attorneys' fees and costs reasonably incurred in prosecuting this action in accordance with 42 U.S.C. § 1988, and the Federal Rules of Civil Procedure and the U.S. Central District Local Rules.

Dated: February 16, 2010

/s/Patrick J. Walsh
Honorable Patrick J. Walsh
United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 08-4707 PJW

[Filed January 19, 2010]

MICHAEL WALKER,	)
	)
Plaintiff,	)
	)
v.	)
	)
CITY OF LOS ANGELES, ET AL.,	)
	)
Defendants.	)
	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

I.

INTRODUCTION

In 2005, Plaintiff was arrested in Los Angeles for committing a series of demand-note style robberies at retail establishments in southwest Los Angeles. Three days after he was arrested, a similar demand-note robbery and an attempted demand-note robbery occurred in the same neighborhood. The police did not

provide the prosecutor or the defense with evidence of the subsequent robbery and attempted robbery. In fact, police told them that the demand-note robberies had stopped when Plaintiff was arrested. As a result, Plaintiff was charged with robbery and spent more than two years in jail. After the trial court ordered LAPD to produce the evidence relating to the subsequent robberies, it became apparent that Plaintiff was not the robber and he was, ultimately, adjudicated factually innocent and released from jail. This lawsuit followed, in which Plaintiff alleges that Defendants violated his constitutional rights when they withheld evidence of the other robberies.

Defendants now move for summary judgment, arguing that they are not liable for violating Plaintiff's civil rights because they were not required to turn over the evidence of the other robbery and attempted robbery. For the reasons explained below, the Court disagrees and holds that it was clearly established in 2005 that this evidence should have been turned over under *Brady v. Maryland*, 373 U.S. 83 (1963). The Court also finds that Defendants' failure to timely produce the evidence resulted in prejudice to Plaintiff, i.e., he spent two years in jail for a crime he did not commit. For these reasons, Defendants' motion for summary judgment is denied.

As to Plaintiff's other claims, i.e., that Defendants violated *Brady* when they destroyed a videotape of the subsequent attempted robbery and that they violated his constitutional rights when they continued to investigate him after they knew or should have known that he was innocent, the Court concludes that Plaintiff has failed to produce sufficient evidence to survive

summary judgment on these claims and, therefore, they are subject to dismissal.

II.

SUMMARY OF FACTS[1]

In the summer of 2005, Stanley Smith began robbing businesses primarily in the Crenshaw corridor of LAPD's Southwest Division. Defendant Detective Pulido assigned the investigation to Defendant Detective Moody. Between June 27 and August 13, 2005, Smith robbed 11 businesses in and around the Crenshaw corridor of LAPD's Southwest Division. He used the same *modus operandi* ("MO") each time. He entered a retail store, like a video store, and posed as a customer, pretending that he wanted to buy or rent something from the store. He then approached the sales clerk to pay for the item and handed the clerk a note that read, in essence, "This is a robbery, give me all your money." Smith sometimes displayed a weapon and sometimes did not. Other times he simulated that he had one. After receiving the money from the clerk, Smith fled on foot. Smith was described by various victims and witnesses as a black man between 25 and 45 years old, anywhere from 5'-5" to 6' tall, and weighing between 100 and 180 pounds.[2]

---

[1] The Court views the evidence and the inferences it draws from the evidence in a light most favorable to Plaintiff. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

[2] Defendants argued at the hearing on this motion that the evidence does not establish that Smith was the robber in all of

On August 13, 2005, Smith robbed the EB Games store in the Crenshaw corridor. Three days later, Plaintiff went into the same store to rent a movie. He was approached by the store's security guard who told him that employees had identified him as the robber from the robbery three days before. Plaintiff agreed to

