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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOAQUIN CIRIA,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO POLICE DEPARTMENT; ARTHUR GERRANS; JAMES CROWLEY; NICOLAS J. RUBINO; AND DOES 1-20, INCLUSIVE,

Defendants.

Case No. 22-cv-07510 KAW (JCS)

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS OF AUTHORITIES

Hearing Date: April 18, 2024
Time: 1:30 p.m.
Place: Via Zoom

Trial Date: July 1, 2024

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that at 1:30 p.m. on April 18, 2024, at the U.S. District Court, N.D. Cal., via Zoom before the Hon. Kandis A. Westmore, Defendants City & County of San Francisco (including the SFPD), Arthur Gerrans, James Crowley, and Nicholas J. Rubino (Defendants) move for summary judgment, in whole or in part, pursuant to F.R.C.P. 56, on the following grounds:

1. Plaintiff's § 1983 malicious prosecution claim is barred by: probable cause; no motive to violate a specific constitutional right; qualified immunity; and no participation by Officer Rubino.

2. Plaintiff's § 1983 fabrication of evidence claim is barred because: Plaintiff cannot show Inspector Crowley and Inspector Gerrans knew or should have known Plaintiff was innocent; George Varela's accusation of Plaintiff predated his conversation with the inspectors, so couldn't have been fabricated by them; most of the identifications were not used to charge Plaintiff; the inspectors' interview techniques with Varela, Duff, and Guevara were not so coercive and abusive that the inspectors knew or should have known that those techniques would yield false information; qualified immunity applies; and there was no participation by Officer Rubino.

3. Plaintiff's § 1983 nondisclosure of exculpatory evidence claim against the inspectors is barred because there was either nothing for the inspectors to disclose, or what needed to be disclosed was disclosed. Plaintiff's nondisclosure claim against Officer Rubino fails because there is insufficient evidence to show the exculpatory evidence exists, or that it would be known to Officer Rubino.

4. Plaintiff's § 1983 conspiracy claim is barred by qualified immunity and lacks evidence.

5. Plaintiff's § 1983 municipal liability claim lacks evidence of a policy or causation.

6. All of Plaintiff's remaining California claims are barred by both probable cause and untimeliness; Officer Rubino is immune under Cal. Civ. Code § 43.55; the Bane Act claim is barred by Cal. Gov. Code § 821.6; and in California there can be no conspiracy as between co-employees.

7. There is insufficient evidence to support federal or California punitive damages claims.

This motion is based on this notice and MPA; a Joint Statement of Undisputed Facts; and the declarations of James Crowley, Arthur Gerrans, Kathleen Guevara, Louis Lipset, Nicholas Rubino, John Tursi, and Aaron Wiener, with exhibits (some filed under seal), the files of this Court, and such matters as may be raised through hearing.

INTRODUCTION

Two murders happened back-to-back in San Francisco on the weekend of March 24-25, 1990. Defendant San Francisco Police Inspectors James Crowley and Arthur Gerrans investigated both murders. Roberto Socorro shot Ruben Alfonso to death on March 24 in the Mission District. Then on March 25, Socorro's associate Felix "Carlos" Bastarrica was gunned down on Clara Street in the South of Market neighborhood. Bastarrica's killer fled in a white Monte Carlo. Eyewitnesses saw it happen. Alfonso's associate, Plaintiff Joaquin Ciria, was convicted for Bastarrica's murder. Plaintiff now claims Defendants violated his constitutional rights. But Plaintiff is wrong, as a matter of law.

Inspector Gerrans and Inspector Crowley amassed an enormous body of evidence of Plaintiff's responsibility for Bastarrica's murder. Their investigative steps, and the evidence they gathered, are documented in the substantial investigation files for both the Alfonso and Bastarrica murders. There is little if any dispute in this case about what actions the inspectors took during their investigation. And there is little if any dispute about what the various witnesses told the inspectors, or about what evidence the inspectors had. Rather, the disputes in this case are legal. Plaintiff contends that the inspectors lacked probable cause to charge Plaintiff based on the information they had – a legal issue. Plaintiff contends that the way the inspectors interviewed witnesses Kenneth Duff, Kathleen Guevara, and George Varela was so coercive that the law must impose constructive knowledge on the inspectors that they were creating false evidence – a legal issue. And while Plaintiff contends that the inspectors failed to disclose information to the prosecutor about witness inducements, the facts are undisputed that the inducements alleged in the Complaint were never actually made by the inspectors – and if they were made, they were disclosed. These are issues proper for summary judgment.

Plaintiff's § 1983 malicious prosecution claim fails, because on the undisputed evidence probable cause existed to charge Plaintiff. Probable cause requires only a probability of criminal activity and can rely on hearsay. And here, probable cause was abundant. Plaintiff was named as the murderer by his stepson (and getaway driver) George Varela and an independent eyewitness, Kathleen Guevara. Informants related accounts from two other people suggesting they knew Plaintiff was the killer. He was linked to the getaway vehicle. Many people established Plaintiff's motive: revenge for Alfonso's murder in an ongoing drug war. This established probable cause, and Plaintiff's alibi didn't

negate that, as a matter of law. And with probable cause at least arguable on these facts, qualified immunity applies. And there is no evidence of intent to interfere with a constitutional right.

Plaintiff also cannot establish a § 1983 "deliberate fabrication of evidence" claim. First, before Varela ever spoke with the inspectors, he had already told his girlfriend Kristina Martin that Plaintiff committed the murder. The inspectors therefore couldn't have coerced him into naming Plaintiff. Separately, there was nothing unlawful about how the inspectors interviewed Varela: They informed Varela his own potential liability for murder if he continued to lie to help Plaintiff. Courts have repeatedly found such advisements lawful, so as a matter of law no intent to fabricate can be inferred. As to independent eyewitnesses Guevara and Kenneth Duff, they both firmly deny any pressure to identify Plaintiff in photographs and a line-up. Plaintiff's criticism of these identification procedures does not establish the extreme coercion required under the law to infer an intent to falsify evidence. And qualified immunity applies.

Plaintiff's § 1983 claim for not disclosing exculpatory or impeachment evidence fares no better. There was nothing to disclose about the reward Guevara received from the Mayor after the trial, because it is undisputed Guevara was unaware of any reward *before* she testified. There was nothing to disclose about any "Secret Witness Program" payments; they were never approved and this program was defunct, and Plaintiff has no evidence to the contrary. There was nothing for the inspectors to disclose about Varela's immunity, because the prosecutor himself obtained the immunity in open court. And while Varela got witness relocation services at SFPD expense, the inspectors disclosed it to the prosecutor – who disclosed it to the defense before trial and on the record. And immunity applies.

As to Defendant Officer Nicholas J. Rubino, Plaintiff's § 1983 claims are baseless. Officer Rubino's only involvement was to arrest Plaintiff on the murder warrant obtained by the inspectors. It is undisputed Officer Rubino had no role in investigating or charging Plaintiff – defeating Plaintiff's § 1983 malicious prosecution and deliberate fabrication of evidence claims against him. As for Plaintiff's § 1983 suppression of evidence claim against Officer Rubino, the evidence does not support this highly implausible, even bizarre claim: Plaintiff alleges that he was the subject of a sprawling surveillance effort by the SFPD; that as part of this effort, undercover police were staking out Plaintiff's house and monitoring his comings and goings the night of the murder, so they could

confirm his alibi that he was home the night of the murder; and that Officer Rubino was part of this concerted effort, privy to the time Plaintiff arrived home, and suppressed it. But this claim rests only on Plaintiff's personal belief that some cars he saw around San Francisco during the first few months of 1990 were driven by undercover SFPD officers surveilling him, and a past arrest by Officer Rubino on December 27, 1989. That is not enough to support Plaintiff's claim, which requires too many implausible inferences. The SFPD was not surveilling Plaintiff, and Officer Rubino had no information about (or interest in) Plaintiff's activities on a Sunday when Officer Rubino was off work.

Plaintiff's § 1983 conspiracy claims are barred by qualified immunity, and also fail for lack of evidence of any agreement. And Plaintiff lacks evidence to support his § 1983 municipal liability claims against the City and County of San Francisco and its police department.

As for Plaintiff's California law claims, the Court previously ruled that Cal. Gov. Code § 821.6 immunity limits these to harm from Plaintiff's April 19, 1990 arrest through arraignment five days later. ECF No. 62. But all of Plaintiff's California claims arising from his arrest through arraignment are barred by probable cause. All of them are also time-barred, because they accrued upon Plaintiff's April 19, 1990 arrest. Other individual California claims fail as a matter of law for additional reasons. And the evidence is insufficient for punitive damages under either federal or California law.

FACTS

Inspector Crowley and Inspector Gerrans conducted an exhaustive investigation. Very little is disputed about what information they had, and the steps they took to get it. But the sheer volume of inculpatory information they had is relevant to two legal issues in this case: first, it supports probable cause to prosecute and arrest Plaintiff; and second, it rebuts Plaintiff's allegation that the inspectors had constructive knowledge of Plaintiff's innocence. Thus, this factual account is broad. Additionally, in light of Plaintiff's allegations of witness coercion and undisclosed witness incentives, this account goes deeper when it comes to the inspectors' interactions with Duff, Guevara, and Varela.

I. Inspector Crowley and Inspector Gerrans' investigation.

Inspector Crowley and Inspectors Gerrans investigated the March 24, 1990 murder of Ruben Alfonso, and the March 25, 1990 murder of Felix "Carlos" Bastarrica. SUF 1; Crowley Dec. ¶¶ 3-8, Exs. 1-2 (chronological reports of investigation); Gerrans Dec. ¶¶ 3-8.

A. Ruben Alfonso was killed on March 24, 1990, and "Carlos" fled the scene.

On the night of March 24, 1990, following a loud public argument, Ruben Alfonso was shot to death on the street in front of the Star Hotel in San Francisco's Mission District. SUF 2. Witness Mercedes Rodriguez told police that after she heard gunshots, "Roberto" and "Carlos" fled, and "Carlos" warned her "you better not say anything." Crowley Dec. Ex. 3 (report) at 1084, SUF 2*[1].

B. Felix "Carlos" Bastarrica was killed on March 25, 1990.

The next night, on Sunday March 25, 1990 around 9 p.m., there was a killing near 254 Clara Street in the South of Market neighborhood. The inspectors responded. SUF 3. Clara is a one-way alley between 5th and 6th Streets. The scene was near the driveway of the Bay Bridge Motel. An upset Edward Lavalle approached the inspectors and said the victim was his brother-in-law, Felix Bastarrica, aka "Carlos." He was Cuban. Crowley Dec. ¶ 11, Exs. 9; 10, at 414-15 (audio, transcript[2]); Gerrans Dec. ¶ 11. Another man reported his landlord heard arguing in Spanish. Crowley Dec. Ex. 7 (notes).

