

1  
2  
3  
4  
5  
6  
7  
8  
9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11 -----oo0oo-----

12 BILAL ABDUL YASIN,  
13 Plaintiff,

NO. CIV. S-08-2299 FCD/GGH

14 v.

MEMORANDUM AND ORDER

15 CHAD COULTER, ALBA ESPINOZA,  
16 JOE GALVAN, ROMAN ALVAREZ,  
and Does 1 through 20,  
inclusive,

17 Defendants.

18 -----oo0oo-----

19 This matter is before the court on defendant Chad Coulter's  
20 ("defendant" or "Coulter") motion for summary judgment as to  
21 plaintiff Bilal Abdul Yasin's ("plaintiff") first amended  
22 complaint ("FAC"), alleging violations of plaintiff's  
23 constitutional rights under the Fourth, Fifth and Fourteenth  
24 Amendments of the United States Constitution.<sup>1</sup> The claims arise

25 \_\_\_\_\_  
26 <sup>1</sup> The FAC, filed May 27, 2009, also names Alba Espinoza,  
27 Joe Galvan and Roman Alvarez as defendants. To date, plaintiff  
28 has not served these defendants, and they are not moving parties  
on the instant motion. By this order, the court dismisses  
Coulter from this action. The court has not yet issued a  
scheduling order. It will defer doing so to permit plaintiff a

1 out of an investigation and arrest of plaintiff for buying stolen  
2 cigarettes and selling illegal narcotics. Plaintiff does not  
3 deny in his FAC that he engaged in this conduct but alleges he  
4 was impermissibly singled out for investigation because he is  
5 Palestinian and a Muslim.

6 Plaintiff opposes Coulter's instant motion, arguing the  
7 hearing on the motion should be continued to permit him time to  
8 conduct discovery. Because the court finds that plaintiff has  
9 not made the requisite showing under Fed. R. Civ. P. 56(f), the  
10 court resolves the motion on the papers and evidence presently  
11 before it.<sup>2</sup>

12 For the reasons set forth below, the court GRANTS  
13 defendant's motion on the ground that plaintiff's claims are  
14 barred by the statute of limitations. As a result of that  
15 finding, the court does not reach defendant's alternative basis  
16 for the motion that Coulter is entitled to qualified immunity.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26 

---

final opportunity to serve the remaining defendants as set forth  
below.

27 <sup>2</sup> Because oral argument will not be of material  
28 assistance, the court orders this matter submitted on the briefs.  
E.D. Cal. L.R. 78-230(h).

1 **BACKGROUND<sup>3</sup>**

2 **I. Factual Background**

3 **A. Investigation of Plaintiff**

4 Coulter, a Federal Bureau of Investigation Special Agent,  
5 first learned of plaintiff's name in connection with potential  
6 drug trafficking in the course of the FBI's investigation of a  
7 drug trafficking operation in Northern California. (RUF ¶ 1.)  
8 Some of the individuals suspected of being involved in the drug  
9 trafficking operation either owned convenience stores or also  
10 worked as resellers of merchandise to convenience stores along  
11 the I-5 Interstate corridor. This corridor is known for drug  
12 trafficking, including methamphetamine. Some of the individuals  
13 suspected of involvement in the drug trafficking operation also  
14 had frequent contacts with plaintiff and his convenience store  
15 called "Chinca's Market" located in Chico, California. (RUF  
16 ¶ 2.)

17 Sometime thereafter, Coulter obtained plaintiff's criminal  
18 history showing an arrest for drug possession in 1994. (RUF  
19 ¶ 3.) In March 2004, Coulter received a 1996 report from the  
20 California Department of Justice concerning the arrest of a  
21 person for transporting 48 cases of pseudoephedrine tablets in a  
22 Ryder truck. The tablets in boxes had labels attached for candy  
23 and gum, and it was suspected this was done to conceal the

---

24  
25 <sup>3</sup> The court considers the following facts undisputed.  
26 While plaintiff claims to "dispute" the majority of the facts  
27 below, the only basis for his dispute is his request for  
28 discovery pursuant to Rule 56(f). For the reasons set forth  
below, the court denies that request, and thus, plaintiff has not  
presented any admissible evidence to create a triable issue.  
(See Reply Sep. Stmt. of Undisp. Facts in Supp. of Def.'s MSJ,  
filed Aug. 24, 2009 [Docket #32-8] [hereinafter "RUF"].)