---

these robberies. They point out that they have not yet reached a conclusion as to who committed these other robberies, except for the ones that Smith pleaded guilty to. The Court, however, is not focused on what the police and the prosecutor have or have not concluded. Reviewing this evidence in a light most favorable to Plaintiff and drawing the inferences from that evidence in his favor, the Court concludes that there is a reasonable inference that Smith committed these other robberies. For example, in July 2005, there was an attempted robbery at Checks Cashed. The robber produced a note stating, "This is a robbery Unload your teller Hurry before I strat (sic) shooting." (Exh. 6 to Moody Dec.) The victim described the robber as a 35 to 40 year old black man, 5'-6" to 5'-9", weighing 170 to 180 pounds. (Exh. 6 to Moody Dec.) On August 21, 2005 a Hollywood Video store was robbed with a note reading, "This is a robbery/Unload your teller an (sic) your safe/Hurry before I strat (sic) shooting/You got five second/If not you die." (Exh. 8 to Arroyo Dec.) The victim in the Hollywood Video robbery described the robber as a 30-year-old black man, 5'-8" to 5'-9", weighing 160 to 170 pounds. (Exh. 10 to Arroyo Dec.) Further, throughout the investigation, the police, including Moody, assumed that the demand-note robberies committed prior to Plaintiff's arrest were committed by the same person. (*See, e.g.*, Pulido Depo. at 35-36; Moody Depo. at 42-43.) It defies common sense to believe that more than one demand-note robber of retail stores was operating in Southwest Division in the summer of 2005, both matching the same general description, and both misspelling the word "start" on their demand notes. This conclusion is further bolstered by the fact that, after Smith was arrested, there were no more demand-note robberies at retail establishments in the area. (Eksler Dec. at ¶ 10.)

wait for police to clear up the situation. Police arrived and arrested him.

Detective Moody met with Plaintiff at the police station where Plaintiff was being held. Plaintiff waived his *Miranda* rights and agreed to talk with Moody. He told Moody that he had not robbed the store and that the employees must be mistaken. He consented to allow Moody to search his possessions, which were in a nearby home where Plaintiff was staying temporarily. Among other things, Plaintiff also told Moody that he always sported a shaved-head style haircut and that he had shaved his head recently. (Walker Dec. at ¶ 3.)

Plaintiff was charged with robbery. Unable to secure a bond, he stayed in jail from August 15, 2005 until November 26, 2007.

On August 19, 2005, three days after Plaintiff was arrested, Smith attempted to rob The Golden Bird, a restaurant in Southwest Division, again using a demand note. The robbery was thwarted when the clerk told Smith that she would not turn over any money and Smith left the restaurant. (Moody Dec. Exh. 23.) That same day, Smith robbed a nearby Burger King, again using a demand note, but this time including in the note that the victim had only five seconds to turn over the money. (Moody Dec. Exh. 24.)

Moody learned of the attempted robbery of The Golden Bird and the robbery of the Burger King soon after they occurred. (Moody Depo. at 128, 162.) He was surprised that demand-note robberies were continuing after Plaintiff was in jail because he believed that Plaintiff was responsible for all of the demand-note

robberies of retail stores in Southwest Division that summer. (Moody Depo. at 130, 152.) He later prepared follow-up reports, which he provided to the prosecutor, and failed to point out that this other demand-note robbery and the attempted robbery had taken place in the same neighborhood three days after Plaintiff was jailed.[3] (Moody Depo. at 128, 144, 162-63.)

On September 14, 2005, Smith tried to rob a Blockbuster in Lawndale, California, about ten miles from the Crenshaw corridor, and was caught. He told police after his arrest that he had been committing about two robberies a week to support a cocaine habit.

Following Plaintiff's arrest, Moody investigated Plaintiff's connection to the other demand note robberies that occurred between June 27 and August 15, 2005, the day before Plaintiff was arrested. Moody showed the victims and witnesses from those other robberies a photospread, which contained Plaintiff's photograph and five others, with mixed results. Some of the witnesses picked out Plaintiff, others did not, and still others provided what can best be described as equivocal identifications, i.e., "It looks most like him (Walker), but I'm not sure."

---

[3] Moody concedes he knew about The Golden Bird attempted robbery soon after it took place. He testified at a hearing in the criminal case that he also knew about the Burger King robbery right after it happened. (Moody Depo. at 162.) He now claims that that testimony was in error. (Moody Depo. at 163.) But, for purposes of this motion, the Court assumes that Moody knew soon after August 19, 2005 about both crimes and failed to tell the prosecutor about them.

Moody presented Plaintiff's case to a deputy district attorney for prosecution. In his reports, Moody claimed that the demand-note robberies had stopped when Plaintiff was arrested. He also pointed out that Plaintiff had admitted to having recently shaved his head, which would explain why he did not have hair at the time of his arrest, even though witnesses to some of the robberies described the robber as having hair.

The prosecutor was concerned with the tentative identifications made by the witnesses and ordered a live line-up. Two of the four witnesses picked Plaintiff out of the lineup and the prosecutor elected to go forward with the case.