1. Kenneth Duff, Anthony Queen, and Kathleen Guevara were eyewitnesses.

Kenneth Duff and Anthony Queen told police they were in a green Mercedes parked on Clara Street near the motel's rear driveway. They saw a two-tone white and yellow 1974 Chevy Monte Carlo with a damaged left front fender go the wrong way up Clara Street, make a U-turn at 6th Street, and come back down Clara. The car stopped, and a man got out of the passenger side and confronted another man on the sidewalk, who was holding a plastic bag. They began to argue loudly in a foreign language. The driver got out and stood by the car. Then, the man from the passenger seat shot the man with the bag three times, first from 3 or 4 feet away, then twice as the victim was falling. He got back in the car, and it sped away. They described the shooter as having dark skin, Middle Eastern or Iranian, dark hair, 5'10" or 11", 190 lbs., "husky," and wearing an olive green London Fog type coat. When the inspectors told Duff and Queen the victim was Cuban, they said the language could have been Spanish. Crowley Dec. ¶¶ 12-13, Exs. 5 (notes), 6 (report), SUF 4*-5*; Gerrans Dec. ¶¶ 12-13.

[1] SUF with an asterisk (*) means Plaintiff's agreement is limited to a record having been made.

[2] Unless otherwise indicated, all Bates stamped transcripts attached as exhibits were prepared by the District Attorney's Office in 1990, from audio recordings supplied by the inspectors. Crowley Dec. ¶ 7; Gerrans Dec. ¶ 7. These, and the inspectors' notes, are admissible public records. F.R.E. 803(8)(A)(ii). While the witness statements within are hearsay, they are offered to establish probable cause, and for non-hearsay purposes, such as the inspectors' state of mind and to explain their actions.

Kathleen Guevara was in a second-floor studio when she heard a loud argument in a foreign language. She looked out her window and saw a large white car parked in the street. Two men were yelling at each other and moving around for about two minutes, before one man pulled out a gun and shot the other man once; the victim started to try to get away but the shooter shot him again. Guevara described the shooter as a Black male of "stocky" build, wearing an overcoat. It was "hard to tell" his height and weight from above. She did not see the driver. Crowley Dec. Ex. 6 (notes), SUF 6*.

2. The inspectors learned about Bastarrica's connection to the Alfonso murder and Bastarrica's connection to Plaintiff.

At 12:30 a.m., Lavalle joined the inspectors at the Hall of Justice and gave a recorded statement. SUF 9. Also participating was Lucy Daley, a California Department of Justice investigator who was specially assigned to the SFPD to work with the inspectors. SUF 8. Daley spoke Spanish. Lavalle confirmed the information he gave at the scene. Lavalle also explained that he and Bastarrica both lived in a hotel at 917 Folsom, two short blocks up from Clara Street. But Bastarrica spent his days in the Mission District, with his friends at the Star Hotel. On Saturday night, Bastarrica woke up Lavalle and said somebody just killed Ruben Alfonso. Sunday morning, Bastarrica said the shooter was Bastarrica's friend Roberto Socorro. The inspectors asked Lavalle if he knew anybody with a light color 1974 Monte Carlo. He said no. Crowley Dec. ¶¶ 17-19, Ex. 9 (audio) & 10 (transcript), SUF 9*.

The night of the murder and on March 26, the inspectors researched Bastarrica. He had a drug-related arrest at 2266 Cayuga Avenue on December 27, 1989, which was connected to a drug bust the same day at the Amazon Hotel at 5060 Mission Street. Crowley Dec. ¶¶ 16, 20-22 & Exs. 11 (Cayuga report), 12 (Amazon report), SUF 10*-11*; Gerrans Dec. ¶¶ 16, 20-22. The Amazon Hotel report showed five arrestees, and one of them – Joaquin Ciria – was 5'9", 193 lbs., and Black, SUF 11, a potential match for the shooter. Crowley Dec. Ex. 12 at 389. They pulled his mugshot, *id.* Ex. 13, a rapsheet, *id.* Ex. 14, and records, *id.* ¶ 22, Ex. 16 (sign-out), showing he was born in Cuba, SUF 12.

C. Witnesses reported a drug war going on, with Socorro and Bastarrica allied against Plaintiff and Alfonso, and Plaintiff looking to avenge Alfonso's murder.

Around 4:30 p.m. on March 26, Richard Diaz called and told the inspectors that Socorro had killed Alfonso at the Star Hotel, after an argument about drugs and money that included Bastarrica. Socorro used a gun he shared with Bastarrica. Diaz said Socorro was hiding out with "Manolo," and

Bastarrica visits them. Crowley Dec. Ex. 17 (notes), SUF 13*. The inspectors later learned "Manolo" was a nickname for Oscar Valdez. Crowley Dec. ¶¶ 24, 44 & Ex. 40 (notes); Gerrans Dec. ¶¶ 24, 44.

That evening, the inspectors visited Bastarrica's common-law wife Elizabeth Robles at 917 Folsom. She heard about Bastarrica arguing with Alfonso before he was shot. She also heard that Plaintiff had threatened Bastarrica with a gun. Crowley Dec. Ex. 18 (notes), SUF 14*. The inspectors also visited Lavalle. Lavalle said he heard that Bastarrica had a problem with Plaintiff. Lavalle said that Plaintiff had threatened Bastarrica with a .45, and identified the mugshot of Plaintiff. Lavalle also said that Plaintiff was seen snooping around the hotel yesterday (the day of the murder), attributing this information to "Mercedes," who was 40 and lived in the projects. *Id.* Ex. 19 (notes), SUF 15*. (It was Mercedes *Mora*, who met with the inspectors on April 11. Gerrans Dec. ¶ 26; Crowley Dec. ¶ 26.)

Leading up to the warrant, several witnesses provided information about the still-boiling conflict involving Plaintiff, Socorro, and the two murder victims. A "drug war" was going on. *Id.* ¶¶ 27, Ex. 20 (Burton), SUF 16*; Exs. 28 & 29 (Austin audio, unofficial transcript[3]), 30 (notes at 771), SUF 21*. Socorro and Bastarrica were allied against Plaintiff and Alfonso, after their friendship broke up. *Id.* Exs. 28 & 29, 30 at 771 (Austin), SUF 21*; Ex. 44 (4/12 Lavalle notes), SUF 28*; Ex. 42 (Mora notes at 125), SUF 27*. Plaintiff came to the Star Hotel looking for Socorro, *id.* Ex. 31 (Rodriguez notes at 743), SUF 22*, with a .45 handgun, Ex. 35 (Arenal notes), SUF 23*. Plaintiff asked his friends what they were going to do about his "best friend" Alfonso's murder. *Id.* Ex. 25 (Arco notes), SUF 20*. Meanwhile, Manolo and Socorro were hiding out after Alfonso's shooting. *Id.* Ex. 20 (Burton notes), SUF 16*; Exs. 28 & 29, 30 at 771 (Austin), SUF 21*; *id.* ¶ 34 (Swancy). Crowley Decl. ¶¶ 34-35, 37-38, 40, 46, 48; Gerrans Decl. ¶¶ 34-35, 37-38, 40, 46, 48.

D. The inspectors applied for rewards for information about the murders.

On March 26 and 27, the inspectors submitted requests for authority to offer rewards for information about the homicides, under two programs. They requested authority for $2,000 rewards through the "Secret Witness Program." SUF 17. But this program was suspended, and no rewards were approved or offered. Crowley Dec. ¶¶ 29-30 & Ex. 30; Gerrans Dec. ¶ 29. Plaintiff has no

[3] The files do not contain a transcript of Austin's statement, so along with relevant excerpts from the audio recording, Defendants have supplied an unofficial transcript to aid the Court's review.

evidence of Varela receiving any such reward. Wiener Dec. Ex. C (Plf. Resp. to RFA 10).

The inspectors also requested the Mayor's Office authorize offering $10,000 rewards. *Id.* Ex. 22 at 1093. The Mayor's Office approved. *Id.* at 1096-1101; SUF 18. After Plaintiff was convicted of Bastarrica's murder, the inspectors recommended Guevara for the reward, *id.* Ex. 22 at 119-120, and she received it from the Mayor's Office. Wiener Dec. Ex. B (legislative file). But before Guevara testified, she was unaware of any reward. *Id.* Ex. C (Plf. Resp. to RFAs 1, 2: no evidence otherwise); Guevara Dec. ¶ 5; Crowley Dec. ¶ 31; Gerrans Dec. ¶ 31.

E. Lavalle relayed how Socorro connected Plaintiff to the Monte Carlo used in Bastarrica's murder and announced he was going after Plaintiff for the murder.

On the afternoon of March 27, the inspectors received information that linked Plaintiff to the Monte Carlo from Bastarrica's murder, and that showed Socorro pointed to Plaintiff as Bastarrica's killer. Lavalle called and spoke with Lucy Daley. Lavalle said Socorro called him the night before (March 26) around 10pm. Socorro told Lavalle that the son of an ex-girlfriend of Plaintiff owned a white-over-yellow Chevy Monte Carlo. Socorro also told Lavalle that he was going to go after Plaintiff for the death of Bastarrica. Lavalle asked Socorro where he was, but Socorro would not say, other than that he was still in San Francisco. Crowley Dec. ¶ 33, Ex. 24 (notes), SUF 19*; Gerrans Dec. ¶ 33.

F. Kathleen Guevara selected Plaintiff's mugshot from a photo array.

On March 28, the inspectors showed Kathleen Guevara an array of six mugshots including Plaintiff's most recent mugshot from December 28, 1989. Guevara selected Plaintiff's photo, and stated "this looks the most like the suspect – especially the profile, or maybe more the attitude." Crowley Dec. Exs. 27 (notes), 2 (Chron at 51). The inspectors did not suggest she select Plaintiff. Guevara "never felt like they coerced or pressured me to say anything I didn't think was true." Guevara Dec. ¶ 3. Guevara's testimony at the criminal trial doesn't suggest otherwise, Wiener Dec. Ex. O (RT456:10-458:17). Crowley Dec. ¶ 36, Ex. 26 (array); Gerrans Dec. ¶ 36.

G. Charles Austin relayed Manolo's account suggesting Plaintiff killed Bastarrica.

On March 28, Charles Austin admitted he saw Socorro shoot Alfonso. As for Bastarrica's murder, Austin told the inspectors he "knew about it the night it happened," because "Manolo" called

him. Manolo said he was hiding out with Socorro. Bastarrica was on his way to deliver clothes to Socorro and Manolo, when he was shot. Austin said, "What I understand is they pulled up. He wanted to really know what was going on. He was denying everything. He did – he's saying he didn't know what's going on. He jumped out the car. And let loose on them, and that was it." Austin said that Bastarrica was killed in retaliation for Alfonso's killing. "Word" was "all over" that Plaintiff had killed Bastarrica, along with "one of his little Puerto Rican" buddies. Austin had seen Plaintiff and a young Puerto Rican man driving in a "Monte Carlo" that was "yellow and white." Crowley Dec. ¶ 37, Exs. 28 & 29 (audio, unofficial transcript), 30 (notes) at 771, SUF 21*; Gerrans Dec. ¶ 37.