1 identity of the contents in an effort to utilize the tablets to  
2 manufacture methamphetamine (since pseudoephedrine is a major  
3 ingredient of methamphetamine). The individual arrested  
4 indicated that he had been working for his "cousin" who owned  
5 Chinca's Market in Chico. This "cousin" was identified through  
6 subsequent investigation as plaintiff. Plaintiff admitted  
7 purchasing some pseudoephedrine boxes every so often, but denied  
8 knowing that such tablets were used to make methamphetamine.  
9 (RUF ¶ 4.)

10 The FBI also received another report indicating that an  
11 individual under investigation frequented plaintiff's apartment  
12 in approximately 2000, and that this person was "involved in  
13 drugs" and was on probation. (RUF ¶ 5.) In May 2004, Coulter  
14 received information from an inmate in a Butte County jail  
15 that plaintiff was involved in bartering alcohol for sexual  
16 favors, and that he hired young men to drive trucks running  
17 drugs to Los Angeles. (RUF ¶ 6.) Coulter also inquired of  
18 local law enforcement about criminal activity near Chinca's  
19 Market. He received information about such activity, including  
20 drug activity. (RUF ¶ 7.)

21 Based on this information, in September 2004 the FBI, with  
22 the assistance of a public utility company, installed a telephone  
23 pole camera ("pole camera") to observe possible criminal activity  
24 at Chinca's Market. (RUF ¶ 8.) Plaintiff learned of the pole  
25 camera from a former public utility employee and called the FBI  
26 shortly after it was installed to inquire about the camera. (RUF  
27 ¶ 9.)

28

1 At some point in 2004, Coulter contacted agents of the  
2 California Alcohol Beverage Control Board ("ABC"). He inquired  
3 about whether they had any information about plaintiff and his  
4 business. This was part of the FBI's routine contact with ABC  
5 concerning potential criminal conduct at liquor  
6 stores. (RUF ¶ 10.) After this contact, the FBI and ABC jointly  
7 opened an investigation of plaintiff, with Coulter providing  
8 assistance to ABC's investigation. (RUF ¶ 11.)

9 ABC began undercover operations beginning in approximately  
10 September 2004. On at least three occasions in 2004 and 2005, an  
11 undercover ABC operative offered to sell plaintiff cigarettes  
12 that the operative told plaintiff were stolen. Plaintiff agreed  
13 to purchase the cigarettes. The undercover operative also had  
14 contact with employees of Chinca's Market concerning the purchase  
15 of cigarettes that the operative told the employees were stolen.  
16 (RUF ¶ 12.)

17 In late January 2005, the undercover ABC operative arranged  
18 to sell plaintiff approximately twenty-five cases of cigarettes  
19 that the operative told plaintiff were stolen. The operative  
20 also arranged to purchase from plaintiff approximately a half  
21 pound of marijuana. (RUF ¶ 13.) Coulter had no direct contact  
22 with plaintiff or anyone else in Chinca's Market during the  
23 undercover operations. (RUF ¶ 14.)

#### 24 **B. Arrest and Search of Plaintiff's Home and Business**

25 On February 1, 2005, ABC obtained a warrant from the Butte  
26 County Superior Court to search plaintiff's residence and  
27 Chinca's Market for evidence of stolen cigarettes and drug  
28

1 trafficking. (RUF ¶ 15.)<sup>4</sup> The warrant was supported by a  
2 fifty-page affidavit setting forth the ABC undercover operation  
3 and evidence obtained against plaintiff with respect to attempted  
4 purchases of stolen cigarettes and attempted sale of marijuana.  
5 (RUF ¶ 16.) On February 3, 2005, per agreement, plaintiff met  
6 undercover ABC operatives at Chinca's Market. He paid the  
7 operatives approximately \$11,000.00 for cigarettes he had been  
8 told were stolen. He also attempted to sell to the operatives a  
9 half pound of marijuana in exchange for approximately \$2,200.00.  
10 After the attempted transaction, plaintiff was arrested by ABC  
11 agents. Coulter was present, but did not physically take  
12 plaintiff into custody. (RUF ¶ 17.) Pursuant to the warrant,  
13 plaintiff's van was searched by an ABC investigator for evidence  
14 of drug trafficking. Marijuana was found in the cup holder next  
15 to the driver's seat, as well as in a jar in the center console.  
16 Minutes after plaintiff was arrested, investigators from  
17 California ABC and other local law enforcement offices, assisted  
18 by some FBI agents, executed a state search warrant for Chinca's  
19 Market and plaintiff's residence in Chico. (RUF ¶ 19.) Pursuant  
20 to the warrant, plaintiff's computers, some cash, and other  
21 evidence were seized by ABC agents and transferred to Coulter's

---

22  
23 <sup>4</sup> Plaintiff disputes whether the warrant attached as Ex.  
24 E to Coulter's declaration is the warrant approved on February 1,  
25 2005 by the Butte County judge because the copy attached to the  
26 declaration has the "no" box checked regarding approval. Coulter  
27 concedes for purposes of this motion that there is a factual  
28 dispute on this issue. However, that dispute is not material to  
the motion. For purposes of this motion, it is only relevant  
that as evidenced by the FBI's and ABC's contemporaneous reports,  
the Butte County judge authorized a search warrant of plaintiff's  
home and business on February 1, 2005, and that warrant was  
executed on February 3, 2005. Plaintiff does not raise any  
evidence to dispute those facts.