Deputy public defender Meredith Rudhman was appointed to represent Plaintiff in the Superior Court. Plaintiff convinced her from the start that he was innocent and that it was a case of mistaken identity. Counsel knew from her experience as a defense lawyer that demand-note robberies at retail businesses like EB Games were unusual. (Rudhman Dec. at ¶ 5.) She also knew that, if she could find evidence that the robberies continued after Plaintiff had been arrested, it would significantly bolster his claim of innocence. (Rudhman Dec. at ¶ 10.) Rudhman requested that the prosecutor provide evidence of similar demand-note robberies occurring after Plaintiff's arrest. None was produced. After months turning to years of haggling, Plaintiff's counsel moved to compel LAPD to produce evidence of similar crimes. LAPD resisted the motion, contending at a hearing that it was not able to provide such information. The court disagreed and ordered production. In response to the order, LAPD turned over the evidence relating to the August 19, 2005 robbery of

Burger King and the attempted robbery of The Golden Bird. Once that evidence was turned over, it became obvious that Plaintiff was not the robber of EB Games, which was confirmed when it was determined that Smith's fingerprint was on a video game he had been holding when he approached the check-out counter at EB Games. Thereafter, all of the charges against Plaintiff were dismissed and he was adjudicated factually innocent of the crimes he had spent more than two years in jail for committing. This lawsuit followed. Plaintiff claims herein, among other things, that Defendants violated his constitutional rights when they withheld from the prosecutor and defense counsel the fact that demand-note robberies had continued in and around the Crenshaw corridor after Plaintiff had been arrested.

III.

ANALYSIS

Defendants bring this motion for summary judgment or partial summary judgment, arguing that Plaintiff has not mustered the requisite evidence to establish that Defendants violated his constitutional rights when they failed to provide the defense with the evidence that demand-note robberies continued in the area after Plaintiff was arrested. Alternatively, they argue that, even assuming that they should have turned over the evidence, the law was not clearly established in 2005 that they should have and, therefore, they are immune from suit.

As explained in detail below, Plaintiff had a clearly established constitutional right to this evidence and Defendants' failure to produce it was a violation of his

rights. For this reason, Defendants' motion for summary judgment is denied. However, Defendants' motion for partial summary judgment is granted on some of Plaintiff's other claims, as detailed below.

A. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A "genuine issue" exists only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party in a summary judgment motion is tasked with presenting admissible evidence that establishes that there is no genuine, material factual dispute and that he is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. *See Anderson*, 477 U.S. at 248. A district court views the inferences it draws from the underlying facts in a light most favorable to the non-moving party. *See Matsushita,* 475 U.S. at 587.

Under Rule 56, the non-moving party also has a burden in opposing a summary judgment motion. He must make a "showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of [his] case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23.

B. Defendants' Failure to Timely Produce Evidence that Smith Had Robbed One Store in the Crenshaw Corridor and Attempted to Rob Another Nearby Using a Demand Note Three Days After Plaintiff Was Placed in Custody Violated Plaintiff's Rights under *Brady*

Under the Due Process Clause of the United States Constitution, the government is required to voluntarily produce exculpatory evidence to a defendant. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In order to fall under *Brady*, evidence must be: 1) favorable to the accused, and 2) material to his guilt or innocence. *United States v. Bagley*, 473 U.S. 667, 675-76 (1985). Evidence is "material" if there is a reasonable probability that it would have caused a different result in the case. *Kyles v. Whitley*, 514 U.S. 419, 433-34 (1995).

The fact that Smith used a demand note to commit robberies at retail establishments in and around the Crenshaw corridor three days after Plaintiff was jailed for committing a demand-note robbery at a retail establishment in the Crenshaw corridor was clearly *Brady* material--it was favorable to Plaintiff and it was material to his innocence. It is undisputed that, once this evidence was turned over to the prosecutor and the defense, it became obvious that Plaintiff was not the demand-note robber and, after that fact was confirmed by matching Smith's fingerprint to the fingerprint left on a video game in EB Games, Plaintiff was exonerated.

The Court's finding that this evidence should have been turned over is based on the particular circumstances of the investigation and prosecution of this case. There was no physical evidence tying

Plaintiff to the robberies. (The only physical evidence the police had was a fingerprint from the EB Games robbery and that print did not match Plaintiff's.) The victims and witnesses were divided as to whether Plaintiff was the robber. Some believed he was. Others did not. And still others were unsure. Even some of those who believed that Plaintiff was the robber were not 100% certain that he was the robber. When Moody presented the case to the prosecutor, she felt it was insufficient to go forward and ordered a line-up. When two of the four witnesses identified Plaintiff as the robber--meaning the other two did not--she decided to go forward.