H. Kenneth Duff provided more information about the shooting, but could not make an identification from a mugshot array.

On April 5, the inspectors met Kenneth Duff. Duff reviewed a photo spread with Plaintiff's photo, but made no identification. Duff said that if he could make an identification, it would have to be in person. Crowley Dec. Ex. 36 (notes), Ex. 26 (array). The inspectors never suggested Duff select Plaintiff. In a recorded interview, Duff gave more details about the night of the murder. Gerrans Dec. ¶¶ 41-42; Crowley Dec. ¶¶ 41-42, Exs. 37 (audio), 38 (transcript), SUF 24*; Gerrans Dec. ¶ 42. Duff was familiar with the Bay Bridge Motel, which he said was a "Hindu motel." Ex. 38 at 503. He thought the shooter was "Hindu," with a "dark complexion," but could be Black. *Id.* at 505-06. The shooter's hair was "dark." When asked, "how would you describe his hair?" Duff said, "The thing I remember most is – is the side profile, 'cause it was receding from the front then," "somewhat like mine." Other than that, he said, "I don't remember it." *Id.* at 506. Duff also confirmed his description of the 1974 Chevy Monto Carlo with the damaged fender. He said that about 30 or 45 minutes before the 9 p.m. shooting, he saw the Monte Carlo near 9th and Folsom Streets. *Id.* at 511-12. (His sighting of the Monte Carlo earlier that night would undermine the alibi that Ciria later gave the inspectors.)

Also on April 5, the ballistics report came back for the three bullets from Bastarrica's body. They matched a .44 Charter Arms Bulldog revolver. Crowley Dec. ¶ 43, Ex. 39; Gerrans Dec. ¶ 43.

I. Mercedes Mora told the inspectors that she told Plaintiff where to find Bastarrica the day of the murder, and provided more information implicating Plaintiff.

On April 12, the inspectors and Lucy Daley spoke with Mercedes Mora. The interview was mostly in Spanish, with Daley relaying what was said. Crowley Dec. ¶ 46, Ex. 42 (notes), SUF 27*;

Gerrans Dec. ¶ 46. Mora said she had lived with Plaintiff for several years, but now he lived with the 19-year-old mother of his baby. Mora showed them stab wounds that she said were from Plaintiff stabbing her after she told him that she did not want to keep drugs in her home. She was very afraid of Plaintiff. Ex. 42 at 125, 128. Mora confirmed the falling-out between Socorro, Bastarrica, Plaintiff, and Alfonso over drugs and money. Plaintiff said that if Bastarrica was going to stand with Socorro, then Plaintiff would take care of both of them – "it's up to you," he said. *Id.* at 126.

The day Bastarrica was killed, around 11 a.m., Mora ran into Plaintiff at the corner of 6th and Harrison (one short block from Clara Street). Mora told Plaintiff that Socorro had killed Alfonso the night before. Plaintiff asked Mora for Bastarrica's address, and she gave it to him. That evening, Mora was with Bastarrica at 917 Folsom, when Socorro called and asked him to bring food and clothing. *Id.*

At Bastarrica's funeral, people told Mora that Plaintiff fit the description of the killer, and that Plaintiff had a friend with a car that matched the white car. *Id.* at 126-127. Mora also said she stayed overnight at the Amazon Hotel with Plaintiff on April 8. Plaintiff showed Mora the .45 he was carrying for protection, and let her hold it. Mora asked Plaintiff who had the car that was described. Plaintiff said it belonged to "George," who was 22 or 23 and Puerto Rican. *Id.* at 127.

J. On April 13, Plaintiff gave the inspectors an alibi – which wasn't credible.

On April 13, Plaintiff and his attorney Christopher Hall came in to talk with the inspectors. Their meeting was not recorded, but Inspector Gerrans made notes. SUF 29; Crowley Dec. ¶ 49, Ex. 45; Gerrans Dec. ¶ 49. (At deposition, Plaintiff agreed that most of the notes were correct, with amendments. Wiener Dec. Ex. L (Ciria Dep. 169:4-182:5). Relevant amendments are reflected here.) Plaintiff said he lived at 159 Sickles. Plaintiff wasn't surprised that people were saying he killed Bastarrica – they didn't like Plaintiff. Plaintiff had a dispute with Socorro, but Bastarrica was his friend and was trying to make peace. Plaintiff learned about Socorro shooting Alfonso on March 25, from one woman named Mercedes at the Star Hotel and from another Mercedes who he saw near the Hall of Justice car wash mid-day. Plaintiff gave the following alibi for when Bastarrica was shot at 9 p.m. on March 25: Around 7 p.m., his stepson George Varela picked him up at home at 159 Sickles. They went to an arcade on Market Street between 6th & 7th. Around 7:30 p.m., they left in Varela's old white Chevy Monte Carlo. They stopped at Galan's Bar on 24th Street in the Mission District.

Plaintiff was there for about 10 minutes to talk to a friend Manolo before he got into a fight. Plaintiff fought with "Roberto," who Plaintiff described as a white Cuban, 5'6", stocky with light colored hair (and drunk). No one was injured, and the fight was broken up by Plaintiff's friends Marcello and Manolo. Varela then dropped Plaintiff off at home at 8:25 p.m. Plaintiff stayed home with his wife and baby son, and their housemate. Plaintiff said he did not shoot Bastarrica and did not own a gun.

The inspectors did not believe Plaintiff's alibi. It was contradicted by Guevara's identification as well as the reported statements of Socorro and (the other) Manolo. Additionally, many witnesses had reported the ongoing "drug war" and Plaintiff's seeking out Bastarrica and Socorro while armed with a .45 (which Plaintiff denied owning). And Plaintiff had confirmed his connection to the Monte Carlo owned by his "stepson." Also, Plaintiff's alibi was inconsistent with Kenneth Duff's having spotted the Monte Carlo nearby 30 to 45 minutes before the 9 p.m. shooting. The inspectors were well-versed in San Francisco's geography, and if the Monte Carlo was at 9th and Folsom Streets between 8:15 and 8:30 p.m., then Plaintiff's alibi did not work. Plaintiff said he arrived at home at 159 Sickles at the southern edge of San Francisco, at 8:25 p.m. That was a 10- or 15-minute drive from Galan's Bar on 24th Street in the Mission District, and the drive didn't pass 9th & Folsom (it was actually in the opposite direction). Plus, Plaintiff had spent at least 10 minutes at Galan's Bar (not to mention time getting to and from the Monte Carlo to the bar). So that meant Plaintiff's alibi put him arriving at Galan's around 8 p.m. And Galan's was at least 10 minutes away from 9th & Folsom, so the latest he could have been near 9th & Folsom was 7:50 p.m. But Duff didn't see the Monte Carlo until 8:15 at the earliest. There was also the timing problem of how dropping off Ciria at 8:25 p.m. could even allow the Monte Carlo enough time to pick up somebody else and get all the way back to Clara Street in time for the argument before the shooting. Crowley Dec. ¶¶ 50, 92, Ex. 88; Gerrans Dec. ¶¶ 50, 92.

K. George Varela came in to support Plaintiff's alibi, but once he learned witnesses saw his Monte Carlo at the scene, he admitted Plaintiff was the murderer.

George Varela came to the Homicide Detail on April 17 for a recorded interview. SUF 30. The first part of the interview was recorded without telling Varela. Crowley Dec. ¶¶ 51, 61, Exs. 46-1, 46-2 (audio files); 47-1, 47-2 (transcripts); Gerrans Dec. ¶¶ 51, 61. Varela first gave a story that generally supported Plaintiff's alibi. Varela was at a downtown video game arcade when Plaintiff showed up

around 7 p.m. and asked for a ride home. They left around 7:30 p.m., and stopped at Galan's Bar close to 8:00 p.m. Plaintiff "was takin' a long time," but then came out and got into a fight. After it was broken up, Varela dropped Plaintiff off at his house, and Varela arrived home in the nearby Sunnydale housing projects "close to 9" p.m. Ex. 47-1 at 427-431. The inspectors then asked some questions.

Varela described his relationship with Plaintiff. They met 10 years ago when Plaintiff was dating Varela's mother. Plaintiff favored Varela, the only boy in the family. Plaintiff went away to prison, but they recently reconnected. *Id.* 432-433. The day Plaintiff's "good friend" was killed, he came to Varela's home and told him, and said "I'm mad like a motherfucker." The inspectors showed Varela mugshots of Bastarrica, Alfonso, and Socorro; Varela did not recognize them. *Id.* 436-439.

Varela described his white Monte Carlo with a damaged front left fender, which he had parked downstairs in front of the Hall of Justice. *Id.* 440-441.

After revisiting Varela's timeline for the night of the murder, *id.* 442-443, the inspectors asked about drug dealing. Varela said he was arrested as a juvenile and was in a boys' home, but had a clean record so far as an adult. When asked whether Plaintiff sold dope, Varela said it was "not my business." About a month before, Varela had seen Plaintiff with a .45 automatic. Varela admitted he dealt some dope when he needed money, "but nothing serious." *Id.* 444-445.

The inspectors then went back over Varela's account of the fight and taking Plaintiff home. They asked Varela whether he left his car with Plaintiff; Varela was firm that he drove his own car home, "parked my car and went in the house. And that was it. That's how she looked." *Id.* 446-448.

At this point in the interview, the inspectors felt they had heard the whole story that Varela wanted to give. And they knew he was lying. His Monte Carlo was at the scene of the murder, plus he was repeating the same faulty alibi Plaintiff gave. Not only that, while trying to help Plaintiff Varela had provided even more evidence of Plaintiff's motive to get revenge: as noted above, Plaintiff told Varela he was "mad like a motherfucker" about the shooting of his "good friend" Alfonso. And Varela confirmed Plaintiff had the same .45 other witnesses mentioned and Plaintiff had denied. The inspectors also recognized Varela's motives to lie for Plaintiff: loyalty to the man who considered Varela a "stepson," or fear of him, or both. Gerrans Dec. ¶ 57; Crowley Dec. ¶ 57.

The inspectors asked Varela point-blank whether he had driven down any alley that night, and

if he had driven down Clara between 5th and 6th Streets. Varela said no. *Id.* Ex. 47-1 at 448-449.

Inspector Crowley[4] then explained to Varela "how the law works" when it comes to murder: if Varela knew that Plaintiff was going to "beat" or "rob" or "thump somebody," and drove Plaintiff to do it, Varela "could be tried" for murder as a principal or an accessory. Varela responded, "I ain't helped nobody do shit." Then he said, "I know what you're getting at. Why don't you get to the point … so we can get it over with." Inspector Gerrans then told Varela how two eyewitnesses on Clara Street saw the damaged Monte Carlo come down Clara, and saw its driver and its passenger. He explained, "you got yourself into a situation, you know, and we know you didn't do it. But if you're going to continue to sit in here and lie and cover up for Joaquin, you're going to be in some deep shit," because these eyewitnesses and others saw exactly what happened. He said Varela had been "in shit as a juvenile, you don't want to get in shit as an adult." Crowley Dec. Ex. 49 at 1-2.

Varela said, "All right." Inspector Gerrans then said, "What you ought to do is tell us exactly what happened. Don't lie. For your own good, son, okay?" After Varela sighed, Gerrans said, "It's best for you to tell us exactly what went down. We know you didn't do it. We know." Varela then said, "I didn't know what was gonna happen, I didn't know what was gonna happen, but, dang, whatever you said." Inspector Gerrans then said, "I want you to tell us. You're the one that's either in the hot seat, you're either gonna be involved in this or not involved in this." Inspector Crowley interrupted, explaining, "We know you're there. You're either there involved in it as a suspect, or you're just there as an innocent party who happened to be there." *Id.* Ex. 49 at 3.

