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**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF LOUISIANA**

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U.S. DIST COURT
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**SHANNON KOHLER** — **CIVIL ACTION NO. 03-857**

**VERSUS** — **SECTION: D**

**PAT ENGLADE, ET AL** — **MAGISTRATE: 2**

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# MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT FILED BY ALL DEFENDANTS

**MAY IT PLEASE THE COURT:**

## PRELIMINARY STATEMENT

Plaintiff, Shannon Kohler ("Kohler"), has sued Baton Rouge Police Department Detective Christopher Johnson, Chief Pat Englade, and City of Baton Rouge as a result of the seizure of his DNA sample on November 14, 2002, in Baton Rouge, Louisiana.

The affidavit of Det. Johnson (Exhibit "A") sets forth the factual basis for Kohler's seizure warrant (Exhibit "B"). It is respectfully submitted that the warrant provided probable cause for Kohler's seizure and this suit should be dismissed.

## LAW AND ARGUMENT

### a. Standards for summary judgment:

This court is quite familiar with the requirements for summary judgment and those requirements are as follows:

In *Matsushita Electric Industrial Co. vs.. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 Led. 2d 538 (1986), the Supreme Court noted that "(w) hen the moving party has carried its burden under Rule 56(C), its opponent must do more than simply show that

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there is some metaphysical doubt as to the material facts . . . (T)he non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.' Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" **Id.** At 586 (emphasis in original; footnotes and citations omitted) (quoting FRCP 56).

In short, while it is the moving party's burden to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, once that burden is met, the non-moving party must establish the contrary proposition, usually by producing affidavits of persons with personal knowledge (not opinion, conjecture, or hearsay) setting forth specific information to be offered at trial. If the non-moving party does not demonstrate the existence of a genuine issue of material fact in dispute with respect to the disputed element of the party's case, summary judgment is appropriate.

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 Led 265 (1986), the Supreme Court held that Rule 56 of the Federal Rules of Civil procedure mandated entry of summary judgment against a party who fails to make such a showing after a proper motion, because the result is "a complete failure of proof concerning an essential element of a non-moving party's case (which) necessarily renders all other facts immaterial." Id. At 323. In other words, the defendants' burden can be met here by "pointing out to the district court -- there is an absence of evidence to support the non-moving party's case." Id. At 325.

Finally, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2506, 91 Led 2d 202 (1986), the Court completed this trilogy of Rule 56 cases by holding that:

"there is no issue for trial unless there is sufficient evidence favoring the non-moving

party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative summary judgment may be granted. Id. at 249. Put another way, does the evidence present a "sufficient disagreement to require submission to a jury or is it so one-sided that one party must prevail as a matter of law?"

**b. Elements of a wrongful seizure with a warrant claim:**

Kohler alleges that Det. Johnson misled the judge by omitting information in his possession that would have weakened the case against Kohler. To impeach the warrant, Kohler must show that Det. Johnson either deliberately or recklessly misled the judge and that without the falsehood there would not be sufficient matter in the affidavit to support the issuance of the warrant. See, *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). The necessary falsehood can be perpetrated by omission as well as commission, but the omission must be of information that is not only relevant, but dispositive, so that if the omitted fact were included, there would not be probable cause. See, *United States v. Bankston*, 182 F.3d 296, 305 (5th Cir. 1999), cert. granted on other grounds, 120 S. Ct. 1416 (March 20, 2000) (No. 99-804); *United States v. Tomblin*, 46 F.3d 1369, 1377 (5th Cir. 1995).

**c. Liability of Det. Christopher Johnson:**

On November 12, 2002, Honorable Richard Anderson, Judge of the State of Louisiana Nineteenth Judicial District Court, signed an seizure warrant to obtain a DNA sample from Mr. Kohler.

On November 14, 2002, Detective Johnson obtained a DNA sample pursuant to the above referenced seizure warrant.

It is undisputed that plaintiff's seizure was based on a seizure warrant issued by Judge Richard Anderson, State of Louisiana Nineteenth Judicial District Court. Det. Johnson acted with probable cause (seizure warrant) when he obtained the DNA sample from the plaintiff.