1 custody. (RUF ¶ 20.)

2 After forensic electronic analysis, in which Coulter did not  
3 participate, the computers were returned to plaintiff. (RUF  
4 ¶ 21.) Coulter did not participate in questioning plaintiff  
5 after he was arrested. (RUF ¶ 22.) Coulter had no additional  
6 involvement in any further investigation of plaintiff by ABC.  
7 (RUF ¶ 23.)

### 8 **C. Criminal Prosecution**

9 On February 25, 2005, the Butte County District Attorney's  
10 Office filed a criminal complaint in California Superior Court  
11 charging plaintiff with two counts of attempting to sell  
12 marijuana under California Health & Safety Code § 11360, and five  
13 counts of attempted receipt of stolen property under California  
14 Penal Code §§ 664, 496(a). (RUF ¶ 24.) Plaintiff was first  
15 arraigned on March 11, 2005, and entered a not guilty plea on  
16 April 4, 2005. (RUF ¶ 25.) Coulter was not involved in the  
17 decision to prosecute. (RUF ¶ 26.)

18 On January 17, 2006, plaintiff filed a motion to dismiss the  
19 complaint for discriminatory prosecution under Murgia v.  
20 Municipal Court, 15 Cal. 3d 286, 306 (1975) (recognizing a  
21 defendant's right to bring a pretrial motion to dismiss on the  
22 grounds of "'intentional and purposeful' invidious  
23 discrimination"). (RUF ¶ 27.) On July 17, 2007, the court  
24 dismissed the prosecution because the FBI had not produced  
25 documents that might have been "material" to plaintiff's motion.  
26 (RUF ¶ 28.) The superior court did not grant the motion based on  
27 any finding of discriminatory investigation or prosecution.  
28 (Id.)

1 **II. Procedural History**

2 Plaintiff filed his original complaint on September 28,  
3 2008. (Docket #1.) Therein, plaintiff alleged claims against  
4 Coulter, the FBI, the State of California and various agents of  
5 ABC. On April 14, 2009, Coulter and the FBI moved to dismiss the  
6 complaint. (Docket # 19.) In response, plaintiff filed a first  
7 amended complaint, thereby mooted the motion to dismiss.  
8 (Docket # 22.) In the FAC, plaintiff continued to allege claims  
9 against Coulter and other individual defendants but dropped the  
10 FBI as a defendant. In response to the FAC, Coulter filed the  
11 instant motion.

12 In the FAC, plaintiff alleges Coulter caused to be installed  
13 a surveillance camera to monitor plaintiff's place of business in  
14 Chico, examined plaintiff's bank, financial, and telephone  
15 records without a warrant; and intercepted plaintiff's telephone  
16 and computer communications without a warrant. (FAC, ¶¶ 10-17.)  
17 Plaintiff alleges that Coulter and the FBI did this because  
18 plaintiff was Palestinian and a Muslim, and that they lacked  
19 probable cause to believe he was financially supporting  
20 terrorists or that he had committed any crime. (Id. at  
21 ¶¶ 18-19.)

22 Plaintiff further alleges that in September 2004, Coulter  
23 told an employee of the California Anti-terrorism Information  
24 Center that plaintiff was suspected of participating in illegal  
25 narcotics activities and that this representation was false in  
26 that Coulter did not have information that plaintiff  
27 participated in illegal narcotics activities. (Id. at ¶¶ 22-24.)  
28 The California official relayed this information to defendant

1 Roman Alvarez ("Alvarez"), an ABC representative. (Id. at ¶ 25.)  
2 Plaintiff alleges that Alvarez contacted Coulter, and he told  
3 Alvarez that he had a report that an African male was involved in  
4 large quantities of narcotics. (Id. at ¶ 26.) Thereafter,  
5 Coulter, Alvarez, and defendants Alba Espinoza ("Espinoza") and  
6 Joe Galvan ("Galvan"), other ABC agents, "conspired to and  
7 devised a plan to investigate, single-out for prosecution, and  
8 entrap plaintiff into committing a crime, for the purposes of  
9 assisting SA Coulter in investigating plaintiff because of his  
10 national origin and religion." (Id. at ¶ 27.)