And that is all it took for the floodgates to open. Varela said, "I just didn't know what was going to happen. It was like everything happened all quick. And if I would have knew what was going to happen, I would have told him to get in the car, and F dude, and went home and said fuck the whole deal, and that would have been that. But he's just hard-headed, man. I don't know how I'm supposed to even try to cover up. Cause like you said, I'm gonna be 18. I'm damn sure I don't want to go to the can for something I didn't do. I don't want to go." Gerrans responded, "Why don't you tell us exactly what happened, and how you got down there and what happened." *Id.* Ex 49 at 4.

[4] For this portion of the interview (Crowley Dec. Ex. 47-1 at 450-452), Defendants submitted a short audio clip (*id.* Ex. 48), and an unofficial transcript (*id.* Ex. 49) that identifies the speakers.

Varela talked about the dangers of snitching. But the inspectors reminded him that Plaintiff's actions put him in a "shitty situation," and he would be in "heavy shit" "unless you tell us the truth, exactly how you got down there. In your own words, just tell us what happened. You know what happened." *Id.* Ex. 47-1 at 452. During this exchange, the inspectors never threatened Varela they would press charges against him. They never threatened to go to the prosecutor. They simply explained to Varela – correctly – that he was in a bad situation by virtue of having driven someone to and from the scene of a murder with eyewitnesses who recognized his car – and if he continued to lie, his situation would only get worse.

Over the rest of this tape and the next, *id.* Exs. 47-1, 47-2, Varela provided details about the shooting and that night. He told the inspectors how he picked up Plaintiff at home and "we were riding around and stuff." *Id.* Ex. 47-1 at 456. After the fight at Galan's, they "went downtown. We were driving and just – you know, riding around listening to music." *Id.* at 455. Then Plaintiff said, "'Go this way, let's see what's down here.'…And the timing was so perfect," with Plaintiff spotting Bastarrica coming out of 917 Folsom. Plaintiff told Varela to follow him, and Plaintiff told Varela to make a U-turn and stop the car on Clara, which Varela did. Then Plaintiff got out and argued with the victim, and shot him three times as the two men in the green Mercedes looked on. *Id.* at 457-458.

Varela told the inspectors that Plaintiff told Varela to tell the story that he first gave. *Id.* at 460-461. He said he was afraid of Plaintiff, *id.* Ex. 47-2 at 559, 561. Varela said he told his girlfriend Kristina Martin about the shooting, and also mentioned it indirectly to his sister Desiree. *Id.* at 556.

They went downstairs to photograph the Monte Carlo. Then they went back upstairs and the inspectors put a tape recorder in front of Varela. Varela confirmed what he already said, and went home. Crowley Dec. ¶ 61, Exs. 46-3 (audio), 47-3 (transcript); Gerrans Dec. ¶ 61.

L. On April 18, the inspectors got a warrant for Plaintiff.

The inspectors met with ADA Alfred Giannini, shared their file, and briefed him thoroughly. Inspector Crowley prepared affidavits, and on April 18 a judge signed arrest and search warrants. Gerrans Dec. ¶¶ 63-65; Crowley Dec. ¶¶ 63-65, Ex. 50 (search warrant), 51 (arrest warrant), SUF 31*.

At some point on April 18, the inspectors visited Galan's Bar. The bartender told them the person who was bartending on March 25 was in the hospital. *Id.* ¶ 68, Ex. 53; Gerrans Dec. ¶ 68.

M. Plaintiff was arrested on the warrant as the inspectors continued to investigate.

1. Plaintiff's home had $10,000 in cash, a gun cleaning kit, and ammunition.

On the morning of April 19, the inspectors went to 159 Sickles and executed the search warrant. Police seized more than $10,000 in cash from under the baby's crib mattress; a drug dog later alerted to cocaine on the cash. Police also found a gun cleaning kit in Plaintiff's bedroom and ammunition in a locker in the garage. Plaintiff was not there at the time, so the inspectors requested a local plainclothes unit to wait with the arrest warrant. Crowley Dec. ¶¶ 69-71, Ex. 54 (warrant return); Ex. 55 (report), SUF 33*; Ex. 56 (report); Gerrans Dec. ¶¶ 69-71. Officers Rubino and Vic Aissa came, and arrested Plaintiff later. Rubino Dec. ¶ 17, Ex. D (report), SUF 34*. The inspectors later Mirandized and interviewed Plaintiff. He denied killing Bastarrica, or looking for him or Socorro after Alfonso's killing. He acknowledged a dispute between himself and Socorro, but said it was due to Plaintiff taking clothes from Socorro's home on Cayuga. Plaintiff stuck by his alibi that he was at Galan's Bar at 8 p.m. and home at 8:25 p.m. Crowley Dec. Exs. 52 (audio), 53 (transcript), SUF 36*.

2. The inspectors interviewed Plaintiff's alibi witnesses.

At 159 Sickles, the inspectors spoke with Yojana Paiz (the mother of Plaintiff's child) and his housemate, Marina Flores. They said Plaintiff was home by 8:30 p.m. the night he fought at Galan's Bar. They also stated that Plaintiff had called them from jail. But the inspectors did not find the alibi any more credible. And Plaintiff's calling from jail made the inspectors concerned about duress and fear, given Mora's reports of Plaintiff's domestic violence. Crowley Dec. ¶ 73, Exs. 57 (Paiz audio), 58 (Flores audio), 59 (Paiz transcript), 60 (Flores transcript), SUF 37*; Gerrans Dec. ¶ 73.

3. Kristina Martin reported what Varela told her right after the murder.

Also on April 19, the inspectors spoke with Kristina Martin. Martin told them that "two days" or "a day" after the shooting, she spoke with Varela "about Joaquin. And, um, that he was just giving Joaquin a ride somewhere, and Joaquin got out. And he seen this man that, I guess, supposedly had killed his friend or something. And he got out, and he was arguing with him. And I guess he just shot him." Crowley Dec. ¶ 74, Ex. 61 (audio), Ex. 62 at 476-77 (transcript), SUF 38*; Gerrans Dec. ¶ 74.

Also on April 19, the inspectors interviewed Varela's sister Desiree. George told her "Joaquin had beat up this person really bad" and that "Joaquin was going to be in a lot of trouble, but he didn't

say why." Crowley Dec. ¶ 75, Ex. 63 (audio), Ex. 64 at 529 (transcript), SUF 39*; Gerrans Dec. ¶ 75.

4. Guevara identified Plaintiff at a live line-up.

At an April 26 live line-up, Guevara heard and signed the standard admonition, Crowley Dec. Ex. 65, and without any coaching Guevara identified Plaintiff; she signed a statement providing explanation. *Id.* ¶ 76, Ex. 66, SUF 41*; Gerrans Dec. ¶ 76; Wiener Dec. Ex. O (RT458:19-462:17).

Duff and Queen were invited to the line-up, Crowley Dec. Ex. 67, SUF 40*, but did not show.

5. Duff identified Plaintiff in a photo of the line-up.

At Plaintiff's trial, Duff testified he was too afraid to attend the live line-up. SUF 44. But on May 1, 1990, Duff reviewed a photograph of the line-up that showed Plaintiff's face and full body, and he identified Plaintiff as the killer. Wiener Dec. Ex. N (RT552:10-13, 19-21; RT577:25-27). He denied any pressure or suggestion to select Plaintiff. *Id.* RT590:18-23, RT592:4-10. And there was none. Crowley Dec. ¶ 81, Exs. 72 (audio), 73 at 463-464 (transcript), 74 (photos); Gerrans Dec. ¶ 81.

6. Witnesses provided more information about Plaintiff.

On April 30, Ramon Castillo confirmed that Plaintiff, Alfonso, Socorro, and Bastarrica dealt drugs together, then split up. Bastarrica said he was having problems with Plaintiff, and Plaintiff had a gun. Crowley Dec. ¶ 78, Exs. 68 (audio), 69, at 518-520 (transcript), SUF 43*; Gerrans Dec. ¶ 78.

On May 7, Socorro was arrested for the Alfonso murder. Crowley Dec. Ex. 75, SUF 45*. In a Mirandized statement, Socorro said Bastarrica shot Alfonso. As for Bastarrica's murder, Socorro said he was at the Bay Bridge Motel when he heard a couple of gunshots, but didn't pay attention. Socorro said he didn't know if Plaintiff shot Bastarrica. Socorro admitted a dispute with Plaintiff that started when Plaintiff called Socorro a snitch after Plaintiff was arrested at the Amazon Hotel (on Dec. 27, 1989). Crowley Dec. ¶ 82, Ex. 76 (audio), SUF 46*; Ex. 77 (unofficial transcript); Gerrans Dec. ¶ 82.

7. Witnesses received contacts from Plaintiff, and threats.

Meanwhile, the inspectors received reports of Plaintiff contacting witnesses, and apparent threats to witnesses. On April 20, Varela said Plaintiff had been calling his house; he declined an offer to be relocated. Crowley Dec. Ex. 78, SUF 47*. Hector Diaz and Dunia Herrera reported an April 22 threat from Mora that "I've got people who will kill you, I and Joaquin are looking to pay someone to kill both of you." *Id.* Ex. 79, SUF 48*. On April 29, George and Desiree Varela reported shots fired

into their home. *Id.* Ex. 80, SUF 49*.

8. Varela provided information about the murder weapon.

Varela met with Officer Joanne Welsh on May 29 to discuss witness relocation. He also told her that the day after the shooting, he drove Plaintiff out to Candlestick Park, and Plaintiff threw the gun into the Bay. Crowley Dec. Ex. 82, SUF 50*. On May 30, Varela met with the inspectors about it. Crowley Dec. ¶¶ 87-88, Exs. 83 (audio), 84 (unofficial transcript); Gerrans Dec. ¶¶ 87-88. Police divers later recovered a Charter Arms Bulldog revolver at the location indicated by Varela. *Id.* ¶ 89; Crowley Dec. ¶ 89, Ex. 85, SUF 52*. In June 1990, the inspectors received a Daly City Police report indicating to them that Varela was genuinely afraid of Plaintiff. *Id.* ¶ 90, Ex. 86; Gerrans Dec. ¶ 90.

II. Superior Court proceedings against Plaintiff.

Plaintiff was arraigned on April 24, 1990. SUF 53; Lipset Dec. ¶ 3 & Ex. A.

Plaintiff's preliminary hearing was on September 4, 1990. SUF 54. Varela failed to appear and a body attachment issued. Wiener Dec. Ex. E (9/4/90 RT3-4). Guevara, Duff, and the Medical Examiner testified. *Id.* 2, 89. This hearing was the first time that Duff or Guevara used the word "Afro" to describe the shooter's hairstyle. *Id.* 26:28-27:6 (Guevara); *id.* 56:4-16 (Duff). The shooter's hairstyle became a defense theme at trial. The Superior Court found probable cause, SUF 54.