Louisiana Code of Criminal Procedure articles 161, et seq., "Search Warrants", provides, in pertinent part:

> Art. 161. Property subject to seizure.
> (A) A judge may issue a warrant authorizing the search for and seizure of any thing within the territorial jurisdiction of the court which:
> (3) May constitute evidence tending to prove the commission of an offense.
>
> Art. 162. Issuance of warrant; affidavit; description
> A search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant.
>
> Art. 163. Officer to whom directed; time for execution.
> A search warrant shall be directed to any peace officer, who shall execute it and bring any property seized into the court issuing the warrant.
> A search or seizure shall not be made during the nighttime or on Sunday, unless the warrant expressly so directs.
> A search warrant cannot be lawfully executed after the expiration of the tenth day after its issuance.
>
> Art. 164. Means of force in executing warrant.
> In order to execute a search warrant a peace officer may use such means and force as are authorized for arrest by Title V.
>
> Art. 165. Authority of peace officer in executing a search warrant.
> While in the course of executing a search warrant, a peace officer may make photographs, lift fingerprints, seize things whether or not described in the warrant that may constitute evidence tending to prove the commission of any offense, and perform all other acts pursuant to his duties.

It is undisputed that plaintiff was seized by Det. Johnson in Baton Rouge, Louisiana pursuant to the authority granted by state law.

In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978),

the Court held that a party may only challenge the veracity of an affidavit if that party can make a "substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth, was included by the affiant in the warrant affidavit," and that the allegedly false statement was necessary for a finding of probable cause. *Id.* at 155, 156, 98 S.Ct. at 2675, 2676-77. The inquiry does not continue if the court finds that the exclusion of the allegedly false statement does not result in a lack of probable cause. The *Franks* doctrine applies to omissions of information from affidavits as well. *United States v. Bonds*, 12 F.3d 540, 568-69 (6th Cir. 1993).

A *Franks* hearing may be merited when facts have been omitted in a warrant application, but only in rare instances. The Sixth Circuit Court of Appeal recently held in *U.S. v. Atkin*, that affidavits with potentially material omissions, while not immune from a *Franks* inquiry, are much less likely to merit a *Franks* hearing than are affidavits including allegedly false statements. *U.S. v. Atkin*, 107 F.3d 1213, 1217 (6th Cir. 1997). The court reasoned that allowing omissions to be challenged would create a situation where almost every affidavit of an officer would be questioned. *Id.*

Affidavits in support of warrants "are normally drafted by non-lawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). An affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation. *United States v. Colkley*, 899 F.2d 297, 302 (4th Cir. 1990). Clearly an affidavit should not be judged on formalities, as long as probable cause is

evident.

Prosecutors, on the other hand, have a greater duty to disclose exculpatory information. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* and its progeny established the prosecutor's duty to disclose to the defendant exculpatory evidence, defined as material evidence that would have a bearing upon the guilt or innocence of the defendant. *Brady*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-1197, 10 L.Ed.2d 215 (1963); *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S.Ct. 2392, 2401-02, 49 L.Ed.2d 342 (1976); *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985). This rule, derived from due process, helps to ensure fair criminal trials, protecting the presumption of innocence for the accused, while forcing the state to present proof beyond a reasonable doubt. *Bagley*, 473 U.S. at 675, 105 S.Ct. at 3380; *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-97.

By contrast, the probable cause determination in *Franks*, derived from the Fourth Amendment, involves no definitive adjudication of innocence or guilt and has no due process implications. Because the consequences of arrest are less severe and easier to remedy than the consequences of an adverse criminal verdict, a duty to disclose potentially exculpatory information appropriate in the setting of trial to protect the due process rights of the accused is less compelling in the context of an application for a warrant.

The duties imposed by *Brady* and *Franks* differ further. In the *Brady* context, the constitutional obligation to disclose material exculpatory information attaches regardless of the prosecutor's intent and constitutional error can be found without

a demonstration of moral culpability. *Agurs*, 427 U.S. at 110, 96 S.Ct. at 2400-01. A *Franks* violation, however, does require a showing intent, i.e., a "deliberate falsehood" or "reckless disregard for the truth." *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684.

