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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

10 DREW GARDNER,  
11 Plaintiff,  
12 v.  
13 CALIFORNIA HIGHWAY PATROL;  
14 CALIFORNIA HIGHWAY PATROL  
15 OFFICER J.J. FISHER;  
16 CALIFORNIA HIGHWAY PATROL T.  
17 NEWMAN; TEHAMA COUNTY  
18 SHERIFF'S DEPARTMENT; TEHAMA  
19 COUNTY SHERIFF'S DEPARTMENT  
DEPUTY INVESTIGATOR ED  
MCCULLOUGH; KENNETH MILLER;  
and DOES 1 through 50,  
Defendants.

No. 2:14-cv-02730 JAM CMK

**ORDER DENYING DEFENDANT MILLER'S  
MOTION TO DISMISS**

20 This matter is before the Court on Defendant Kenneth  
21 Miller's ("Defendant") motion to dismiss the seventh and ninth  
22 causes of action (Doc. #10) of Plaintiff ("Plaintiff") Drew  
23 Gardner's complaint (Doc. #1). For the following reasons,  
24 Defendant's motion is DENIED.<sup>1</sup>

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27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was  
scheduled for February 11, 2015.

1                   I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2                   On January 2, 2014, Plaintiff was riding as a passenger in a  
3 Jeep Wrangler that had been reported stolen. Compl. ¶¶ 16-17.  
4 Upon seeing a police car, the driver of the Jeep abandoned the  
5 car and told Plaintiff to do the same. Compl. ¶ 18. Plaintiff  
6 was apprehended and taken into custody at Tehama County Jail.  
7 Compl. ¶¶ 19, 25. During booking, the arresting officer reported  
8 confiscating a "clear white baggie with a white crystalline  
9 substance" - which tested positive for methamphetamine - from  
10 Plaintiff's jacket. Compl. ¶ 26.

11                  On January 3, 2014, Ed McCullough - a deputy investigator  
12 with the Tehama County Sheriff's Department - was tasked with  
13 conducting an investigation of this incident. Compl. ¶ 30.  
14 McCullough interviewed Plaintiff, who told him that he was a  
15 passenger in the car and had been offered a ride by Charles Jacob  
16 Steele, whom "he had just met at a mutual friend's house."  
17 Compl. ¶ 32. Plaintiff informed McCullough that, prior to his  
18 arrest, they had stopped at a car dealership and a gas station,  
19 and that witnesses at both locations could confirm that he was  
20 not the driver of the stolen vehicle. Compl. ¶¶ 33-34.  
21 McCullough followed up on both of these leads, and spoke with a  
22 witness at the car dealership. Compl. ¶ 34. The witness picked  
23 Plaintiff out of a photo line-up, and identified him as the  
24 passenger of the vehicle. Compl. ¶ 35. McCullough allegedly  
25 "failed to alert anyone at the Tehama [County] District  
26 Attorney's office, the Tehama County Jail, or the Shasta County  
27 Sheriff's department" of these exculpatory findings. Compl. ¶  
28 36.

1           On January 6, 2014, Plaintiff was charged with: (1) unlawful  
2 driving or taking of a vehicle; (2) receiving stolen property -  
3 motor vehicle; (3) driving under the influence; (4) bringing  
4 contraband into the jail; (5) possession of a controlled  
5 substance; and (6) carrying a dirk or dagger. Compl. ¶ 38.  
6 Defendant Kenneth Miller was assigned to be his public defender.  
7 Compl. ¶ 41.

8           On January 8, 2014, McCullough resumed his investigation and  
9 visited the gas station at which Plaintiff claimed to have  
10 stopped before his arrest. Compl. ¶ 42. He obtained video  
11 surveillance from the date of the incident, and allegedly  
12 observed that Plaintiff was the passenger in the vehicle. Compl.  
13 ¶ 42. McCullough wrote up a report of his findings ("the  
14 McCullough Report"), but it is unclear when this report was filed  
15 with the Tehama County District Attorney's Office. Compl. ¶ 45.  
16 Plaintiff alleges that it "failed to make its way to the Tehama  
17 County District Attorney's Office" during the period that  
18 Defendant represented Plaintiff. Compl. ¶ 48.