Plaintiff's trial began on February 4, 1991. SUF 55. ADA Louis Lipset appeared for the People, and Randy Montesano, Esq., represented Plaintiff. Plaintiff filed a pretrial motion to exclude Guevara's and Duff's identifications as violating the Due Process Clause, which the People opposed. Wiener Dec. Ex. H. The Superior Court denied the motion, ruling that the identifications were not impermissibly suggestive and there was no due process violation, but explaining Plaintiff was free to argue to the jury about their reliability. *Id.* Ex. Q (RT35–45, 73–77).

The People called Varela, who invoked the Fifth Amendment. The District Attorney requested and the court granted Varela immunity for his involvement in the killing. Wiener Dec. Ex. P (RT124-129). Varela testified about the details of how he drove Plaintiff and saw him commit the murder. *Id.* RT138-202. Plaintiff's criminal defense counsel stated his intention to cross-examine Varela about his immunity as well as other asserted favorable treatment in his criminal cases. *Id.* RT129–137. The prosecution requested and the court granted Varela immunity for several drug crimes so that the

defense could cross-examine him. *Id.* RT246–272, 274–304, 315–320, 335–338. The defense did just that. *Id.* RT320–325, 339–368, 402–404. The prosecutor re-directed on this issue, *id.* RT370–371, 384–390, 392–398. The prosecutor also elicited that Varela was relocated by the police department for witness protection, and didn't have to pay for it. *Id.* RT391–392. Excerpts from George Varela's taped interview were played for the jury; this was admitted as a "prior consistent statement" to rebut the defense allegation that Varela was induced to name Plaintiff by later grants of immunity or any other leniency. *Id.* Ex. Q (RT871:25-873:4).

The People also called Duff and Guevara. Both identified Plaintiff as the shooter. On cross-examination, the defense tried to show they thought the shooter had an Afro. Wiener Dec. Ex. N 527-606 (Duff); *id.* Ex. O (RT440-518) (Guevara). The People called other witnesses. *Id.* Ex. Q (RTii).

The defense called Roberto Hernandez, the "Roberto" from Galan's Bar. Hernandez testified that at the time he fought with Plaintiff, whom he disliked, Plaintiff was wearing a black and red jacket with the word "Commando" on the back, and Plaintiff had a greasy hairstyle. *Id.* Ex. Q (RT761–768). The defense also called other witnesses. *Id.* RTiii.

Plaintiff was convicted. SUF 56. His conviction was vacated on April 18, 2022. SUF 57.

ARGUMENT

I. Summary judgment is proper on the § 1983 malicious prosecution claim (3d Claim).

A. Probable cause existed, defeating this claim as to all Defendants.

The plaintiff in a malicious prosecution action must prove a lack of probable cause. *Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019). This is "a legal question resolved by the court." *Magnetar Techs. Corp. v. Intamin, Ltd.*, 801 F.3d 1150, 1155–56 (9th Cir. 2015). The test is objective. *Conrad v. U.S.*, 447 F.3d 760, 768 (9th Cir. 2006). "Probable cause 'is not a high bar.'" *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (quoting *Kaley v. U.S.*, 571 U.S. 320, 338 (2014)). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)). "[P]robable cause means 'fair probability,' not certainty or even a preponderance of the evidence." *U.S. v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006) (citing *Gates*, 462 U.S. at 246). "Police may rely on hearsay and other evidence that would not be admissible in a court to determine probable cause." *Hart v. Parks*, 450 F.3d 1059,

1066 (9th Cir. 2006). The standard permits "reasonable inference[s]" of guilt, *Wesby*, 583 U.S. at 57, and "common-sense conclusions about human behavior," *id.* at 58 (quoting *Gates*, 462 U.S. at 231).

Under this standard, as a matter of law probable cause existed to charge Plaintiff for Bastarrica's killing. The information the inspectors collected supported at least a "fair probability" or "substantial chance" that Plaintiff had killed Bastarrica. Early on, Guevara identified Plaintiff as Bastarrica's killer. Facts § I.F. While Guevara did not express 100% certainty in her initial identification of Plaintiff, it was buttressed by Plaintiff's build matching all three eyewitnesses' description of the shooter's build. Facts §§ I.B.1., 2. And these eyewitness accounts were buttressed by a great deal of other information pointing to Plaintiff. Informants Lavalle and Austin reported what they heard from Socorro and Manolo, suggesting they knew Plaintiff was responsible for Bastarrica's murder. Facts §§ I.E., G. Such hearsay statements, received through informants, can support probable cause. *Hart*, 450 F.3d at 1066; *U.S. v. Angulo-Lopez*, 791 F.2d 1394, 1397 (9th Cir. 1986) ("Hearsay reported by informants is no bar to a finding of probable cause.") They had indicia of reliability: Circumstantial evidence supported Socorro and Manolo's being in a position to know who shot Bastarrica: multiple witnesses confirmed Bastarrica was bringing clothes to Socorro when he was shot, Facts § I.C.; multiple witnesses confirmed Socorro and Manolo were hiding out together at a series of hotels, *id.*; and Bastarrica was shot next to the Bay Bridge Motel. The details Manolo gave to Austin, Facts § I.G., were consistent with the details provided by Queen, Duff, and Guevara, Facts § I.B.1.

Additionally, there was ample evidence of Plaintiff's motive. The day Bastarrica was killed, Plaintiff was near where Bastarrica lived and asked Mora for Bastarrica's address (917 Folsom), which she told him. Facts § I.I. Multiple witnesses supported Plaintiff's wanting revenge for Alfonso's death, both because Alfonso was his friend and as a tit-for-tat in the ongoing drug war. Facts § I.C. Multiple witnesses reported Plaintiff's violence and his stalking Bastarrica and Socorro with a .45. *Id.*

Then there was the 1974 Monte Carlo with the damaged left front fender at the scene of the murder. Witnesses in the community tied the car's young Puerto Rican owner to Plaintiff, and no one else. Plaintiff himself acknowledged he was in his "stepson"'s Monte Carlo the night of the murder.

Probable cause was not negated by Plaintiff's alibi. "[P]robable cause does not require officers to rule out a suspect's innocent explanation for suspicious facts." *Wesby*, 583 U.S. at 61. "Once

probable cause … is established … a law enforcement officer is not required by the Constitution to investigate independently every claim of innocence." *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003) (internal quotation marks and citations omitted). "For information to amount to probable cause, it does not have to be conclusive of guilt, and it does not have to exclude the possibility of innocence." *Garcia v. County of Merced*, 639 F.3d 1206, 1209 (9th Cir. 2011). Under this law, a reasonable police officer could simply disbelieve Plaintiff's alibi given all of the inculpatory evidence. Not only that, these inspectors had evidence directly contradicting Plaintiff's alibi: that Kenneth Duff spotted the Monte Carlo at a time and place before the shooting that made Cira's alibi impossible. Plaintiff's false alibi gave more support to probable cause. *Devenpeck v. Alford*, 543 U.S. 146, 149, 155-156 (2004) ("untruthful" statements to police could support probable cause). So did his denial he owned a .45. *Id.*

Finally, George Varela provided a detailed account of how Plaintiff, a person known to him for years, murdered Bastarrica. This statement is properly included in the probable cause analysis, *see infra* § II.A.2. But even if it weren't, probable cause would still exist. See *Smith v. Almada*, 640 F.3d 931, 938 (9th Cir. 2011) (where probable cause still existed "after correcting for the allegedly false" information, plaintiff could not maintain malicious prosecution action). The standard, after all, requires only a "reasonable probability." And that standard was met here, with or without Varela.

B. There are other bars to Plaintiff's malicious prosecution claim.

1. Qualified immunity applies, where probable cause was at least "arguable."

Because of qualified immunity, Plaintiff cannot prevail against the individual Defendants if it is "reasonably arguable that there was probable cause." *Johnson v. Barr*, 79 F.4th 996, 1005 (9th Cir. 2023) (quoting *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011)). "This reasonable officer standard for qualified immunity differs from the prudent person standard guiding [the] probable cause" analysis. *Id.* "An officer would not be on notice that his or her action was unreasonable unless 'all reasonable officers would agree that there was no probable cause in this instance.'" *Id.* (quoting *Rosenbaum*, 663 F.3d at 1078). That means that binding case law as of 1990 had to show probable cause was lacking under "similar circumstances." *Wesby*, 583 U.S. at 64. The plaintiff must "identify cases" that would defeat qualified immunity. *Johnson*, 79 F.4th at 1006. Plaintiff cannot do so.

2. Plaintiff has no evidence of any purpose to prosecute Plaintiff to deprive him of a particular federal right, defeating this claim as to all Defendants.

"[A] § 1983 malicious prosecution plaintiff must prove that the defendants acted for the purpose of depriving him of a 'specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1069 (9th Cir. 2004) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995)). But Plaintiff has not alleged that defendants had any such purpose. Wiener Dec. Ex. F (Complaint ¶¶ 115-129). And they didn't. Crowley Dec. ¶ 93; Gerrans Dec. ¶ 93. Plaintiff alleges only that malicious prosecution violates due process. Complaint ¶ 116. But "[m]alicious prosecution, by itself, does not constitute a due process violation." *Freeman*, 68 F.3d at 1189.

3. Defendant Rubino did not participate in bringing charges against Plaintiff, so he cannot be liable for malicious prosecution under section 1983.

For liability, a defendant must be "actively instrumental in causing the initiation of legal proceedings." *Awabdy*, 368 F.3d at 1067. Officer Rubino had no role at all. Rubino Dec. ¶ 19; Gerrans Dec. ¶ 71; Crowley Dec. ¶ 71; Wiener Dec. Ex. C (Plf. Resp. to RFAs 5-6 (no evidence)).

II. Summary judgment is proper on the § 1983 fabrication of evidence claim (1st Claim).

The Ninth Circuit has recognized a right "not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). To prove such a claim, "the plaintiff must first point to evidence he contends the government deliberately fabricated." *Bradford v. Scherschigt*, 803 F.3d 382, 386 (9th Cir. 2015). Then, the plaintiff must prove intent: that the defendant intended to fabricate that evidence. Where as here there is no direct evidence of intent, the plaintiff may use one of two circumstantial methods to prove deliberate fabrication. The first is to show that the defendant continued his investigation of the plaintiff even though he knew or should have known that the plaintiff was innocent. *Devereaux*, 263 F.3d at 1076. The second is to show that the defendant used "investigative techniques that were so coercive and abusive that [he] knew or should have known that those techniques would yield false information." *Id.* These "methods [of proving intent] are not themselves independent causes of action," but simply ways to prove intent. *Bradford*, 803 F.3d at 386.

The question of whether a police officer "used investigative techniques that were so coercive and abusive that he knew or should have known those techniques would yield false information," is a

"legal ruling" analogous to other judicial rulings "whether an official acted reasonably" on the evidentiary record at summary judgment. *Gausvik v. Perez*, 345 F.3d 813, 816 (9th Cir. 2003).

A. Inspector Crowley and Inspector Gerrans did not charge Plaintiff based on fabricated evidence.

1. Plaintiff cannot show that the inspectors knew or should have known Plaintiff was innocent.

The inspectors believed Plaintiff was guilty. Crowley ¶ 93; Gerrans ¶ 93. As discussed above, the inspectors collected overwhelming evidence against Plaintiff before charging him (Facts §§ I.A.-K.) as well as after (Facts §§ I.M.). It cannot be argued that they should have known he was innocent.