11 Plaintiff alleges that in "furtherance of that conspiracy,"  
12 the named defendants agreed to send Espinoza, "an attractive  
13 female" to plaintiff's business to entrap plaintiff into  
14 furnishing Espinoza with narcotics. (Id. at ¶¶ 28-29.)  
15 Plaintiff alleges when that failed, defendants agreed to send  
16 Espinoza back to plaintiff's business to entrap plaintiff into  
17 purchasing stolen cigarettes. (Id. at ¶¶ 30-31.) On the  
18 third occasion, plaintiff's employees agreed to purchase stolen  
19 cigarettes. (Id. at ¶¶ 32-33.)

20 Plaintiff further alleges that in "contravention" of ABC  
21 policy, Coulter, Alvarez, Espinoza, and Galvan decided not to  
22 arrest plaintiff's employees but to continue to send Espinoza to  
23 plaintiff's business to entrap plaintiff into "furnishing"  
24 narcotics and purchasing stolen cigarettes. (Id. at ¶ 34.)  
25 Plaintiff finally agreed to buy cigarettes after Espinoza told  
26 plaintiff that instead of being stolen, the cigarettes were  
27 purchased on a credit card and she wanted to sell them for cash.  
28 (Id. at ¶¶ 35-38.) Plaintiff alleges Espinoza also went to

1 plaintiff's business on three separate occasions to get him to  
2 sell her narcotics. (Id. at ¶¶ 39-40.) After being spurned  
3 three times by plaintiff, Espinoza told plaintiff that she needed  
4 to sell illegal drugs to continue her business. (Id. at ¶¶  
5 41-43.) Plaintiff then agreed to furnish plaintiff with  
6 marijuana. (Id. at ¶ 44.)

7 Plaintiff alleges he was then arrested, and a search warrant  
8 was served on his residence. (Id. at ¶¶ 45-46.) Plaintiff  
9 alleges that FBI agents unlawfully "interrogated" plaintiff,  
10 asking him questions about his immigration history, his Muslim  
11 religion, how often he attended church and how much he  
12 contributed, his relationship with other Middle Eastern  
13 shopkeepers in Butte County, his contributions to local  
14 Muslim churches, his financial contributions to Hamas, "a Muslim  
15 organization," his thoughts about September 11, 2001, and where  
16 he had hidden \$85,000.00 in cash in his house. (Id. at ¶¶  
17 47-56.) Plaintiff alleges that FBI agents illegally seized his  
18 personal property, including his computer, videotapes, personal  
19 mail, photographs, and cash. (Id. at ¶ 57.) Plaintiff alleges  
20 defendants' conduct violated plaintiff's constitutional rights  
21 under the Fourth, Fifth and Fourteenth Amendments.

22 To date, no discovery has taken place. The instant motion  
23 is Coulter's first responsive pleading to the FAC.

#### 24 STANDARD

##### 25 I. Summary Judgment

26 The Federal Rules of Civil Procedure provide for summary  
27 judgment where "the pleadings, the discovery and disclosure  
28 materials on file, and any affidavits show that there is no

1 genuine issue as to any material fact and that the movant is  
2 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c);  
3 see California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998).  
4 The evidence must be viewed in the light most favorable to the  
5 nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th  
6 Cir. 2000) (en banc).

7 The moving party bears the initial burden of demonstrating  
8 the absence of a genuine issue of fact. See Celotex Corp. v.  
9 Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to  
10 meet this burden, "the nonmoving party has no obligation to  
11 produce anything, even if the nonmoving party would have the  
12 ultimate burden of persuasion at trial." Nissan Fire & Marine  
13 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).  
14 However, if the nonmoving party has the burden of proof at trial,  
15 the moving party only needs to show "that there is an absence of  
16 evidence to support the nonmoving party's case." Celotex Corp.,  
17 477 U.S. at 325.

18 Once the moving party has met its burden of proof, the  
19 nonmoving party must produce evidence on which a reasonable trier  
20 of fact could find in its favor viewing the record as a whole in  
21 light of the evidentiary burden the law places on that party.  
22 See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th  
23 Cir. 1995). The nonmoving party cannot simply rest on its  
24 allegations without any significant probative evidence tending to  
25 support the complaint. See Nissan Fire & Marine, 210 F.3d at  
26 1107. Instead, through admissible evidence the nonmoving party  
27 "must set forth specific facts showing that there is a genuine  
28 issue for trial." Fed. R. Civ. P. 56(e).