Thus, there can be no doubt that the evidence that the demand-note robberies allegedly stopped after Plaintiff was arrested, which Moody bolded in his reports for emphasis, was critical to the prosecution of this case because demand-note robberies at retail establishments like video stores were rare. (*See* Pulido Depo. at 33; Arroyo Depo. at 17; Eksler Dec. at ¶ 2; Rudhman Dec. at ¶ 5.) Presumably, the prosecutor relied heavily on this fact when she determined to go forward with the case. As such, the Court concludes that evidence that someone matching Plaintiff's description continued committing these type of robberies after Plaintiff was arrested fell within *Brady* and should have been turned over.

Defendants take great pains to explain why Moody withheld the evidence. The essence of their argument is that Moody and Pulido had determined in good faith that the robberies committed after Plaintiff was arrested were committed by someone else because the robber included in his demand notes that the victim

had only five seconds to comply. They argue, it seems, that because they acted in good faith there was no *Brady* violation. That argument is rejected. In the first place, the facts do not support it. The note used in The Golden Bird robbery did not include the five-second limit. (Exh. 23 to Moody Dec.) Even if it had, Defendants' argument would still fall short. *Brady* does not only apply to instances of bad faith. *Brady*, 373 U.S. at 87. It applies to good-faith suppressions, too. *Id.* Nor is it limited to intentional acts. *Id.* An inadvertent failure to disclose is also a violation of due process under *Brady*. *Id.*

Defendants contend that they are insulated from liability because the deputy district attorney independently elected to pursue these charges. *See, e.g.*, *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981). This argument, too, is rejected. The prosecutor's decision to pursue charges against Plaintiff was made by the deputy district attorney after Moody reported to her that the demand-note robberies had ended when Plaintiff was arrested, which Moody knew was false. (Moody Depo. at 143.) Where, as here, the police withhold critical information from the prosecutor and she bases her decision to file charges on incomplete information, the police are not insulated from suit because she elected to go forward with the case. *See, e.g., Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067-68 (9th Cir. 2004) ("[T]he presumption of prosecutorial independence does not bar a subsequent § 1983 claim against state or local officials who improperly exerted pressure on the prosecutor, knowingly provided misinformation to him, concealed exculpatory evidence, or otherwise engaged in wrongful or bad faith conduct

that was actively instrumental in causing the initiation of legal proceedings.").

Defendants argue that Plaintiff was not prejudiced because he received the *Brady* material before trial. The Court disagrees. First, *Brady* does not apply only to trial, it applies to pre-trial proceedings as well. *United States v. Gamez-Orduno*, 235 F.3d 453, 461-62 (9th Cir. 2000) ("The suppression of material evidence helpful to the accused, whether at trial or on a motion to suppress, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."); *United States v. Barton*, 995 F.2d 931, 935 (9th Cir. 1993) (holding *Brady* applies to suppression hearings). Second, there was no trial. There was only an arrest and detention. The test the Court applies in this situation is whether the evidence was produced in time to be of value to the accused. *See, e.g., United States v. Coppa*, 267 F.3d 132, 142 (2d Cir. 2001) (finding *Brady* material must be disclosed "no later than the point at which a reasonable probability will exist that the outcome would have been different if an earlier disclosure had been made"). The evidence in this case was not produced in time to be of any value to Plaintiff in his efforts to gain his freedom in 2005, 2006, and most of 2007. Thus, there was prejudice. *See Tennison v. City & County of S.F.*, 570 F.3d 1078, 1089-90 (9th Cir. 2009) (upholding district court's finding that production of *Brady* material on second-to-last day of hearing on motion for new trial was much too late to be of value to the defendant). Had Defendants withheld this evidence for weeks, or even months, the result might have been different. But where, as here, the evidence was kept from the prosecutor and the defense

for almost two years and caused Plaintiff to be incarcerated during that period, the Court has little trouble concluding that there was prejudice.