2. The inspectors did not fabricate George Varela's naming of Plaintiff.

a. The inspectors' April 17, 1990 interview with Varela did not "fabricate" his naming Plaintiff as the shooter, because he had already named Plaintiff as the shooter three weeks before.

Plaintiff cannot show that "*the government* deliberately fabricated" George Varela's naming Plaintiff as the shooter. *Bradford*, 803 F.3d at 386 (emphasis added). Where Varela already named Plaintiff as the shooter to Kristina Martin on March 26 or 27, the inspectors didn't "fabricate" this evidence by interviewing Varela three weeks later on April 17.

Martin stated that "two days" or "a day" after the shooting, Varela told her "he was just giving Joaquin a ride somewhere, and Joaquin got out. And he seen this man that, I guess, supposedly had killed his friend or something. And he got out, and he was arguing with him. And I guess he just shot him." Crowley Dec. Ex. 61 (audio), Ex. 62 at 476-77 (transcript). Martin's statement is admissible for its truth – that one or two days after the March 25 shooting, Varela told her that Plaintiff was the shooter. It is a "recorded recollection" under F.R.E. 803(5), meeting all three prongs of the Rule. First, Martin's statement is "on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately." F.R.E. 803(5)(A). At her 2023 deposition, Martin testified that she spoke with George Varela about a shooting in 1990, but she could not remember what he said, even after listening to her statement about it. Wiener Dec. Exs. R (Martin Dep.) 12:4-9, 14:20-15:1, S (Martin Depo Ex. 1-A (Martin audio)). Second, Martin's statement "was made … by the witness when the matter was fresh in the witness's memory," F.R.E. 803(5)(B). Martin Dep. 14:15-19. Third, it "accurately reflects the witness's knowledge." F.R.E. 803(5)(C). Martin identified her voice in the

recorded statement she listened to, Martin Dep. 15:2-5, and testified that she was truthful when she told police what Varela told her about the shooting. *Id.* 14:2-14, 16:5-14. Because Varela already identified Plaintiff as the shooter on March 26 or 27, the inspectors did not fabricate it later.

b. Even if Varela hadn't already named Plaintiff as the shooter, the undisputed evidence does not support "intentional fabrication."

The inspectors' interview of Varela was not "so coercive and abusive that [they] knew or should have known that those techniques would yield false information." *Devereaux*, 263 F.3d at 1076. Whether interview techniques meet this standard is a legal question, not a factual one. *Bradford*, 803 F.3d at 386. And it requires an extraordinary showing. A jury cannot draw an inference of intent to fabricate "any time an interviewer discounts an initial denial and continues with aggressive questioning that produces an accusation." *Devereaux*, 263 F.3d at 1080. "[R]epeated admonitions to be truthful" are not problematic. Id. at 1077. Rather, the techniques used must be "inherently so coercive or abusive as to give rise to liability even if used in good faith." Id. at 1081. This showing was not even made in the *Devereaux* case itself, which concerned aggressive questioning of child witnesses.

None of the tactics used with Varela come even close. They were lawful even under the more stringent Fifth Amendment right of an in-custody suspect "to be free from coercive interrogation." *Cunningham v. City of Wenatchee*, 345 F.3d 802, 810 (9th Cir. 2003). Varela's interview went for only 80 minutes before a break to look at his car, then just 20 minutes more, Crowley Dec. Exs. 46-1, -2, -3. But in *Cunningham*, an eight-hour interview was permissible. And unlike the *Cunningham* suspect who was on bi-polar medication, 345 F.3d at 810, Varela showed no sign of being under the influence of anything. Crowley Dec. ¶ 51; Gerrans Dec. ¶ 51. And if "continuing to question a suspect after the suspect claims he is innocent does not constitute coercion and is often necessary to achieve the truth," *Cunningham*, 345 F.3d at 810, that was even more true for Varela, a witness who was not in custody and who the inspectors knew was lying. There was nothing wrong with explaining to Varela his potential liability as an accessory, including the liability he would now face as an adult. *Id.* ("Officers are allowed to recite the sentence a suspect may receive if found guilty.")(citing cases). The inspectors never threatened to make Varela's predicament worse than it already was, by virtue of Varela's having driven his car used in the murder and lying about it. Telling Varela the advantages of

telling the truth in his situation was proper. *People v. Andersen*, 101 Cal.App.3d 563, 579 (1980) ("We reject defendant's contention that urgings by the police to tell the truth or assertions that one is better off telling the truth amount to threats of coercion or to false promises of leniency."). "Other cases finding coercion have been far more outrageous." *Cunningham*, 345 F.3d at 811 (citing cases).

The *Devereaux* "so coercive and abusive that [they] knew or should have known those techniques would yield false information" rule is an even higher threshold for proving unconstitutional conduct. And it is not met by Inspector Gerrans' statement, "But if you're going to continue to sit in here and lie and cover up for Joaquin, you're going to be in some deep shit, because [witnesses saw your car]." That was far less coercive than the permissible tactics in *Cunningham*, where Detective Perez "told [the suspect's daughter] Jessica that she could not leave Pinecrest until she confessed to the abuse. Perez's conduct, while inappropriate, does not satisfy *Devereaux*." *Cunningham*, 345 F.3d at 812. Similarly, there was nothing wrong with Inspector Gerrans identifying Plaintiff as the person Varela was lying and covering up for; Varela was speaking with the inspectors at Plaintiff's request, and he was clearly lying about not being at the scene of the crime, so it was logical to conclude Varela was lying to cover up for Plaintiff. More to the point, mentioning a specific suspect in an interrogation isn't even close to unconstitutional. After all, in *Cunningham* it was constitutional when Detective Perez told a witness that she couldn't leave a psychiatric facility until she implicated a specific person – *her father* – as a child abuser. Indeed, even under the more restrictive Fifth Amendment standard, it is not coercive to tell an accomplice the advantages of telling the truth about a principal's role – which is what the inspectors did here. *People v. Ditson*, 57 Cal. 2d 415, 433 (1962) ("It was to Cisneros' advantage to bring out the truth that he had been led into participation in the gang crimes, and directed therein, by Ditson. … The asking of searching questions by Officer Kearney, coupled with his statements that he could not, and would not if he could, help Cisneros at the bar of justice, but that he was trying to get Cisneros to help himself by clearing up the details as to Ditson's dominant control, appears to have been a straightforward, honest procedure.").

Another reason why this evidence is insufficient to show the inspectors "knew or should have known that those techniques would yield false information," *Devereaux*, 263 F.3d at 1076, is that by the time the inspectors interviewed Varela, they already had ample evidence that Plaintiff was

Bastarrica's murderer – so a reasonable police officer would not believe that information from Varela implicating Plaintiff was false. That makes this case different from the sex abuse "witch hunts" that began with only suspicions, but no evidence. And even those cases found no *Devereaux* violation.

Also, shortly after they spoke with Varela, the inspectors spoke with Martin. She told them that Varela told her Plaintiff was the shooter just a day or two after the March 25 shooting. That was three weeks before Varela told the inspectors the same thing. That prior consistent statement would confirm for a reasonable police officer that their April 17 interview did not spur a false accusation.

The inspectors believed Plaintiff was guilty, and they did not believe their interview techniques were so coercive and abusive as to be likely to produce false evidence. Crowley ¶ 93; Gerrans ¶ 93. And, importantly, neither did anybody else in 1990 and 1991. The prosecutor saw nothing wrong with it. Lipset Dec. ¶ 6. And neither did Plaintiff's own defense lawyer. At Plaintiff's trial, the defense never argued Varela's testimony was coerced. Rather, the defense argued that Varela purposely "set up" Plaintiff, and "staged this whole thing to look like Joaquin Ciria did it." Wiener Dec. Ex. Q (RT918:22-23, 928:23-24). Indeed, the defense attorney requested that the portion of the interview tape that Plaintiff now argues was "so coercive and abusive that [the inspectors] knew or should have known that those techniques would yield false information," *Devereaux*, 263 F.3d at 1076, be cut out of the tape, because he did not believe the jury needed to hear it. Wiener Dec. Ex. I (Montesano Dep. 79:5-12, 79:24-81:23, 87:7-23). The fact that none of the legally trained actors in the criminal justice system in 1990 and 1991 expressed any concern about the inspectors' conduct during Varela's interview crossing the line, is a strong indication that the law cannot impute constructive knowledge to police officers that this conduct was so inherently coercive that it necessarily crossed the line. *Gausvik*, 345 F.3d at 816 (constructive knowledge under *Devereaux* a legal issue). It got nowhere near that line.

3. The inspectors did not fabricate Guevara's or Duff's identifications.

The inspectors did not do anything with Kathleen Guevara or Kenneth Duff that was "so coercive and abusive that [they] knew or should have known that those techniques would yield false information." *Devereaux*, 263 F.3d at 1076.

There was no coercion or abuse of Guevara on March 28, 1990, when she selected Plaintiff's mugshot from a photo array. Facts § I.F. To the extent that Plaintiff criticizes the admonition given to

Guevara, "interviewing techniques that were in some sense improper" do not establish the level of coercion and abuse required to infer deliberate intent to fabricate evidence. *Devereaux*, 263 F.3d at 1075. "Failing to follow guidelines or to carry out an investigation in a manner that will ensure an error-free result is one thing; intentionally fabricating false evidence is quite another." *Id.* at 1076-77. Thus, in *Caldwell v. City & Cnty. of San Francisco*, 889 F.3d 1105, 1118-19 (9th Cir. 2018), the Ninth Circuit rejected a similar fabrication claim premised on how inspectors asked about photos.

On April 5, 1990, Duff was shown a photo spread but did not identify anyone; that produced no evidence against Plaintiff, so it cannot support a false evidence claim. *Devereaux*, 263 F.3d at 1078. Regardless, there was no coercion or abuse. Crowley Dec. ¶ 41; Gerrans Dec. ¶ 41.

As for Guevara's and Duff's later identifications on April 26 and May 1, respectively, these cannot be a basis for liability because they were done after Plaintiff was charged. The right under *Devereaux* is "not to be subjected to criminal charges on the basis of" deliberately fabricated evidence. 263 F.3d at 1074. These identifications were not part of the "basis" for charging Plaintiff. And even if they were, there was no coercion or abuse. Facts §§ I.M.4., 5.

4. Qualified immunity protects the inspectors.

While *Devereaux* established a general right not to be charged based on deliberately fabricated evidence, to overcome qualified immunity Plaintiff must identify case law in 1990 that clearly established to the inspectors that in the specific situation they faced, they were violating *Devereaux*. *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011); *see Tobias v. Arteaga*, 996 F.3d 571, 586 (9th Cir. 2021) (immunity from 14th Amendment coercive interrogation claim where no case clearly governed).

B. Defendant Rubino was not involved in the alleged fabrications.

Under section 1983, an individual defendant "is only liable for his or her own misconduct." *Peck v. Montoya*, 51 F.4th 877, 890 (9th Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). Officer Rubino had no role in the allegedly fabricated evidence, Rubino Dec. ¶ 19; Gerrans Dec. ¶ 71; Crowley Dec. ¶ 71; Wiener Dec. Ex. C (Plf. Resp. to RFAs 5-6 (no evidence)).