1 **II. Rule 56(f)**

2 Rule 56(f) provides in pertinent part:

3 Should it appear from the affidavits of a party opposing  
4 the motion that the party cannot for reasons stated  
5 present by affidavit facts essential to justify the  
6 party's opposition, the court may refuse the application  
7 for judgment or may order a continuance to permit affidavits  
8 to be obtained or depositions to be taken or discovery to  
9 be had or may make such other order as is just.

7 Fed. R. Civ. P. 56(f). The party seeking a continuance has a  
8 three-fold burden under Rule 56(f): First, he "must make clear  
9 what information is sought and how it would preclude summary  
10 judgment." Garrett v. City and County of San Francisco, 818 F.2d  
11 1515, 1518 (9th Cir. 1987). Second, he must explain "why [he]  
12 cannot immediately provide 'specific facts' demonstrating a  
13 genuine issue of material fact." Mackey v. Pioneer Nat. Bank,  
14 867 F.2d 520, 524 (9th Cir. 1989). Third, he must put the  
15 foregoing explanations into an affidavit. Fed. R. Civ. P. 56(f);  
16 Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th  
17 Cir. 1986).

18 Under Rule 56(f), the party seeking a continuance bears the  
19 burden of showing what specific facts it expects to uncover that  
20 will raise an issue of material fact. Continental Maritime v.  
21 Pacific Coast Metal Trades Dist. Council, 817 F.2d 1391, 1395  
22 (9th Cir. 1987). The affidavit in support of the request must  
23 make clear what information would preclude summary judgment.  
24 Garrett, 818 F.2d at 1518. Mere speculation or hope that further  
25 information may be developed is inadequate to postpone the  
26 court's ruling on a motion for summary judgment. Neely v. St.  
27 Paul Fire & Marine Ins. Co., 584 F.2d 341, 344 (9th Cir. 1978).  
28

1 Where there is no likelihood that further discovery will produce  
2 material new information, the court need not grant the  
3 continuance and may proceed to a ruling on the motion for summary  
4 judgment. California Union Ins. Co. v. American Diversified Sav.  
5 Bank, 914 F.2d 1271, 1278 (9th Cir. 1990).

## 6 ANALYSIS

### 7 I. Rule 56(f) Request

8 In the first instance, plaintiff requests a continuance of  
9 the motion to permit time for him to depose Coulter, the other  
10 named defendants and the FBI and Homeland Security Officer who  
11 interrogated plaintiff following his arrest. Plaintiff asserts  
12 that if given an opportunity to depose Coulter he could establish  
13 Coulter's illegal motivation for investigating plaintiff.  
14 Plaintiff asserts that whether Coulter's investigation was an  
15 anti-terrorism investigation based only on plaintiff's Muslim  
16 religion and Middle-Eastern ancestry is the essential issue in  
17 this case, and if permitted to depose Coulter he could garner  
18 evidence supporting his claim of a discriminatory investigation.  
19 Plaintiff asserts that if permitted to depose the other named  
20 defendants and other persons involved in plaintiff's arrest,  
21 plaintiff could gather facts concerning the illegal bases for  
22 Coulter's investigation. (See Katz Decl., filed July 10, 2009  
23 [Docket # 25-4].)

24 Plaintiff's assertions are insufficient to establish  
25 entitlement to relief under Rule 56(f). Plaintiff's counsel's  
26 affidavit filed in support of the Rule 56(f) request (see id.)  
27 does not set forth what *specific* facts plaintiff expects to  
28 obtain that will defeat Coulter's motion for summary judgment.

1 As set forth below, as his preliminary argument in support of his  
2 motion for summary judgment, Coulter argues plaintiff's claims  
3 are barred by the statute of limitations. Plaintiff has not  
4 explained how the requested discovery will establish the  
5 timeliness of this action. To be entitled to relief under Rule  
6 56(f), plaintiff's supporting affidavit must make clear what  
7 information would defeat summary judgment. Garrett, 818 F.2d at  
8 1518. Instead, here, plaintiff simply identifies the various  
9 topics of which he would like to inquire of Coulter and others,  
10 without tying those inquiries to the issues presented by Coulter's  
11 motion. This does not meet the requirements of the Rule; nowhere  
12 does plaintiff identify what specific facts he anticipates  
13 gathering to defeat the instant motion.