Whereas the "overriding concern" of *Brady* is with the "justice of finding guilt" that is appropriate at trial, *Agurs*, 427 U.S. at 112, 96 S.Ct. at 2401, *Franks* recognizes that information an affiant reports may not ultimately be accurate, and is willing to tolerate such a result at that early stage of the process, so long as the affiant believed the accuracy of the statement at the time it was made. *Franks*, 438 U.S. at 165, 98 S.Ct. at 2681.

These disparate standards of intent reflect differences in the consequences of error in the two contexts. They also indicate recognition that the non-lawyers who normally secure warrants in the heat of a criminal investigation should not be burdened with the same duty to assess and disclose information as a prosecutor who possesses a mature knowledge of the entire case and is not subject to the time pressures inherent in the warrant process. A statement of these differences does not condone deliberate misrepresentations in the warrant application process. Rather it points out that the obligations shouldered during the adjudication process should not be imposed by inference onto the warrant application process.

To interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit, places an extraordinary burden on law enforcement officers, compelling them to follow up and include in a warrant affidavit every hunch and

detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. Under such a scenario, every arrest would result in a swearing contest with participants arguing after the fact over whether exculpatory evidence even existed. *Mays v. City of Dayton*, 134 F.3d 809 (6th Cir. 1998).

In *Morin v. Caire,* 77 F.3d 116 (5th Cir. 1996), the Fifth Circuit held:

> "In order to constitute a constitutional violation sufficient to overcome the qualified immunity of an arresting officer, the material misstatements and omissions in the warrant affidavit must be of "such character that no reasonable official would have submitted it to a magistrate."[1] Furthermore, specific omitted facts must be "clearly critical" to a finding of probable cause.[2] Caire's alleged omissions, even if proven true, would not survive this test." 77 F.3d at 122.

The plaintiff claims that the warrant affidavit does not inform the court that the plaintiff had been pardoned in 1996 for the 1982 burglary conviction[3], that plaintiff wore size 14 shoes or boots and therefore it was impossible for him to have left the size 10 or 11 bloody footprints in the Pace home[4], and that plaintiff "had not worked at the Choctaw Drive address for 11 years.[5]

**The failure to inform the court of the 1996 pardon for the 1982 burglary conviction**

The plaintiff complains that Detective Johnson failed to inform the court that,

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1 *Hale v. Fish,* 899 F.2d 390, 402 (5th Cir. 1990)

2 *Id.* at 400.

3 Plaintiff's complaint, paragraph 11.

4 Plaintiff's complaint, paragraph 12.

5 Plaintiff's complaint, paragraph 14.

in 1996, he had received a pardon for his 1982 burglary conviction. Assuming that plaintiff, in fact, received a pardon in 1996 for the conviction and communicated that to Detective Johnson, the failure to put that in the warrant application is of no moment. The 1996 pardon did not negate the fact that plaintiff was a convicted burglar, as far as it related to his prior criminal history. In other words, the pardon did not mean plaintiff was innocent of being a burglar. Detective Johnson's failure to include the pardon information is not a material omission of fact in the affidavit of "such character that no reasonable official would have presented it to a magistrate" nor was that omission "clearly critical to a finding of probable cause."[6] An experienced homicide detective would not negate the burglary conviction from his evaluation of a suspect just because the suspect had received a pardon for same.

**The failure to inform the court of plaintiff's shoe size**

Likewise, as stated in Detective Johnson's affidavit, the omission of plaintiff's alleged shoe size, even if true, would not exclude plaintiff as a suspect in the murder of Charlotte Murray Pace. A reasonable homicide detective could not definitively state that the print was made by the actual perpetrator, a co-perpetrator, or an individual who had been at the scene prior to it being secured by the police department.

Detective Johnson's alleged failure to include reference to plaintiff's shoe size in relation to the bloody shoe print is not a material omission of fact in the affidavit.

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6. *Morin v. Caine*, 77 F3d. At 122 (5th Cir. 1996).