Defendants argue that they are entitled to qualified immunity because it was not clearly established in 2005 that they were required under *Brady* to produce similar-crimes evidence. They contend that that requirement did not become clear until 2007, when the Ninth Circuit decided *United States v. Jernigan*, 492 F.3d 1050, 1056-57 (9th Cir. 2007)(en banc). They point out that the qualified immunity analysis should be performed in the specific context of a case and turns on the particular nature of the right in issue, not broad, general principles like *Brady*. *See Brosseau v. Haugen*, 543 U.S. 194, 198-99 (2004) (per curiam). They argue that under the particular facts in this case there was no violation. Again, the Court disagrees. *Jernigan* did not create new law, nor did it claim to. It relied on *Brady*, a 1963 Supreme Court case that held that prosecutors had to turn over evidence that was material and exculpatory, and found that evidence that similar bank robberies by a suspect resembling the accused that occurred after the accused was in jail was exculpatory. *Jernigan*, 492 F.3d at 1053-57. *Brady* was clearly established law for more than 40 years at the time Plaintiff was arrested. The fact that the Ninth Circuit had not applied it to similar-crimes evidence before *Jernigan* is of no import. *See Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008) ("For a legal principle to be clearly established, it is not necessary that 'the very action in question has previously been held unlawful.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Nor had any court held before *Jernigan* that there was an exception to *Brady* for

exculpatory evidence that fell under the heading of "similar-crimes evidence."[4]

Importantly, even assuming that the law regarding "other crimes" evidence was not clearly established until *Jernigan*, the Court would still conclude that it was clearly established in 2005 that Defendants should have produced the evidence of the other robberies in this case. The "other crimes" evidence in *Jernigan* was not directly relevant to guilt or innocence. There, the government did not present evidence that demand-note bank robberies ceased after Jernigan was arrested to prove that she was guilty. *Jernigan*, 492 F.3d at 1052. It merely presented the testimony of the eyewitnesses who identified her as the bank robber. *Id.*

Here, the government relied on the "fact" that the demand-note robberies ceased after Plaintiff was arrested to confirm that he was the robber. The fact that the crimes continued after Plaintiff was arrested directly contradicted that evidence and was required to be turned over to the defense, just as the government's evidence that not all of the witnesses identified

---

[4] The Court has considered the Supreme Court's decision in *United States v. Ruiz,* 536 U.S. 622, 629 (2002), overturning the Ninth Circuit's holding that prosecutors are required to turn over *Brady* material prior to a plea. In *Ruiz*, the court carved out an exception for production of certain types of *Brady* material in the context of a case where a defendant is pleading guilty. But the *Brady* material the defendant sought in that case was impeachment, which the Supreme Court noted was not necessarily related to guilt or innocence. *Id.* at 625, 629-30. The court made clear that, prior to the plea, the government had produced any information it had that established that the defendant was innocent. *Id.* at 631. Thus, *Ruiz* is distinguishable.

Plaintiff as the robber and that others were equivocal in their identifications had to be turned over.

Finding that Defendants violated Plaintiff's rights under *Brady* does not end the inquiry, however, because, in order for Plaintiff to prevail, he has to show that Defendants acted with deliberate indifference to or reckless disregard for his rights or for the truth in withholding the evidence. *See Tennison*, 570 F.3d at 1089. According to Moody's testimony in the criminal proceeding, Moody knew when he told the prosecutor that the demand-note robberies had stopped after Plaintiff was arrested that that statement was false. (Moody Depo. at 143.) This is sufficient to meet the threshold established in *Tennison* and warrants the case proceeding to trial on this ground.

C. Plaintiff Has Failed to Carry His Burden to Show that Defendants' Use of the Photospread Violated the Constitution

Plaintiff has alleged in his Complaint, and argues herein, that Defendant Moody violated his constitutional rights when Moody pursued the investigation knowing that Plaintiff was innocent. (Opposition at 22.) Among the charges Plaintiff levels at Moody are that Moody showed witnesses a photospread that included Plaintiff's photo and some of them identified Plaintiff. (Opposition at 22.) As explained below, the Court finds that Plaintiff has failed to present sufficient admissible evidence to go forward on this claim.

To establish a claim of deliberate fabrication of evidence, a plaintiff must show: 1) a law enforcement officer continued his investigation even though he knew

or should have known that the suspect was innocent, or 2) the officer used investigative techniques that were so coercive and abusive that he knew that they would cause false evidence. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The evidence does not support Plaintiff's allegation that Moody knew that Plaintiff was innocent and continued to pursue a case against him even so. Plaintiff's innocence was not established until 2007, when the evidence of the other robberies and attempted robberies were produced to the prosecutor and the defense, triggering the fingerprint analysis, which established that Smith was the robber of EB Games. Moody stopped working at LAPD in late 2005.