14 At best, plaintiff appears to want to test the credibility  
15 of Coulter's declaration filed in support of the motion. Yet,  
16 merely testing Coulter's sworn statements through a deposition in  
17 hope that he might change his declaration is not a basis for  
18 granting a Rule 56(f) request. See e.g. Strang v. U.S. Arms  
19 Control and Disarmament Agency, 864 F.2d 859, 861 (D.C. Cir.  
20 1989) (holding that "[w]ithout some reason to question the  
21 veracity of [the defendant's] affiants . . . , whom [the  
22 plaintiff] sought to depose . . . , [the plaintiff's] desire to  
23 'test and elaborate' the affiants' testimony falls short" of  
24 demonstrating entitlement to relief under Rule 56(f)). Mere  
25 speculation or hope that further information may be developed is  
26 inadequate to postpone the court's ruling on Coulter's motion for  
27 summary judgment. Neely, 584 F.2d at 344.

1           Ultimately, plaintiff proposes to conduct broad discovery of  
2 Coulter and other agents without any idea of what specific facts  
3 will be obtained or how those facts will defeat summary judgment.  
4 This is precisely what Rule 56(f) does not permit. Duffy v.  
5 Wolle, 123 F.3d 1026, 1041 (8th Cir. 1997) (holding "'Rule 56(f)  
6 does not condone a fishing expedition' where a plaintiff merely  
7 hopes to uncover some possible evidence of a constitutional  
8 violation") (citations omitted). Because plaintiff offers no  
9 specific reasons demonstrating the necessity and utility of  
10 discovery to enable him to withstand summary judgment, the court  
11 properly denies plaintiff's Rule 56(f) request.<sup>5</sup>

## 12 **II. Coulter's Motion for Summary Judgment**

13           Plaintiff brings his constitutional claims pursuant to  
14 Bivens and 42 U.S.C. § 1983.<sup>6</sup> Such claims are governed by the  
15 statute of limitations for personal injury actions for the state  
16 in which the misconduct allegedly occurred. Van Strum v. Lawn,  
17 940 F.2d 406, 410 (9th Cir. 1991). In California, the applicable  
18 statute of limitations is two years. Cal. Civ. Proc. Code §  
19 355.1.

---

22           <sup>5</sup>           Additionally, the court notes that although it does not  
23 reach the issue of qualified immunity since the action is  
24 dismissed on statute of limitations grounds, plaintiff's Rule  
25 56(f) request also fails because the Supreme Court has repeatedly  
26 recognized the propriety of resolving issues of qualified  
immunity pre-discovery. See e.g. Crawford-El v. Britton, 523  
U.S. 574, 597-98 (1998); Pearson v. Callahan, 129 S. Ct. 808, 815  
(2009).

27           <sup>6</sup>           Since Coulter is a federal officer, plaintiff's  
28 constitutional claims are authorized by Bivens v. Six Unknown  
Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388  
(1971).

1           However, when the claim accrued is governed by federal law.  
2 Wallace v. Kato, 549 U.S. 384, 388 (2007); Papa v. United States,  
3 281 F.3d 1004, 1009 (9th Cir. 2002). A constitutional tort claim  
4 arises where plaintiff has "a complete and present cause of  
5 action"--i.e., when he can file suit and obtain relief. See  
6 Wallace, 549 U.S. at 388 (internal quotations omitted).  
7 Moreover, each discrete act gives rise to a separate  
8 constitutional claim for purposes of the statute of limitations.  
9 See Carpienteria Valley Farms, Ltd., v. County of Santa Barbara,  
10 344 F.3d 822, 829 (9th Cir. 2003) (no "continuing violation  
11 doctrine" applies to § 1983 claims).

12           Plaintiff alleges wrongdoing by Coulter at least as early as  
13 2004, including warrantless searches and a discriminatory  
14 investigation. (FAC, ¶¶ 22.) The culmination of the  
15 investigation was plaintiff's arrest and search of his office and  
16 residence on February 3, 2005. (RUF ¶¶ 17, 19, 20.) A claim for  
17 an unreasonable search and seizure under the Fourth Amendment  
18 arises at the time of search or arrest. See Matthews v. Macanas,  
19 990 F.2d 467, 469 (9th Cir. 1993), *abrogated on other grounds*;  
20 Pearce v. Romeo, C02-04011 RMW, 2007 WL 30596, \*2 (N.D. Cal. Jan.  
21 3, 2007) ("[I]t is well-settled that the statute of limitations  
22 for a section 1983 claim stemming from a warrantless search  
23 begins to run on the date of the search, not on the date the  
24 plaintiff learns that the search was constitutionally  
25 deficient.") Thus, plaintiff's Fourth Amendment claims based on  
26 any pre-arrest searches accrued prior to February 3, 2005, and  
27 the claims based on the arrest or post-arrest searches accrued on  
28 February 3, 2005. Thus, for all of plaintiff's Fourth Amendment

1 claims, the two-year statute of limitations ran prior to, or on,  
2 February 3, 2007, approximately a year-and-a-half before  
3 plaintiff filed the current action on September 29, 2008.