**The failure to inform the court of that plaintiff had not worked at the Choctaw Drive address for 11 years**

The fact that plaintiff allegedly had not worked at the Choctaw Drive address for 11 years, even if true, does not negate the fact that he would have still be familiar with the area. From the perspective of an experienced homicide detective, the fact that the items taken from the Gina Green murder scene were found near his former place of employment do provide a link to Kohler. Also, as stated in Detective Johnson's affidavit, the fact that Kohler was unemployed is significant because that gave him an opportunity to be mobile. Kohler would have been able to travel to many areas of Baton Rouge. Additionally, having financial stress would be one of the factors set forth by the FBI profile.

It is respectfully submitted that plaintiff's claim that Det. Johnson misrepresented the facts to the state district court judge is not supported by the summary judgment evidence. Rather, the opposite is true. Detective Johnson did provide an accurate recitation of the facts he discovered through the investigation.

**d. Liability of Chief Pat Englade:**

Neither a supervisory official or a municipality may be held liable pursuant to section 1983 under a theory of respondeat superior. *Lozano v. Smith*, 718 F. 2d 756, (5th Cir. 1983); *Benavides v. County of Wilson*, 955 F. 2d 968, 972 (5th Cir. 1992), *cert. denied*, 506 U.S. 824, 113 S.Ct. 79 (1992). To be liable under section 1983 a person must either be personally involved in the acts causing the alleged deprivation of constitutional rights, or there must be a causal connection between the acts of the person and the constitutional violation sought to be addressed.

*Lozano, supra.*

Chief Englade played no part in plaintiff's arrest. Since Englade had no personal involvement he cannot be held liable.

In addition, since the officers acted properly and did not violate Kohler's constitutional rights, plaintiff cannot show a causal connection between Englade's conduct and the alleged constitutional violation. Therefore, summary judgment in favor of Chief Englade is proper.

**e. Liability of City of Baton Rouge:**

Neither a supervisory official or a municipality may be held liable pursuant to section 1983 under a theory of respondeat superior. *Lozano v. Smith*, 718 F.2d 756 (5th Cir. 1983); *Benavides v. County of Wilson*, 955 F.2d 968, 972 (5th Cir. 1992), *cert. denied*, 506 U.S. 824, 113 S.Ct. 79 (1992). In any case alleging municipal liability under section 1983, the plaintiff must be able to prove a direct causal connection between a policy, practice or custom of the municipality being sued and the constitutional violation sought to be addressed. *City of Canton, Ohio, v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1203, 103, L.ed. 2d 412 (1989). To be liable under section 1983 a person must either be personally involved in the acts causing the alleged deprivation of constitutional rights, or there must be a causal connection between the acts of the person and the constitutional violation sought to be addressed. *Lozano, supra.*

There is no summary judgment evidence that any policy of City of Baton Rouge was responsible for any alleged violation of plaintiff's constitutional rights.

Therefore, since there is no evidence that any policy of City of Baton Rouge

was responsible for any alleged violation of plaintiff's constitutional rights, plaintiff cannot show a causal connection between any policy of City of Baton Rouge and the alleged constitutional violation. Therefore, summary judgment in favor of City of Baton Rouge is proper.

In addition, since Detective Johnson acted properly and did not violate Kohler's constitutional rights, plaintiff cannot show a causal connection between any policy of City of Baton Rouge and the alleged constitutional violation. Therefore, summary judgment in favor of City of Baton Rouge is proper.

## CONCLUSION

To interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially exculpatory evidence be included in an affidavit, places an extraordinary burden on law enforcement officers, compelling them to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. Under such a scenario, every arrest would result in a swearing contest with participants arguing after the fact over whether exculpatory evidence even existed. *Mays. v. City of Dayton*, 134 F.3d 809 (6th Cir. 1998).

The law and evidence clearly show that probable cause existed for plaintiff's seizure and that the warrant affidavit does not contain misrepresentations or material omissions that are "of such character that no reasonable official would have submitted it to a magistrate."[7]

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7 *Morin v. Caire*, 77 F.3d at 122.

Based on the state court seizure warrant, it is respectfully submitted that probable cause existed for plaintiff's seizure of his DNA and this complaint should be dismissed.

Respectfully submitted,
By Attorneys:

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**CERTIFICATE**

I hereby certify that a copy of the foregoing has this day been mailed, postage prepaid to:

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BATON ROUGE, LOUISIANA, this 30th day of September, 2004.

JAMES L. HILBURN