19           Between January 6, 2014 - when he was appointed as  
20 Plaintiff's attorney - and February 25, 2014 - when he was fired  
21 by Plaintiff - Defendant Miller allegedly "never once interviewed  
22 Plaintiff to obtain Plaintiff's version of the facts nor  
23 conducted any investigation." Compl. ¶ 47. On February 7, 2014,  
24 Plaintiff's mother retained private counsel to represent  
25 Plaintiff. Compl. ¶ 49. Plaintiff's retained counsel conducted  
26 an investigation and allegedly discovered substantially the same  
27 exculpatory information which McCullough had learned through his  
28 official investigation. Compl. ¶¶ 50-53. On March 12, 2014,

1 Plaintiff's retained counsel sent a letter summarizing its  
2 findings to the Tehama County District Attorney's Office. Compl.  
3 ¶ 54. That same day, the Tehama County District Attorney  
4 provided Plaintiff with a copy of the McCullough Report. Compl.  
5 ¶ 55. On March 17, 2014, the three vehicle-related counts  
6 against Plaintiff were dropped. Compl. ¶ 56. Plaintiff remained  
7 in custody on the three booking-related pending charges. Compl.  
8 ¶ 56.

9 On April 1, 2014, Plaintiff "persuaded Sergeant Baulkin at  
10 the Tehama County Jail to look at the booking video." Compl.  
11 ¶ 58. The video showed that Plaintiff was not wearing the jacket  
12 which allegedly contained the "baggie of meth" confiscated during  
13 booking. Compl. ¶ 58. Instead, the video showed that the  
14 arresting officer carried the jacket into the booking room.  
15 Compl. ¶ 58. On April 21, 2014, the remaining counts relating to  
16 Plaintiff's booking were dismissed. Compl. ¶ 59. Plaintiff was  
17 released from custody that day. Compl. ¶ 59.

18 On October 17, 2014, Plaintiff filed his complaint in Tehama  
19 County Superior Court. On November 11, 2014, Defendants removed  
20 the matter to this Court. The Complaint includes nine causes of  
21 action. As noted above, only the seventh cause of action for  
22 negligent infliction of emotional distress and the ninth cause of  
23 action for professional negligence are brought against the moving  
24 defendant Kenneth Miller. The remaining causes of action are  
25 brought against individual officers and municipal police entities  
26 for their alleged role played in Plaintiff's arrest and  
27 incarceration.

## II. OPINION

#### A. Judicial Notice

Defendant Miller requests that the Court take judicial notice (Doc. #11) of the complaint filed in this action. The complaint is already part of the record in this case, and the request is denied as unnecessary.

## B. Discussion

9           Defendant Miller argues that both causes of action brought  
10          against him - negligent infliction of emotional distress and  
11          professional negligence - must be dismissed because Plaintiff has  
12          failed to allege facts sufficient to establish the essential  
13          element of causation. Mot. at 7. Specifically, Defendant Miller  
14          argues that Plaintiff has failed to allege that he would have  
15          spent less time in jail if Defendant had competently represented  
16          him. Mot. at 8. Plaintiff responds that Defendant's inaction -  
17          especially his failure to interview Plaintiff during the entirety  
18          of his representation - "resulted in additional jail time for  
19          Plaintiff." Opp. at 3-4.

20 Causation is a necessary element of both negligent  
21 infliction of emotional distress and professional negligence.

22 Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc., 48 Cal.  
23 3d 583, 588 (1989); Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th  
24 811, 821 (2011). Thus, to state a claim for these two causes of  
25 action, Plaintiff must allege that the harm would not have  
26 occurred "but for" Defendant's breach of his duty. In other  
27 words, Plaintiff must allege facts which give rise to a  
28 reasonable inference that he would have spent less time in jail

1 if Defendant had been reasonably competent in representing him.