III. Summary judgment is proper on the § 1983 nondisclosure of evidence claim (2d Claim).

A plaintiff suing a police officer for withholding material exculpatory evidence must prove that the plaintiff's underlying right under *Brady v. Maryland*, 373 U.S. 83 (1963) was violated, and that the

officer was deliberately indifferent to his duty to inform the prosecutor about Brady material. *Tennison v. City and Cnty. of San Francisco*, 570 F.3d 1078, 1088–89 (9th Cir. 2008).

A. Defendants Crowley and Gerrans are not liable.

1. There is no evidence of undisclosed benefits to Varela.

a. Witness protection was disclosed to the prosecutor and defense.

The inspectors extensively documented their efforts to provide witness protection to George Varela, and kept the prosecutor informed about it. Crowley Dec. ¶ 66; Gerrans Dec. ¶ 66. Their Chronological Report contains several references to witness protection for George Varela. Crowley Dec. Ex. 2, at 53, 57. Varela's recorded statements received by the prosecutor (and the defense) included offers of witness protection. *Id.* Exs. 47-1, -2, -3, 78. The inspectors asked Officer Joanne Welsh to memorialize her meeting with George Varela to discuss witness protection. *Id.* Ex. 82.

The prosecutor was aware of Varela's witness protection. Lipset Dec. ¶¶ 4-5. The prosecutor disclosed it to the defense and to the jury on the record. Wiener Dec. Ex. P (RT303-304, 390-392). The defense even got a copy of the Welsh memorandum. *Id.* Ex. J (NCIP2375-76); *id.* Ex. K (Kaneb Dep. 16:15-17:3, Ex. 17A, item 4 (identifying documents Plaintiff received during 1990-1991 case)).

b. There is no evidence of the inspectors' intervening for Varela in other criminal matters, so nothing to disclose.

There is no evidence the inspectors intervened on George Varela's behalf in other criminal matters. There is affirmative evidence they did not, from the inspectors, Crowley Dec. ¶ 91; Gerrans Dec. ¶ 91; Wiener Dec. Ex. Q (RT683:28-684:7), and from Varela, *id.* Ex. P (RT384:5-385:4, 385:8-27, 390:3-9, 392:12-20). Additionally, it was the inspectors' custom to put any requests for leniency for witnesses in writing, for clarity and to facilitate disclosure – but there are no such requests for leniency in the file for Varela. Crowley Dec. ¶ 91, Ex. 87; Gerrans Dec. ¶ 91.

c. There is no evidence that the inspectors offered George Varela any "Secret Witness" reward or he received it, so nothing to disclose.

The Secret Witness Program was not operating at the time, no reward was approved or paid to Varela, and Plaintiff has admitted he has no contrary evidence. Crowley Dec. ¶¶ 29-30 & Ex. 30; Gerrans Dec. ¶ 29; Wiener Dec. Ex. C (Plf. Resp. to RFA 10). There was nothing to disclose. Even so, the defense still got a copy of the memo requesting a $2,000 Secret Witness reward. *Id.* Ex. J

(NCIP2370); Ex. K (Kaneb Dep. 16:15-17:3, Ex. 17A, item 4 (identifying documents Plaintiff received during 1990-1991 case)).

d. Varela's immunity was requested by the prosecutor and granted in open court, so there was nothing for the inspectors to disclose.

The People requested immunity for Varela here, not the inspectors – so there was nothing for them to disclose. Additionally, there is no constitutional problem with a witness receiving immunity. It is "well-established in the United States that the Government may use incentives to elicit relevant testimony." *U.S. v. Roque-Acosta*, 28 F. Supp. 2d 1256, 1257 (D. Haw. 1998). And the defense knew it: after immunity was granted on the record, the defense cross-examined Varela about it. Facts § II.

2. There is no evidence that eyewitness Kathleen Guevara was aware of the existence of a reward before she testified, so there was nothing to disclose.

It is undisputed Guevara was not aware of any reward before she testified. Guevara Dec. ¶ 5; Crowley Dec. ¶ 31; Gerrans Dec. ¶ 31; Wiener Dec. Ex. C (Plf. Resp. to RFAs 1, 2: no evidence otherwise). When as here there is no evidence of a pre-testimony "deal," a post-trial award to a witness is not an incentive, and therefore not *Brady* material. *E.g., Bell v. Bell*, 512 F.3d 223, 234 (6th Cir. 2008). Certainly, the contrary was not clearly established for purposes of qualified immunity.

B. Defendant Rubino is not liable for withholding exculpatory evidence.

Plaintiff alleges that Officer Rubino was aware that Plaintiff got home at 8:30 p.m. the night of Bastarrica's 9 p.m. murder, and failed to disclose this exculpatory evidence. Plaintiff admits he did not see Officer Rubino outside his home the night of the murder. Wiener Dec. Ex. L (Ciria Dep. 316:12-20). Plaintiff still contends the SFPD was surveilling him for months in 1990, knew when he got home, and gave this exculpatory information to Officer Rubino. But Plaintiff's bare testimony is insufficient to support this claim, which requires too many implausible inferences.

1. Plaintiff cannot defeat summary judgment based on a scintilla of evidence from which multiple implausible inferences would have to be drawn.

"The mere existence of a scintilla of evidence … will be insufficient" to defeat summary judgment; there must be sufficient evidence "on which a jury could reasonably find" for the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). And when, as here, "the factual context" renders a plaintiff's claim "implausible," even more is required to defeat summary judgment: the

plaintiff "must come forward with more persuasive evidence to support [his] claim than would otherwise be necessary." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Tanner v. Heise*, 879 F.2d 572, 577 (9th Cir. 1989) (applying principle in § 1983 action).

2. Plaintiff's testimony is insufficient to support a conclusion that a team of SFPD officers was surveilling Plaintiff for months, knew Plaintiff got home at 8:30 p.m. the night of the murder, and told Officer Rubino.

a. Plaintiff's testimony about Officer Rubino and SFPD surveillance.

Officer Rubino and another officer arrested Plaintiff at the Amazon Hotel on December 27, 1989, and brought him to Ingleside Station. Plaintiff's testified that Officer Rubino released him from Ingleside Station 20 or 25 minutes later. He said Officer Rubino appeared frustrated and said he didn't have enough evidence to charge Plaintiff, and warned him, "I'm going to get you, and I'm going to throw the key away on you." Wiener Dec. Ex. L (Ciria Dep. 263:6-264:11, 287:19-288:4.)

Multiple official records make Plaintiff's account implausible. Officer Rubino would not have been frustrated by not charging Plaintiff, because records show Officer Rubino actually did charge Plaintiff, and that Plaintiff was taken to County Jail and booked, with a mugshot dated the next day, December 28, 1989. Records also show Plaintiff was released from County Jail in the evening on December 28, 1989. Rubino Dec. ¶¶ 6-12, Exs. A (report showing charging), B (Jail custody records); Crowley Dec. Exs. 12 (report showing charges and booking); 13 (mugshot), 15 (rapsheet).

Plaintiff's next implausible allegation is that he was under SFPD surveillance from then until his April 19, 1990 arrest for the murder. Wiener Dec. Ex. F (Complaint ¶¶ 47–53). But the evidence doesn't support this either. Plaintiff admits he has no documents showing he was under SFPD surveillance. Wiener Decl. Ex. C (Plf. Resp. to RFA 4). Plaintiff has only his own testimony. Plaintiff said he saw Officer Rubino following him on three occasions: once in a red Firebird or Camaro just like one Plaintiff drove, *id.* Ex. L (Ciria Dep. 269:1-12), once in a small truck just like one Plaintiff drove, *id.* 269:22-270:8, and once in a minivan, *id.* 270:9-271:13. There was no communication on any of these occasions. *Id.* 280:10-25. Plaintiff also said that about ten other times he thought he was being followed by undercover SFPD officers. They were in regular cars, not obvious unmarked police cars. *Id.* 281:11-24. But Plaintiff's "street sense" told him they were undercover police. *Id.* 281:25-282:20. The people in the cars were well groomed and in good shape, and not Black, which made Plaintiff

think they were police. *Id.* 281:1-10, 283:15-284:4. And in three or four instances, the cars had license plates with an "E" indicating they were government vehicles. *Id.* 282:21-283:14. Finally, there was one occasion when Plaintiff was pulling out of a parking spot, Plaintiff spotted a truck he thought was surveilling him, and it peeled out and sped away. *Id.* 284:5-285:5.

Plaintiff also thought he was being surveilled the night of the murder. Plaintiff testified that after he got home he looked out his living room window. His home on Sickles Avenue was near an intersection, and he saw a car parked "kitty-corner" on the far side of the cross-street. *Id.* 21:20-22:13, 26:5-27:4. The car's windshield was facing toward Sickles Street, so it was parked facing the wrong way. *Id.* 27:1-28:1. There was no light on in the car, but Plaintiff said he could see "shadows" moving. *Id.* 29:11-30:6. Plaintiff could not make out any faces. *Id.* 30:18-31:7. He did not see Officer Rubino in the car. *Id.* 316:12-21. But Plaintiff thought they were police because he could tell the people in the car were white, *id.* 33:17-34:4, and he had seen this car before parked in the same place, *id.* 29:7-10.

On April 19, 1990, Officer Rubino arrested Plaintiff on the murder warrant. Plaintiff testified that while he was in the car waiting to be transported to County Jail, Officer Rubino read him his rights, then he said to Officer Rubino, "Hey, Rubino, come on man, you know I don't kill nobody," with Rubino responding, "Why do you kill Felix?" *Id.* 286:12-23. According to Plaintiff, he then told Officer Rubino that he had seen him following him around, and Officer Rubino responded, "Oh, yeah. I saw you the night after the murder taking a bunch of kids to the movies." *Id.* 289:11-289:18. That is the sum of Plaintiff's evidence to support his surveillance claim. *Id.* 285:6-11.

b. Plaintiff's testimony is insufficient to support his implausible nondisclosure claim against Officer Rubino.

Even accepting Plaintiff's observations for purposes of summary judgment, these are still insufficient to support Plaintiff's exceedingly implausible *Brady* claim against Officer Rubino. The Supreme Court has cautioned that when it comes to claims of coordinated misconduct, courts must "hedge[] against false inferences from identical behavior." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). Plaintiff's observations of people who he thought were undercover law enforcement a dozen times over the course of three to four months is consistent with the activity of simply driving around San Francisco; it does not support a conclusion that SFPD was tracking Plaintiff's movements

and keeping Officer Rubino informed. The comments Plaintiff attributes to Officer Rubino do not make SFPD monitoring of Plaintiff any more plausible; a supposed grudge does not make a sprawling conspiracy, or conjure into being exculpatory evidence that doesn't exist.