Nor does the evidence establish that Moody should have known that Plaintiff was innocent. Importantly, the investigation of Plaintiff was not instigated by the police, it was the result of the victims of the EB Games robbery mistakenly identifying Plaintiff as the robber and calling the police. It was perfectly reasonable for Moody to conduct an investigation of Plaintiff's involvement in that robbery and other similar robberies following the witnesses' identification of him even though the demand-note robberies continued after Plaintiff was in jail. Even assuming Moody recognized the inconsistency between his belief that Plaintiff was the sole demand-note robber and the fact that the demand-note robberies continued after Plaintiff was arrested, that did not mean that he was required to stop investigating Plaintiff.

As to the second prong under *Devereaux*, there is no evidence that Moody used any abusive or coercive techniques to convince witnesses to falsely identify

Plaintiff. Nor does the photospread, which is included as an exhibit, appear to be suggestive in the least. For these reasons, Plaintiff may not pursue these claims at trial.

This same analysis does not apply to Plaintiff's claims that Moody ignored and concealed evidence inconsistent with the eyewitnesses' identifications of Plaintiff. There are issues of fact relating to these claims, which require a trial.[5]

D. Destruction of the Videotape from EB Games Was Not a Violation of *Brady*

Plaintiff alleges that Defendants violated his rights under *Brady* when they deliberately destroyed a videotape of the August 19, 2005 attempted robbery of The Golden Bird. Again, the evidence does not support a constitutional claim.

The government is required to preserve evidence that appears to be exculpatory. *California v. Trombetta*, 467 U.S. 479, 489 (1984). In order to prevail on a § 1983 claim for destruction of evidence, a plaintiff must establish that the police who destroyed the

---

[5] For example, Plaintiff told Moody that he had always worn his hair closely-shaved and that he had recently shaved it. (Walker Dec. at 3.) Plaintiff claims that Moody left out the first part in attempting to persuade the prosecutor to go forward with the charges, telling her only that Plaintiff admitted that he recently shaved his head. This was important because some of the witnesses described the robber as having hair. Though this and many other allegations raised by Plaintiff do not really amount to "claims" in the Court's view, the evidence supporting them, and undermining them, may be introduced at trial to allow the parties to tell the whole story of this case.

evidence acted in bad faith. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

The videotape Plaintiff complains of was not destroyed by Defendant Moody, it was destroyed by an officer who worked in the evidence room at LAPD, Richard Record. Record did not know of the potential exculpatory value of the tape when he destroyed it, nor does Plaintiff claim that he did. In fact, Plaintiff has dismissed Record from the suit.

As to Moody's culpability, his failure was to determine at the outset that the attempted robbery of The Golden Bird was connected to the robbery of EB Games and make sure that the videotape was preserved for the EB Games' prosecution. Plaintiff has not established that Moody acted in bad faith in failing to make this connection, nor is there any evidence that Moody intentionally neglected to cross-reference the two cases so that Record would unwittingly destroy the videotape. As such, Plaintiff cannot proceed to trial on this claim.[6]

---

[6] The Court has considered the evidentiary objections raised by both sides regarding the other side's facts and overrules the objections to the extent that these facts form the basis of the Court's decision.

IT IS SO ORDERED.

Dated this 19th of January 2010.

/s/Patrick J. Walsh
PATRICK J. WALSH
UNITED STATES MAGISTRATE JUDGE

S:\PJW\Cases-Consent\Walker\walker.summary judgment.wpd

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-55692

D.C. No. 2:08-cv-04707-PJW
Central District of California, Los Angeles

[Filed November 18, 2014]

MARY TATUM,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
STEVEN MOODY, LAPD Detective;	)
ROBERT PULIDO, LAPD Detective,	)
	)
Defendants - Appellants.	)

ORDER

Before: WARDLAW and BERZON, Circuit Judges, and WHYTE, Senior District Judge.*

The panel has unanimously voted to deny the petition for rehearing.

* The Honorable Ronald M. Whyte, Senior District Judge for the U.S. District Court for the Northern District of California, sitting by designation.

Judges Wardlaw and Berzon vote to deny the petition for rehearing en banc and Judge Whyte so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied, and the petition for rehearing en banc is rejected.