2 Plaintiff was in custody from January 2, 2014 until April  
3 21, 2014, for a total of 110 days (Plaintiff's calculation of 91  
4 days appears to be incorrect). Compl. ¶¶ 26, 59. Plaintiff's  
5 release was the result of two discrete events. First, on March  
6 12, 2014, Plaintiff's retained counsel obtained a copy of the  
7 exculpatory McCullough Report from the Tehama County District  
8 Attorney's Office. Compl. ¶¶ 54-55. This led to the dismissal  
9 of the three vehicle-related counts against Plaintiff, on March  
10 17, 2014. Compl. ¶ 56. Second, on April 1, 2014, Plaintiff  
11 "persuaded Sergeant Baulkin at the Tehama County Jail to look at  
12 the booking video," which showed that Plaintiff was not wearing  
13 the jacket which contained a "baggie of meth." Compl. ¶ 58.  
14 Approximately three weeks later, the remaining counts "related to  
15 [the] booking of Plaintiff" were dismissed. Compl. ¶ 59.

16 Plaintiff has alleged that he was represented by Defendant  
17 Miller from January 6, 2014 until February 25, 2014 - roughly  
18 seven weeks. Compl. ¶¶ 41, 47. During these seven weeks,  
19 Plaintiff alleges that Defendant Miller "never once interviewed  
20 Plaintiff to obtain Plaintiff's version of the facts nor  
21 conducted any investigation." Compl. ¶ 47. The following  
22 inferences can reasonably be drawn from Plaintiff's factual  
23 allegations: (1) if Defendant Miller had interviewed his client  
24 promptly, he would have learned that Plaintiff was not wearing  
25 the jacket at booking; (2) Defendant Miller would have relayed  
26 this information to the apparently-cooperative Sergeant Baulkin  
27 (or another equally helpful corrections officer), and would have  
28 been permitted to view the booking video; (3) the video would

1 have revealed that Plaintiff was not wearing the jacket at the  
2 time of booking, and the booking-related charges would have been  
3 dismissed well before April 21, 2014. Thus, even if the  
4 exculpatory McCullough Report did not surface until March 12,  
5 2014, Plaintiff would still have been released on March 17, 2014,  
6 when the only remaining counts – the three vehicle-related  
7 charges – were dismissed. Thus, Plaintiff's allegations are  
8 sufficient to establish that Defendant Miller's failure to  
9 interview Plaintiff could have plausibly caused Plaintiff to  
10 spend more time in custody.

11 Defendant contends that Plaintiff "can only speculate that  
12 the district attorney's office might have dropped the charges  
13 sooner had a more aggressive defense been initiated during Mr.  
14 Miller's short representation." Mot. at 9. However, in  
15 considering a motion to dismiss, the Court "must . . . draw all  
16 reasonable inferences in favor of the plaintiff." Scheuer v.  
17 Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by  
18 Davis v. Scherer, 468 U.S. 183 (1984); Cruz v. Beto, 405 U.S.  
19 319, 322 (1972). As noted above, Plaintiff's factual allegations  
20 – and all favorable, reasonable inferences drawn from these  
21 allegations – "plausibly suggest" that Plaintiff is entitled to  
22 relief on his professional negligence and negligent infliction of  
23 emotional distress claims. Starr v. Baca, 652 F.3d 1202, 1216  
24 (9th Cir. 2011), cert. denied, 132 S. Ct. 2101, 182 L. Ed. 2d 882  
25 (U.S. 2012). It is far from speculation to infer that, had  
26 Defendant promptly interviewed Plaintiff, the events leading to  
27 Plaintiff's release would have unfolded exactly as they did in  
28 reality, albeit much sooner. As discussed above, this would have

1 ensured Plaintiff's release on March 17, 2014, as opposed to  
2 April 21, 2014.

Given the liberal standard required to be applied by the Court on a motion to dismiss, Plaintiff has sufficiently pleaded the element of causation for both negligent infliction of emotional distress and professional negligence. As Defendant Miller has only challenged Plaintiff's allegations with regard to the element of causation, his motion to dismiss is DENIED.

9

### III. ORDER

11 For the reasons set forth above, the Court DENIES Defendant  
12 Miller's motion to dismiss:

13 IT IS SO ORDERED.

14 || Dated: February 12, 2015

*John A. Mendez*  
JOHN A. MENDEZ,  
UNITED STATES DISTRICT JUDGE