Indeed, the evidence makes it implausible to infer SFPD surveillance of Plaintiff. What Plaintiff describes does not match how the SFPD did surveillance in 1990. The Narcotics Detail is the SFPD division that would have been responsible for any large-scale surveillance of a drug dealer like Plaintiff. Rubino Dec. ¶ 16; Tursi Dec. ¶ 3. But it was exceedingly rare for the Narcotics Detail to engage in surveillance for more than a week. Surveillance would end if it was not progressing toward a drug seizure or arrests. Plaintiff was never the subject of any long-term surveillance. *Id.* ¶ 4.

Plaintiff's testimony also does not describe Narcotics Detail surveillance tactics and personnel in 1990. Cars with "E" license plate were never used; this would immediately reveal law enforcement activity. And surveillance vehicles did not park facing the wrong direction, as that would draw attention. Narcotics Detail personnel purposely were not well-groomed, so they could blend in as drug dealers, drug users, or members of the community. There were many Black officers in the Narcotics Detail, so that any large surveillance operation would have at least one Black officer. Tursi Dec. ¶ 5.

Even if the Narcotics Detail had been surveilling Plaintiff, and outside his home on March 25, it would be implausible to infer that there would be a record of when Plaintiff got home. Narcotics Detail practice in 1990 was to only memorialize surveillance when it resulted in contact with a subject, an arrest, or a seizure. A subject's comings and goings at particular times would not otherwise be recorded. Tursi Dec. ¶ 6. Thus, it is implausible to conclude that an exculpatory record would exist.

Even if an exculpatory record existed, Officer Rubino didn't know about it. Rubino Dec. ¶ 16. And it is implausible to conclude Officer Rubino would know about it. Officer Rubino was not part of the Narcotics Detail. *Id.* The Narcotics Detail would not share its investigative file or details of its surveillance activities with a plainclothes unit in a police district. Tursi Dec. ¶ 7. Rather, at this time Officer Rubino was a plainclothes patrol officer assigned to the Ingleside District. He did not work undercover. He responded to calls for police service while wearing plainclothes. As of 1990, the plainclothes unit was Officer Rubino and Officer Aissa, and its primary focus was investigating burglaries and robberies. When he did surveillance, it would be brief – if some illegal activity or

wanted person could not be found within a matter of minutes or hours, it was over. He did not do multi-day surveillance. He did not have access to a mix of vehicles, he only had the standard unmarked car his unit regularly used (the kind of car Plaintiff said wasn't following him), and with permission he could use his own car at the time (a red Honda Prelude). Rubino Dec. ¶¶ 2-3, 14-16.

Finally, Plaintiff's evidence is insufficient to support a claim that Officer Rubino was outside his home at 8:30 p.m. on Sunday March 25, 1990. He didn't see Officer Rubino. And Officer Rubino wasn't there. Rubino Dec. ¶ 13. Officer Rubino did not work Sundays or nights. His schedule was to work weekday day shifts; when he was on rare occasion scheduled for a weekend, that would be for a special event requiring extra police in uniform (e.g., a demonstration). His overtime records show no overtime earned on Sunday March 25, 1990. *Id.* ¶ 13 & Ex. C. Officer Rubino wasn't there.

IV. Summary judgment is proper on the § 1983 conspiracy claim (4th Claim).

"Conspiracy is not itself a constitutional tort under § 1983," it only makes additional defendants liable for a proven "underlying constitutional violation." *Lacey v. Maricopa County*, 693 F.3d 896, 935 (9th Cir. 2012). Without a violation, there is no conspiracy liability.

And qualified immunity applies, because the Ninth Circuit has never held that the "intracorporate conspiracy doctrine" *doesn't* bar a section 1983 conspiracy claim against officers employed by the same department. *See Lobato v. Las Vegas Metro. Police Dep't*, No. 22-16440, 2023 WL 6620306, at *2 (9th Cir. Oct. 11, 2023); *see Ziglar v. Abbasi*, 582 U.S. 120, 154 (2017) (qualified immunity bars § 1985(3) conspiracy claim for same reason).

Finally, there is no evidence of a conspiracy. To prove conspiracy, a "plaintiff must show that the conspiring parties 'reached a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.'" *Lacey*, 693 F.3d at 935 (quoting *Gilbrook v. City of Westminster*, 177 F.3d 839, 856-857 (9th Cir. 1999)). There is no such evidence. Rubino Dec. ¶ 19; Gerrans Dec. ¶¶ 71, 93; Crowley Dec. ¶¶ 71, 93; Wiener Dec. Ex. C (Plf. Resp. to RFAs 5-6).

V. Summary judgment is proper on § 1983 municipal liability (1st, 2d, 3d Claims).

Without an underlying violation, there is no entity liability under section 1983. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). But even if a constitutional violation occurred, Plaintiff has no evidence that a specific policy or training defect was the "moving force" that caused that

violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Absent an official policy, a plaintiff must show the violation was caused by "a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005) (internal quotation marks omitted). "Plaintiffs cannot allege a widespread practice of custom based on 'isolated or sporadic incidents; [liability] must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.'" *Sabra v. Maricopa Cnty. Cmnty. Coll. Dist.*, 44 F.4th 867, 884 (9th Cir. 2022) (quoting *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996)) (alteration in original).

"A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). A plaintiff must establish that "city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights," and "the policymakers choose to retain that program." *Id.* This requires the plaintiff to show "[a] pattern of similar constitutional violations by untrained employees." *Id.* at 62.

Here, Plaintiff lacks the evidence to meet this exacting standard. The only witnesses Plaintiff identified for this claim are the inspectors themselves, and the only evidence Plaintiff has identified are a few judicial opinions from 2006 or later. Wiener Dec. Ex. M (contention interrogatory responses). But the inspectors' testimony does not establish any longstanding practice or custom of causing prosecutions without probable cause, not disclosing exculpatory evidence, or intentionally fabricating evidence; to the contrary, they rebut it. Crowley Dec. ¶ 2; Gerrans Dec. ¶ 2. And judicial opinions aren't evidence, they are hearsay. *U.S. v. Stinson*, 647 F.3d 1196, 1210 (9th Cir. 2011); *U.S. v. Sine*, 493 F.3d 1021, 1036 (9th Cir. 2007). They are not even admissible to show municipal notice of a need for different training or policies, because they all postdate 1990 by at least 15 years.

VI. Summary judgment is proper on the remaining California claims (5th-8th Claims).

The Court has already limited Plaintiff's California claims to pre-arraignment harm – from his arrest through his April 24, 1990 arraignment. ECF No. 62. Plaintiff cannot prevail on these claims.

A. Probable cause to arrest Plaintiff is a bar to all California claims.

In California, peace officers have "no civil liability" for false arrest and imprisonment where

probable cause exists. Cal. Pen. Code § 847(b); *e.g.*, *McArthur v. City and Cnty. of San Francisco*, 190 F. Supp. 3d 895, 906 (N.D. Cal. 2016) (§ 847(b) barred negligence claim). As explained above, § I.A., probable cause existed to prosecute Plaintiff. The probable cause standard for arrest is the same. *Wige v. City of Los Angeles*, 713 F.3d 1183, 1185 (9th Cir. 2013). This bars any liability.

B. Independently, all California claims accrued in 1990 and are time-barred.

Under California law, a plaintiff cannot sue a public employee or public entity on a cause of action for which no timely Government Claim was presented. Cal. Gov. Code § 945.4; *City of Stockton v. Super. Ct.*, 42 Cal. 4th 730, 738 (2007). The claim must be presented within sixth months of accrual of the cause of action. Cal. Gov. Code § 911.2(a). Under California law, a "cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced." *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 798 (2010). Here, Plaintiff presented his claim on September 19, 2022, SUF 58, specifying an incident date of April 18, 2022, the date Plaintiff's conviction was vacated and his cause of action for malicious prosecution accrued. Wiener Dec. Ex. G. It was timely with respect to that malicious prosecution cause of action. The City denied the claim. *Id.* Ex. F (Complaint ¶ 18).

Plaintiff's claim, however, was not timely as to Plaintiff's separate cause of action for his false arrest and imprisonment up to April 24, 1990. That separate cause of action accrued immediately upon Plaintiff's April 19, 1990 arrest. "A cause of action for false arrest "accrues on the arrest and is actionable immediately." *Mohlmann v. City of Burbank*, 179 Cal. App. 3d 1037, 1041, n.1 (1986). Unlike for malicious prosecution, "[t]here is no requirement that the arrestee allege favorable termination of the criminal proceedings" before pursuing a cause of action based on his false arrest and imprisonment up to arraignment. *Id.*; *accord Collins v. Cnty. of Los Angeles*, 241 Cal. App. 2d 451, 459 (1966). The harm of false imprisonment through arraignment is a distinct cause of action, as the California Supreme Court held. *Asgari v. City of Los Angeles*, 15 Cal. 4th 744, 758 (1997) ("Plaintiff's false imprisonment ended when he was arraigned in municipal court on the felony complaint [five] days after he was arrested. At that point, plaintiff's confinement was pursuant to lawful process and no longer constituted false imprisonment."). But Plaintiff did not present a timely Government Claim. Therefore, judgment should be entered for Defendants.

C. Officer Rubino's reliance on a regular arrest warrant is a bar to any liability.

"There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice …." Cal. Civ. Code § 43.55(a). Officer Rubino arrested Plaintiff on a warrant regular on its face. The "without malice" requirement is met, where Officer Rubino did not "'knowingly or recklessly' giv[e] false information" to support Plaintiff's arrest warrant. *Harden v. San Francisco Bay Area Rapid Transit Dist.*, 215 Cal. App. 3d 7, 15, (1989). It is undisputed Officer Rubino had no part in getting the warrant. *Supra*, § I.B.3. Immunity applies.

D. There are additional bars to the Bane Act and conspiracy claims (5th, 6th Claims).

Plaintiff's Bane Act claim (Fifth Claim) is barred for the additional reason that all alleged conduct was part of his prosecution, Complaint ¶¶ 138-149, and is therefore within the scope of Government Code § 821.6 immunity. *Leon v. Cnty. of Riverside*, 14 Cal. 5th 910, 922 (2023).

Plaintiff's California conspiracy claim (Sixth Claim) is barred by California's intracorporate conspiracy doctrine, where as here the conspiracy is alleged to be between employees of the same entity acting in the scope of employment, Complaint ¶¶ 107, 150. *E.g.*, *Black v. Bank of America*, 30 Cal. App. 4th 1, 6 & n.3 (1994). And as with the federal claim, no evidence supports it.

VII. Summary judgment is proper on the punitive damages claims.

There is insufficient evidence to conclude the defendant officers were "motivated by malice or indifference to" Plaintiff's federal rights, as required for punitive damages. *Franet v. Cnty. of Alameda Soc. Servs. Agency*, 291 F. App'x 32, 35 (9th Cir. 2008) (affirming striking of punitive damages award against county worker who wrongfully took children from their mother's custody). And on Plaintiff's remaining state law claims (regarding his arrest through arraignment), there is not "clear and convincing" evidence of malice, oppression, or fraud as required by Cal. Civ. Code § 3294.

CONCLUSION

For the foregoing reasons, summary judgment, in whole or in part, should be granted.

Dated: February 8, 2024

DAVID CHIU, City Attorney

By: */s/ Peter J. Keith*
PETER J. KEITH, Deputy City Attorney