4 Similarly, plaintiff alleges that Coulter conspired with  
5 others to cause plaintiff to be arrested, and that this too was  
6 the result of a discriminatory investigation in violation of the  
7 Fifth and Fourteenth Amendments' guarantee of equal protection.  
8 The arrest occurred on February 3, 2005, and thus, the statute  
9 ran on February 3, 2007. Further, even if the claim is construed  
10 as one of false arrest or imprisonment due to a discriminatory  
11 motive, such a claim accrues at the time that the legal process  
12 was first initiated and a person is bound over or arraigned.  
13 Wallace, 549 U.S. at 389-90. Here, the criminal complaint was  
14 filed against Plaintiff on February 25, 2005, and he was first  
15 arraigned on March 11, 2005. (RUF ¶ .) Thus, the statute of  
16 limitations ran at the latest on March 11, 2007, over a year and  
17 a half before plaintiff filed his complaint in September 2008.<sup>7</sup>

18 In response to defendant's motion, plaintiff does not  
19 dispute that all of the conduct on which he bases his  
20 constitutional claims occurred on or before February 3, 2005.  
21 Nor does he claim that the statute was somehow tolled during the  
22 pendency of the criminal action against him.<sup>8</sup> Instead, he argues  
23

---

24 <sup>7</sup> The arraignment was apparently continued to April 4,  
25 2005, when Plaintiff entered his guilty plea. (Def.'s RJN, filed  
26 July 10, 2009, Ex. A.) Even using this date as the date of  
accrual, plaintiff's claim is still time barred as the statute  
would have run on April 4, 2007.

27 <sup>8</sup> Regardless, such an argument would be unavailing. In  
28 Wallace v. Kato, the Supreme Court held that there is no federal  
tolling of constitutional torts while a plaintiff is  
subject to a criminal prosecution. 549 U.S. at 394-95.

1 his claims are not time barred because he only learned in  
2 November 2006 of the alleged "conspiracy" to deprive him of his  
3 rights.

4 Plaintiff alleges a conspiracy only with respect to his  
5 second claim for relief for violation of the Fourteenth  
6 Amendment's due process protections. Thus, plaintiff offers no  
7 rebuttal to Coulter's motion that plaintiff's Fourth Amendment  
8 unlawful search and seizure and Fifth and Fourteenth Amendment  
9 equal protection claims are barred by the statute of limitations.  
10 Coulter's motion is thus properly granted on the basis of  
11 plaintiff's failure to oppose the motion on those issues. With  
12 respect to plaintiff's second claim for relief, for a civil  
13 conspiracy, "it is the wrongful act, not the conspiracy, which is  
14 actionable in a civil case." Compton v. Ide, 732 F.2d 1429, 1433  
15 (9th Cir. 1984). Thus, the Ninth Circuit has recognized that  
16 under the "last overt act" rule, injury flows from the alleged  
17 wrongful acts, not the existence of the conspiracy. Gibson  
18 v. United States, 781 F.2d 1334, 1340 (9th Cir. 1986). "The  
19 existence of a conspiracy does not generally postpone accrual of  
20 causes of action arising from the conspirators' separate wrongs."  
21 Compton, 732 F.2d at 1433. Rather, a plaintiff may recover only  
22 for the overt acts that occurred within the statute of  
23 limitations; here, after September 29, 2006. See Gibson,

24 \_\_\_\_\_  
25 Following Wallace, courts in this district have similarly found  
26 Bivens and § 1983 claims time-barred despite the pendency of  
27 state criminal proceedings that related to the underlying alleged  
28 constitutional tort. See e.g., Kamar v. Krolczyk, 07-CV-0340 AWI  
TAG, 2008 WL 2880414, \* 6-7, 11-12 (E.D. Cal. July 22, 2008)  
(claims based on unreasonable search and seizure time-barred);  
Olson v. Oreck, 06-CV-2064 MCE-CMK, 2008 WL 149976, \*6-7 (E.D.  
Cal. Jan. 14, 2008) (same).

1 781 F.2d at 1340. All of the overt acts that plaintiff complains  
2 were part of the conspiracy--e.g., installation of the pole  
3 camera, the review of his records and email, his arrest, and the  
4 search of his home, car, and office--occurred prior to or in  
5 February 2005, well outside of the limitations period.  
6 Thus, any conspiracy claim is barred. Gibson, 781 F.2d at 1340;  
7 Hogan v. Robinson, 01:03-CV-0648 LJO WMW, 2007 WL 2972911, \* 4-5  
8 (E.D. Cal. Oct. 10, 2007) (granting judgment on § 1983  
9 claim where all overt acts occurred prior to statute of  
10 limitations).

11 Contrary to plaintiff's argument, the Ninth Circuit in Kimes  
12 v. Stone, 84 F.3d 1121 (9th Cir. 1996) did not hold differently.  
13 In Kimes, the Ninth Circuit applied the discovery rule to a  
14 conspiracy claim, finding that the claim accrued when the injury  
15 (overt act) is known or reasonably should have been known. Id.  
16 at 1128. In contrast, plaintiff here cannot plead ignorance to  
17 the overt acts that give rise to his conspiracy claim. In  
18 particular, plaintiff stated in his declaration submitted in this  
19 case that he was questioned by an FBI agent on February 3, 2005,  
20 the date of the arrest, about his possible ties to Hamas and his  
21 religion. (See Yasin Decl. [Docket No. 25-6], at ¶¶ 5-7; Pickles  
22 Decl., filed July 10, 2009, Ex. A (6/12/2007 Reporter's  
23 Transcript), at 14:18-18:2.) Moreover, it is undisputed that  
24 plaintiff was aware of the FBI's involvement in a potential  
25 investigation even earlier than his arrest when he called the FBI  
26 directly in October 2004 about the installation of a pole camera  
27 outside of his convenience store. (RUF, ¶ 9; Pickles Decl., Ex. A  
28 at 18:6-20:4.) All of this occurred in or prior to February

1 2005. Moreover, at the latest, plaintiff's suspicions of an  
2 improper investigation culminated in January 2006 when plaintiff  
3 brought his motion to dismiss, in state court, for a selective  
4 prosecution based on race and religion. (RJN, Ex. A [Docket No.  
5 24-8].)

6 Accordingly, plaintiff was aware of the overt acts on which  
7 he is now basing his conspiracy claim and could have formed a  
8 belief that his arrest was improperly motivated by race or  
9 religion long before the statute of limitations ran. Moreover,  
10 that plaintiff claims he was not aware of the full extent of  
11 Coulter's involvement in an alleged conspiracy until a hearing in  
12 November 2006 does not defeat summary judgment. Coulter submits  
13 evidence, which is undisputed by plaintiff, that plaintiff and  
14 his attorney met with Coulter in May 2006 when Coulter returned  
15 plaintiff's computer and other items. (Pickles Decl., Ex. A at  
16 20:21-22:23.) Further, an ABC agent testified as to the FBI's  
17 involvement in ABC's investigation during a hearing on  
18 plaintiff's motion to dismiss in July 2006. (See Pickles Decl.,  
19 Ex. B (7/11/2006 Reporter's Transcript) at 13:22-18:4.) Thus,  
20 plaintiff was aware or reasonably should have been aware of  
21 Coulter and the FBI's involvement in ABC's investigation months  
22 before he now claims. It is Plaintiff's knowledge of the overt  
23 acts, not of the conspiracy or the extent of Coulter's  
24 involvement, that triggers the statute. See e.g., Pearce v.  
25 Romeo, 299 Fed. Appx. 653, 655-56 (9th Cir. 2008) (claims barred  
26 where arrest and search known to plaintiff despite claim he did  
27 not know full extent of alleged misconduct until later); Amcor  
28 Capital Corp. v. United States, 94-CV-21814 DT, 1995 WL 769173,

1 \*3-5 (C.D. Cal. June 12, 1995) (granting judgment where plaintiff  
2 aware of misconduct before statute ran despite plaintiff's claims  
3 it was unaware of conduct).

4 Because all of the conduct on which plaintiff bases his  
5 claims occurred on or before February 2005, and plaintiff was  
6 aware or reasonably should have been aware of this conduct long  
7 before the statute ran, his claims against Coulter are time  
8 barred and Coulter is entitled to summary judgment.

9 **CONCLUSION**

10 For the foregoing reasons, plaintiff's motion for a  
11 continuance, pursuant to Rule 56(f), to permit time for discovery  
12 is DENIED. Defendant Coulter's motion for summary judgment is  
13 granted on the ground that plaintiff's claims against him are  
14 barred by the statute of limitations.

15 The case remains pending against the other named defendants,  
16 Espinoza, Galvan and Alvarez. Plaintiff shall have 90 days from  
17 the date of this Order to effectuate service on said defendants  
18 or the court will dismiss the action for a failure to timely  
19 serve. Fed. R. Civ. P. 4(m).

20 IT IS SO ORDERED.

21 DATED: September 8, 2009

22 

23 \_\_\_\_\_  
24 FRANK C. DAMRELL, JR.  
25 UNITED STATES DISTRICT JUDGE  
26  
27  
28